NATIONAL UNIVERSITY LIBRARY

SAN DIEGO

NON CIRCULATING

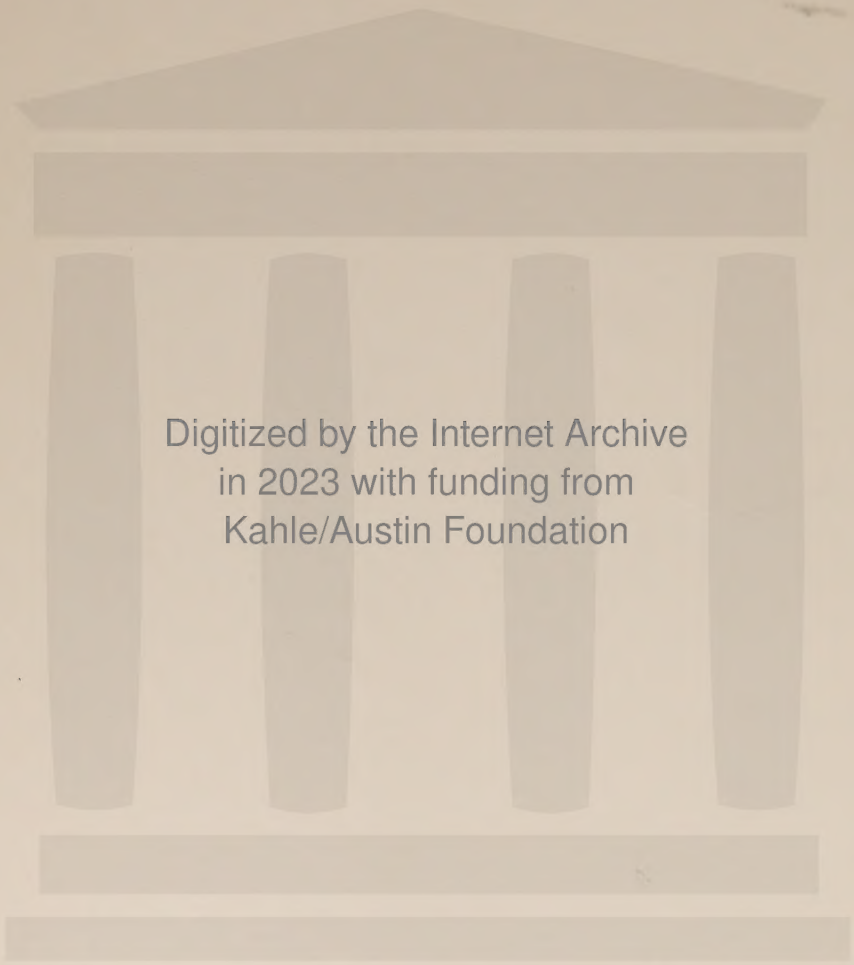
# CALIFORNIA REPORTER REFERENCES

## 30 CALIFORNIA REPORTS, 2d SERIES

| Cal. Page | P.2d Vol. | P.2d Page |
|---|---|---|
| 1 | 180 | 345 |
| 8 | 180 | 335 |
| 20 | 180 | 326 |
| 34 | 180 | 11 |
| 49 | 179 | 804 |
| 54 | 181 | 645 |
| 84 | 180 | 4 |
| 97 | 179 | 807 |
| 104 | 180 | 351 |
| 110 | 180 | 321 |
| 118 | 180 | 342 |
| 124 | 180 | 676 |
| 138 | 180 | 691 |
| 144 | 180 | 888 |
| 157 | 180 | 673 |
| 162 | 180 | 886 |
| 165 | 180 | 900 |
| 184 | 180 | 912 |
| 193 | 180 | 873 |
| 215 | 181 | 1 |
| 240 | 181 | 369 |
| 268 | 181 | 865 |
| 274 | 181 | 874 |
| 285 | 182 | 565 |
| 295 | 182 | 549 |
| 297 | 182 | 529 |
| 312 | 182 | 537 |
| 326 | 182 | 545 |
| 335 | 182 | 182 |
| 356 | 181 | 881 |
| 362 | 181 | 868 |
| 372 | 182 | 195 |
| 388 | 182 | 159 |
| 421 | 182 | 554 |
| 426 | 182 | 178 |
| 433 | 182 | 551 |
| 439 | 182 | 557 |
| 453 | 183 | 4 |
| 463 | 183 | 10 |
| 472 | 183 | 16 |
| 485 | 183 | 897 |
| 492 | 183 | 269 |
| 496 | 183 | 658 |
| 512 | 183 | 1 |
| 517 | 183 | 265 |
| 524 | 183 | 654 |
| 531 | 183 | 649 |
| 541 | 184 | 153 |
| 549 | 184 | 305 |
| 560 | 184 | 673 |
| 575 | 184 | 505 |
| 589 | 184 | 512 |
| 605 | 184 | 521 |
| 610 | 184 | 879 |
| 632 | 184 | 873 |
| 643 | 184 | 892 |
| 676 | 185 | 1 |
| 694 | 185 | 11 |
| 719 | 185 | 805 |
| 746 | 185 | 597 |
| 763 | 185 | 585 |
| 785 | 185 | 793 |
| 799 | 186 | 1 |
| 811 | 185 | 801 |
| 817 | 186 | 124 |
| 832 | 186 | 121 |
| 838 | 186 | 134 |
| 861 | 186 | 417 |
| 871 | 186 | 401 |
| 879 | 186 | 405 |
| 898 | 186 | 678 |
| 905 | 186 | 673 |
| 914 | 187 | 9 |
| 919 | 182 | 178 |
| 920 | 182 | 177 |

| Cal.App. Page | P.2d Vol. | P.2d Page |
|---|---|---|
| 1 | 181 | 72 |
| 21 | 180 | 940 |
| 28 | 181 | 110 |
| 31 | 180 | 937 |
| 36 | 180 | 750 |
| 39 | 180 | 740 |
| 46 | 180 | 747 |
| 48 | 180 | 998 |
| 59 | 181 | 84 |
| 68 | 180 | 920 |
| 70 | 181 | 410 |
| 78 | 181 | 69 |
| 83 | 181 | 390 |
| 102 | 181 | 414 |
| 114 | 181 | 26 |
| 123 | 181 | 112 |
| 128 | 181 | 16 |
| 136 | 181 | 387 |
| 140 | 181 | 401 |
| 144 | 181 | 429 |
| 150 | 181 | 115 |
| 154 | 181 | 680 |
| 158 | 181 | 385 |
| 161 | 181 | 690 |
| 166 | 181 | 98 |
| 173 | 181 | 433 |
| 182 | 181 | 935 |
| 206 | 181 | 424 |
| 215 | 181 | 699 |
| 223 | 181 | 682 |
| 229 | 181 | 404 |
| 239 | 181 | 422 |
| 242 | 181 | 687 |
| 246 | 181 | 664 |
| 249 | 182 | 250 |
| 255 | 181 | 686 |
| 256 | 181 | 751 |
| 269 | 181 | 953 |
| 277 | 181 | 924 |
| 284 | 181 | 893 |
| 291 | 181 | 672 |
| 295 | 181 | 885 |
| 301 | 181 | 899 |
| 316 | 181 | 923 |
| 318 | 181 | 665 |
| 330 | 181 | 662 |
| 333 | 181 | 730 |
| 335 | 181 | 897 |
| 340 | 180 | 30 |
| 344 | 181 | 693 |
| 347 | 181 | 758 |
| 358 | 181 | 675 |
| 367 | 181 | 909 |
| 372 | 181 | 950 |
| 378 | 182 | 258 |
| 386 | 181 | 889 |
| 391 | 181 | 741 |
| 397 | 181 | 765 |
| 412 | 182 | 212 |
| 422 | 182 | 222 |
| 437 | 182 | 218 |
| 443 | 181 | 732 |
| 453 | 181 | 641 |
| 458 | 181 | 738 |
| 463 | 180 | 27 |
| 468 | 182 | 305 |
| 476 | 181 | 933 |
| 480 | 182 | 309 |
| 486 | 182 | 623 |
| 492 | 180 | 24 |
| 498 | 181 | 644 |
| 500 | 182 | 234 |
| 508 | 180 | 32 |
| 513 | 181 | 929 |
| 517 | 181 | 931 |
| 519 | 182 | 331 |
| 526 | 182 | 585 |
| 536 | 181 | 962 |
| 542 | 182 | 241 |
| 550 | 182 | 253 |
| 557 | 180 | 21 |
| 562 | 182 | 605 |
| 574 | 182 | 246 |
| 579 | 182 | 573 |
| 583 | 182 | 300 |
| 590 | 182 | 601 |
| 592 | 182 | 289 |
| 601 | 182 | 284 |
| 610 | 182 | 294 |
| 621 | 182 | 615 |
| 634 | 182 | 596 |
| 639 | 182 | 344 |
| 655 | 182 | 337 |
| 666 | 182 | 266 |
| 675 | 182 | 209 |
| 681 | 182 | 239 |
| 686 | 182 | 231 |
| 691 | 181 | 958 |
| 696 | 182 | 582 |
| 702 | 182 | 314 |
| 709 | 181 | 892 |
| 711 | 182 | 318 |
| 723 | 182 | 275 |
| 728 | 182 | 278 |
| 731 | 182 | 579 |
| 735 | 182 | 313 |
| 737 | 182 | 263 |
| 742 | 182 | 249 |
| 745 | 182 | 576 |
| 751 | 182 | 639 |
| 756 | 183 | 97 |
| 769 | 182 | 634 |
| 778 | 182 | 204 |
| 782 | 182 | 336 |
| 784 | 182 | 613 |
| 787 | 182 | 206 |
| 790 | 182 | 630 |
| 796 | 183 | 54 |
| 798 | 182 | 626 |
| 801 | 183 | 59 |
| 806 | 182 | 591 |
| 809 | 183 | 275 |
| 815 | 183 | 50 |
| 823 | 183 | 72 |
| 827 | 183 | 56 |
| 832 | 183 | 81 |
| 841 | 183 | 288 |
| 853 | 183 | 362 |
| 857 | 183 | 91 |
| 868 | 183 | 86 |
| 875 | 183 | 34 |
| 879 | 182 | 593 |
| 884 | 182 | 612 |
| 887 | 183 | 380 |
| 888 | 184 | 33 |
| 898 | 183 | 36 |
| 898 | 183 | 706 |
| 902 | 183 | 75 |
| 911 | 183 | 318 |
| 921 | 183 | 43 |
| 927 | 183 | 347 |
| 936 | 183 | 128 |
| 945 | 183 | 354 |
| 954 | 183 | 366 |
| 958 | 183 | 26 |
| 965 | 183 | 279 |
| 970 | 183 | 39 |
| 974 | 183 | 41 |
| 976 | 183 | 115 |
| 983 | 183 | 119 |





Digitized by the Internet Archive
in 2023 with funding from
Kahle/Austin Foundation

https://archive.org/details/californiareport0000unse_r4t2

# CALIFORNIA REPORTER

COVERING CASES REPORTED IN

## PACIFIC REPORTER
SECOND SERIES




## 189 P.2d – 190 P.2d

---

CITE BY VOLUME AND PAGE
OF THE
PACIFIC REPORTER
SECOND SERIES

Thus:
189 P.2d 1

ST. PAUL, MINN.
WEST PUBLISHING CO.
1948

COPYRIGHT, 1948, BY WEST PUBLISHING CO.
Pacific Reporter, Second Series, Vol. 189, Nos. 1-4;
Vol. 190, Nos. 1-4.

---

COPYRIGHT, 1948, BY WEST PUBLISHING CO.

# JUDGES AND OFFICERS

## SUPREME COURT

### Chief Justice

PHIL S. GIBSON ..... San Francisco

### Associate Justices

JOHN W. SHENK ..... San Francisco
DOUGLAS L. EDMONDS ..... San Francisco
JESSE W. CARTER ..... San Francisco
ROGER J. TRAYNOR ..... Berkeley
B. REY SCHAUER ..... Los Angeles
HOMER R. SPENCE ..... San Francisco

### Clerks

WILLIAM I. SULLIVAN ..... Clerk ..... San Francisco
I. M. JOHNSON ..... Chief Deputy Clerk ..... San Francisco
LOREN F. WHITE ..... Deputy Clerk ..... San Francisco
HARRY M. GARDISER ..... Deputy Clerk ..... San Francisco
L. A. ENDRES ..... Deputy Clerk ..... Sacramento
HENRY P. CRABTREE ..... Deputy Clerk ..... Los Angeles
WILLIAM J. SINKFORD ..... Deputy Clerk ..... Los Angeles

## DISTRICT COURTS OF APPEALS

### FIRST DISTRICT—SAN FRANCISCO

*Division 1*

PRESIDING JUSTICE

RAYMOND E. PETERS — San Francisco

ASSOCIATE JUSTICES

LOUIS H. WARD — San Francisco
A. F. BRAY — San Francisco

*Division 2*

PRESIDING JUSTICE

JOHN T. NOURSE — San Francisco

ASSOCIATE JUSTICES

C. J. GOODELL — San Francisco
MAURICE T. DOOLING, Jr. — Hollister

CLERKS

WALTER S. CHISHOLM — Clerk — San Francisco
W. B. SULLIVAN — Deputy Clerk — San Francisco
JOHN J. NOONAN, Jr. — Deputy Clerk — San Francisco

### SECOND DISTRICT—LOS ANGELES

*Division 1*

PRESIDING JUSTICE

JOHN M. YORK — Los Angeles

ASSOCIATE JUSTICES

WILLIAM C. DORAN — Los Angeles
THOMAS P. WHITE — Los Angeles

*Division 2*

PRESIDING JUSTICE

MINOR MOORE — Los Angeles

ASSOCIATE JUSTICES

MARSHALL F. McCOMB — Los Angeles
EMMET H. WILSON — Los Angeles

## DISTRICT COURTS OF APPEALS—Cont'd.

*Division 3*

PRESIDING JUSTICE

WALTER DESMOND — Los Angeles

ASSOCIATE JUSTICES

CLEMENT L. SHINN — Los Angeles
PARKER WOOD — Los Angeles

CLERKS

JAMES E. BROWN — Clerk — Los Angeles
JOHN W. SHENK III — Deputy Clerk — Los Angeles
WM. E. DORAN — Deputy Clerk — Los Angeles

## THIRD DISTRICT—SACRAMENTO

PRESIDING JUSTICE

ANNETTE ABBOTT ADAMS — Sacramento

ASSOCIATE JUSTICES

ROLFE L. THOMPSON — Sacramento
PAUL PEEK — Long Beach

CLERKS

GEORGE N. DIDION — Clerk — Sacramento
THOMAS J. DILLON — Deputy Clerk — Sacramento

## FOURTH DISTRICT

*Fresno—San Bernardino—San Diego*

PRESIDING JUSTICE

CHARLES R. BARNARD — Fresno

ASSOCIATE JUSTICES

E. J. MARKS — San Bernardino
LLOYD E. GRIFFIN — San Diego

CLERKS

EARL J. VERDECKBERG — Clerk — San Diego
LLOYD E. HIDDEN — Deputy Clerk — San Bernardino
ROY M. BOSTWICK — Deputy Clerk — Fresno
GEORGE J. KOBELIN — Deputy Clerk — San Diego

## APPELLATE DEPARTMENT, SUPERIOR COURT

### LOS ANGELES COUNTY

PRESIDING JUDGE

HARTLEY SHAW — Los Angeles

JUDGES

EDWARD T. BISHOP — Los Angeles
JESS E. STEPHENS — Los Angeles

CLERK

JEROME B. WILLIAMS — Los Angeles

### SAN FRANCISCO COUNTY

PRESIDING JUDGE

FRANKLIN A. GRIFFIN — San Francisco

JUDGES

EDWARD P. MURPHY — San Francisco
HERBERT C. KAUFMAN — San Francisco

CLERK

S. I. HUGHES — San Francisco

### SAN DIEGO COUNTY

PRESIDING JUDGE

L. N. TURRENTINE — San Diego

JUDGES

GORDON THOMPSON — San Diego
ROBERT B. BURCH — San Diego

CLERK

DEAN SHULTZ — San Diego

### SACRAMENTO COUNTY

PRESIDING JUDGE

PETER J. SHIELDS — Sacramento

JUDGES

MALCOLM C. GLENN — Sacramento
RAYMOND T. COUGHLIN — Sacramento

---

ATTORNEY GENERAL

FRED N. HOWSER — Los Angeles

# CASES REPORTED


| | Vol. | | Page |
|---|---|---|---|
| Abila v. Spendrup, App. | 190 | P.2d | 237 |
| Abila's Estate, In re, App. | 190 | P.2d | 237 |
| Adams v. Wolff, App. | 190 | P.2d | 665 |
| Allynn; Andre v., App. | 190 | P.2d | 949 |
| Alves v. Rodrigues, App. | 190 | P.2d | 649 |
| Andre v. Allynn, App. | 190 | P.2d | 949 |
| Aptos Bldg. Co. v. Superior Court in and for County of Santa Cruz, App. | 190 | P.2d | 303 |
| Aptos Land & Water Co. v. Superior Court in and for Santa Cruz County, App. | 190 | P.2d | 305 |
| Arden Farms Co.; Cartmill v., App. | 189 | P.2d | 739 |
| Arthur Realty Corp. v. Los Angeles County Flood Control Dist., App. | 190 | P.2d | 943 |
| Baker v. Kale, App. | 189 | P.2d | 57 |
| Bank of America Nat. Trust & Sav. Ass'n; Bonnear v., App. | 190 | P.2d | 307 |
| Bank of America Nat. Trust & Sav. Ass'n v. Superior Court in and for City & County of San Francisco, App. | 189 | P.2d | 799 |
| Barker; Young v., App. | 189 | P.2d | 521 |
| Barlow v. City Council of City of Inglewood, App. | 190 | P.2d | 226 |
| Basalt Rock Co.; Hurt v., App. | 190 | P.2d | 240 |
| Bekins Van & Storage Co.; George v., App. | 189 | P.2d | 301 |
| Benjamin v. Dalmo Mfg. Co., Sup. | 190 | P.2d | 593 |
| Bennett; California Trust Co. v., App. | 189 | P.2d | 531 |
| Bennett v. Steinman, App. | 190 | P.2d | 987 |
| Beondo; Mayer v., App. | 189 | P.2d | 327 |
| Beondo; Mayer v., App. | 190 | P.2d | 23 |
| Berry; Guttman v., App. | 189 | P.2d | 41 |
| Bianco; People v., App. | 190 | P.2d | 280 |
| Bixby v. California Trust Co., App. | 190 | P.2d | 321 |
| Black; Leboire v., App. | 190 | P.2d | 634 |
| Board of Medical Examiners; Housman v., App. | 190 | P.2d | 653 |
| Board of Police and Fire Pension Com'rs of City of Long Beach; Tyra v., App. | 189 | P.2d | 754 |
| Boltz; Davis v., App. | 190 | P.2d | 218 |
| Bonnear v. Bank of America Nat. Trust & Sav. Ass'n, App. | 190 | P.2d | 307 |
| Boss; City and County of San Francisco v., App. | 189 | P.2d | 32 |
| Bowman v. Victor, App. | 189 | P.2d | 876 |
| Bracey; Gray v., Sup. | 189 | P.2d | 3 |
| Brancato; People v., App. | 189 | P.2d | 504 |
| Bratlie; Mantonya v., App. | 190 | P.2d | 996 |
| Brewer v. Second Baptist Church of Los Angeles, App. | 189 | P.2d | 75 |
| Broadnax v. Moore, App. | 190 | P.2d | 975 |
| Brown; Jones v., App. | 190 | P.2d | 956 |
| Brown; Wilkerson v., App. | 190 | P.2d | 958 |
| Burnand v. Nowell, App. | 189 | P.2d | 796 |
| Burns; People v., App. | 189 | P.2d | 868 |
| Butte v. Distillery, Rectifying and Wine Workers Intern. Union, Local No. 45, Sup. | 189 | P.2d | 9 |
| Butts v. State Bar, Sup. | 189 | P.2d | 1 |
| Byrnes; People v., App. | 190 | P.2d | 286 |
| Byrnes; People v., App. | 190 | P.2d | 290 |
| California Cas. Indem. Exchange v. Industrial Acc. Commission, App. | 190 | P.2d | 990 |
| California Horse Racing Bd.; Sandstrom v., Sup. | 189 | P.2d | 17 |
| California Trust Co. v. Bennett, App. | 189 | P.2d | 531 |
| California Trust Co.; Bixby v., App. | 190 | P.2d | 321 |

| | Vol. | | Page |
|---|---|---|---|
| Calvert v. Stoner, App. | 189 | P.2d | 820 |
| Cantlay & Tanxola; Smith v., App. | 189 | P.2d | 542 |
| Carlton; People v., App. | 189 | P.2d | 299 |
| Carr, Application of, Sup. | 190 | P.2d | 604 |
| Cartmill v. Arden Farms Co., App. | 189 | P.2d | 739 |
| Chakmakjian v. Lowe, App. | 190 | P.2d | 980 |
| Chapman v. Mason, App. | 189 | P.2d | 510 |
| Cheesewright; Llewellyn v., App. | 189 | P.2d | 822 |
| City and County of San Francisco v. Boss, App. | 189 | P.2d | 32 |
| City Council of City of Inglewood; Barlow v., App. | 190 | P.2d | 226 |
| City of Inglewood; Felice v., App. | 190 | P.2d | 317 |
| City of Long Beach; Hossom v., App. | 189 | P.2d | 787 |
| City of Long Beach; Palmer v., App. | 189 | P.2d | 62 |
| City of Los Angeles; People v., App. | 189 | P.2d | 489 |
| City of Los Angeles; Smith v., App. | 190 | P.2d | 943 |
| City of Los Angeles; Stahl v., App. | 190 | P.2d | 943 |
| City of Los Angeles; Steen v., Sup. | 190 | P.2d | 937 |
| City & County of San Francisco; Dry v., App. | 189 | P.2d | 761 |
| Clements v. Rankin, App. | 189 | P.2d | 725 |
| Coast Consol. Oil Co.; First Nat. Bank in Santa Ana v., App. | 190 | P.2d | 214 |
| Coleman; People v., App. | 189 | P.2d | 845 |
| Colwell v. Jones, App. | 189 | P.2d | 842 |
| Contractors' State License Bd. of Dept. of Professional and Vocational Standards; Terminix Co. v., App. | 190 | P.2d | 24 |
| Crehan; Hammer v., App. | 190 | P.2d | 270 |
| Curtin v. Superior Court In and For San Mateo County, App. | 189 | P.2d | 288 |
| Dalmo Mfg. Co.; Benjamin v., Sup. | 190 | P.2d | 593 |
| Davis, Ex parte, Sup. | 189 | P.2d | 283 |
| Davis v. Boltz, App. | 190 | P.2d | 218 |
| Delany; Leoni v., App. | 189 | P.2d | 517 |
| Del Porto v. O'Donnell, App. | 190 | P.2d | 955 |
| De Mattie v. Henry, App. | 189 | P.2d | 774 |
| De Mutiis; Kauffman v., Sup. | 189 | P.2d | 271 |
| Department of Motor Vehicles, Cal. Highway Patrol, v. Industrial Acc. Commission, App. | 189 | P.2d | 730 |
| Devens v. Goldberg, App. | 189 | P.2d | 859 |
| Distillery, Rectifying and Wine Workers Intern. Union, Local No. 45; Butte v., Sup. | 189 | P.2d | 9 |
| Dry v. City & County of San Francisco, App. | 189 | P.2d | 761 |
| Eckles v. Justice's Court of Beverly Hills Tp., App. | 190 | P.2d | 224 |
| Erskine v. Erskine, App. | 190 | P.2d | 659 |
| Erskine's Estate, In re, App. | 190 | P.2d | 659 |
| Etzel v. Rosenbloom, App. | 189 | P.2d | 848 |
| Fadel v. Slayman, App. | 189 | P.2d | 771 |
| Fallon v. Fallon, App. | 189 | P.2d | 766 |
| Felice v. City of Inglewood, App. | 190 | P.2d | 317 |
| Ferrula v. Santa Fe Bus Lines, App. | 189 | P.2d | 294 |
| First Nat. Bank in Santa Ana v. Coast Consol. Oil Co., App. | 190 | P.2d | 214 |
| First Nat. Trus & Sav. Bank of San Diego; Kuchel v., Sup. | 190 | P.2d | 611 |
| Fish v. Security-First Nat. Bank of Los Angeles, Sup. | 189 | P.2d | 10 |
| Fleming's Estate, In re, Sup. | 190 | P.2d | 611 |
| Fletcher; Stowers v., Super. | 190 | P.2d | 338 |
| Foster v. Mathews, App. | 190 | P.2d | 629 |
| Fruehauf Trailer Co.; Oregon-Nevada-California Fast Freight v., App. | 189 | P.2d | 329 |
| Garbedian v. Gogian Avocado Co., App. | 190 | P.2d | 617 |
| Gardner's Estate, In re, App. | 190 | P.2d | 629 |
| George v. Bekins Van & Storage Co., App. | 189 | P.2d | 301 |
| Gibbons; People v., App. | 189 | P.2d | 37 |
| Gilbert; Hagan v., App. | 189 | P.2d | 548 |

| | Vol. | | Page |
|---|---|---|---|
| Gill v. Wolf, Super. | 190 | P.2d | 52 |
| Gilmer v. Spitalny, two cases, App. | 189 | P.2d | 744 |
| Gogian Avocado Co.; Garbedian v., App. | 190 | P.2d | 617 |
| Goldberg; Devens v., App. | 189 | P.2d | 859 |
| Graham; Williams v., App. | 189 | P.2d | 324 |
| Gray v. Bracey, Sup. | 189 | P.2d | 3 |
| Grayson; People v., App. | 189 | P.2d | 285 |
| Graziano; People v., App. | 189 | P.2d | 518 |
| Gregory v. State, App. | 190 | P.2d | 639 |
| Guttman v. Berry, App. | 189 | P.2d | 41 |
| Haddox; People v., App. | 189 | P.2d | 83 |
| Hagan v. Gilbert, App. | 189 | P.2d | 548 |
| Hamilton v. Hamilton, App. | 189 | P.2d | 722 |
| Hammer v. Crehan, App. | 190 | P.2d | 270 |
| Hamner; Owsley v., App. | 189 | P.2d | 50 |
| Harkness v. Montgomery, App. | 189 | P.2d | 758 |
| Harris; Warner v., App. | 190 | P.2d | 21 |
| Hastorf; Sjoberg v., App. | 190 | P.2d | 636 |
| Heatly v. Heatly, App. | 189 | P.2d | 748 |
| Heatly; Kings County Abstract Co. v., App. | 189 | P.2d | 748 |
| Henry; De Mattie v., App. | 189 | P.2d | 774 |
| Hoff; People v., App. | 190 | P.2d | 616 |
| Hossom v. City of Long Beach, App. | 189 | P.2d | 787 |
| Hotel & Restaurant Employees' Intern. Alliance & Bartenders' Intern. League of America; Killeen v., App. | 190 | P.2d | 30 |
| Housing Authority of City & County of San Francisco; Muses v., App. | 189 | P.2d | 305 |
| Housman v. Board of Medical Examiners, App. | 190 | P.2d | 653 |
| Houston; La Porte v., App. | 189 | P.2d | 544 |
| Howe; Netz v., Sup. | 189 | P.2d | 5 |
| Howe's Estate, In re, Sup. | 189 | P.2d | 5 |
| Hurt v. Basalt Rock Co., App. | 190 | P.2d | 240 |
| Industrial Acc. Commission; California Cas. Indem. Exchange v., App. | 190 | P.2d | 990 |
| Industrial Acc. Commission; Department of Motor Vehicles, Cal. Highway Patrol, v., App. | 189 | P.2d | 730 |
| Industrial Acc. Commission; Liberty Mut. Ins. Co. v., App. | 189 | P.2d | 853 |
| Ingraham v. Smith, App. | 189 | P.2d | 721 |
| Jacoby v. Johnson, App. | 190 | P.2d | 243 |
| James v. James, App. | 190 | P.2d | 219 |
| J. B. Hill Co.; Taylor v., Sup. | 189 | P.2d | 258 |
| Jewett; People v., App. | 190 | P.2d | 330 |
| Johnson; Jacoby v., App. | 190 | P.2d | 243 |
| Johnson; Shinn v., App. | 189 | P.2d | 322 |
| Jones v. Brown, App. | 190 | P.2d | 956 |
| Jones; Colwell v., App. | 189 | P.2d | 842 |
| Justice's Court of Beverly Hills Tp.; Eckles v., App. | 190 | P.2d | 224 |
| Kale; Baker v., App. | 189 | P.2d | 57 |
| Kauffman v. De Mutiis, Sup. | 189 | P.2d | 271 |
| Kazarian; People v., App. | 189 | P.2d | 39 |
| Kemp's Estate, In re, App. | 190 | P.2d | 619 |
| Kessler's Estate, In re, App. | 189 | P.2d | 79 |
| Killeen v. Hotel & Restaurant Employees' Intern. Alliance & Bartenders' Intern. League of America, App. | 190 | P.2d | 30 |
| King v. Stanley, App. | 189 | P.2d | 46 |
| Kings County Abstract Co. v. Heatly, App. | 189 | P.2d | 748 |
| Kirkner, In re, App. | 189 | P.2d | 54 |
| Kirkner v. Simpson, three cases, App. | 189 | P.2d | 54 |
| Kirkner's Guardianship, In re, App. | 189 | P.2d | 54 |
| Klor; People v., App. | 190 | P.2d | 643 |
| Krog v. Krog, App. | 189 | P.2d | 81 |

| | Vol. | | Page |
|---|---|---|---|
| Krone v. Krone, App. | 189 | P.2d | 741 |
| Krone's Estate, In re, App. | 189 | P.2d | 741 |
| Kuchel v. First Nat. Trust & Sav. Bank of San Diego, Sup. | 190 | P.2d | 611 |
| Kuchel; Merchants Finance Corp. v., App. | 189 | P.2d | 513 |
| Kurt's Estate, In re, App. | 189 | P.2d | 528 |
| La Porte v. Houston, App. | 189 | P.2d | 544 |
| Leboire v. Black, App. | 190 | P.2d | 634 |
| Leoni v. Delany, App. | 189 | P.2d | 517 |
| Liberty Mut. Ins. Co. v. Industrial Acc. Commission, App. | 189 | P.2d | 853 |
| Lillefloren v. Superior Court, in and for Los Angeles County, Sup. | 189 | P.2d | 265 |
| Linton v. Walker, App. | 189 | P.2d | 79 |
| Litchfield v. Marin County, App. | 189 | P.2d | 750 |
| Llewellyn v. Cheesewright, App. | 189 | P.2d | 822 |
| Llewellyn's Estate, In re, App. | 189 | P.2d | 822 |
| Loeb v. Loeb, App. | 190 | P.2d | 246 |
| Los Angeles County Flood Control Dist.; Arthur Realty Corp. v., App. | 190 | P.2d | 943 |
| Los Angeles Transit Lines; Wahrenbrock v., App. | 190 | P.2d | 272 |
| Lowe; Chakmakjian v., App. | 190 | P.2d | 980 |
| Lowe; Moushek Chakmakjian v., App. | 190 | P.2d | 980 |
| Lumber & Sawmill Workers' Union, United Brotherhood of Carpenters & Joiners of America; Northwestern Pac. R. Co. v., Sup. | 189 | P.2d | 277 |
| Luthringer v. Moore, Sup. | 190 | P.2d | 1 |
| Lynch v. Santa Fe Bus Lines, App. | 189 | P.2d | 294 |
| McColgan; Union Bank & Trust Co. of Los Angeles v., App. | 190 | P.2d | 42 |
| McKinley; Wilkinson & Co. v., App. | 190 | P.2d | 35 |
| Mantonya v. Bratlie, App. | 190 | P.2d | 996 |
| Marin County; Litchfield v., App. | 189 | P.2d | 750 |
| Mason; Chapman v., App. | 189 | P.2d | 510 |
| Mathews; Foster v., App. | 190 | P.2d | 629 |
| Mayer v. Beondo, App. | 189 | P.2d | 327 |
| Mayer v. Beondo, App. | 190 | P.2d | 23 |
| Meacham; People v., App. | 190 | P.2d | 262 |
| Mendoza; Sparks v., App. | 189 | P.2d | 43 |
| Merchants Finance Corp. v. Kuchel, App. | 189 | P.2d | 513 |
| Milstein v. Ogden, App. | 190 | P.2d | 312 |
| Mitchell; Nichols v., App. | 189 | P.2d | 734 |
| Monroe v. Superior Court in and for Santa Cruz County, App. | 190 | P.2d | 304 |
| Montgomery; Harkness v., App. | 189 | P.2d | 758 |
| Moore; Broadnax v., App. | 190 | P.2d | 975 |
| Moore; Luthringer v., Sup. | 190 | P.2d | 1 |
| Moore; Wilson v., App. | 190 | P.2d | 975 |
| Moushek Chakmakjian v. Lowe, App. | 190 | P.2d | 980 |
| Muses v. Housing Authority of City & County of San Francisco, App. | 189 | P.2d | 305 |
| Nelson; Spencer v., App. | 190 | P.2d | 40 |
| Netz v. Howe, Sup. | 189 | P.2d | 5 |
| Nichols v. Mitchell, App. | 189 | P.2d | 734 |
| Noble v. Noble, App. | 189 | P.2d | 502 |
| Noland; People v., Super. | 189 | P.2d | 84 |
| Nordin v. Wedler, App. | 190 | P.2d | 209 |
| Northwestern Pac. R. Co. v. Lumber & Sawmill Workers' Union, United Brotherhood of Carpenters & Joiners of America, Sup. | 189 | P.2d | 277 |
| Nowell; Burnand v., App. | 189 | P.2d | 796 |
| Nulsen v. Nulsen, App. | 190 | P.2d | 316 |
| O'Day, In re, App. | 189 | P.2d | 525 |
| O'Donnell; Del Porto v., App. | 190 | P.2d | 955 |
| Ogden; Milstein v., App. | 190 | P.2d | 312 |
| Ohm; Silveira v., App. | 189 | P.2d | 782 |
| O'Moore; People v., App. | 189 | P.2d | 554 |
| Oregon-Nevada-California Fast Freight v. Fruehauf Trailer Co., App. | 189 | P.2d | 329 |

| | Vol. | | Page |
|---|---|---|---|
| Owen; Parker v., App. | 189 | P.2d | 81 |
| Owsley v. Hamner, App. | 189 | P.2d | 50 |
| Pacific Gas & Elec. Co. v. Phelps, App. | 190 | P.2d | 209 |
| Pacific Greyhound Lines; Root v., App. | 190 | P.2d | 48 |
| Paiva; People v., Sup. | 190 | P.2d | 604 |
| Palmer v. City of Long Beach, App. | 189 | P.2d | 62 |
| Palpar, Inc,. v. Thayer, App. | 189 | P.2d | 752 |
| Parker v. Owen, App. | 189 | P.2d | 81 |
| Pasadena Tournament of Roses Ass'n; Weaver v., App. | 190 | P.2d | 626 |
| People v. Bianco, App. | 190 | P.2d | 230 |
| People v. Brancato, App. | 189 | P.2d | 504 |
| People v. Burns, App. | 189 | P.2d | 868 |
| People v. Byrnes, App. | 190 | P.2d | 286 |
| People v. Byrnes, App. | 190 | P.2d | 290 |
| People v. Carlton, App. | 189 | P.2d | 299 |
| People v. City of Los Angeles, App. | 189 | P.2d | 489 |
| People v. Coleman, App. | 189 | P.2d | 845 |
| People v. Gibbons, App. | 189 | P.2d | 37 |
| People v. Grayson, App. | 189 | P.2d | 285 |
| People v. Graziano, App. | 189 | P.2d | 518 |
| People v. Haddox, App. | 189 | P.2d | 83 |
| People v. Hoff, App. | 190 | P.2d | 616 |
| People v. Jewett, App. | 190 | P.2d | 330 |
| People v. Kazarian, App. | 189 | P.2d | 39 |
| People v. Klor, App. | 190 | P.2d | 643 |
| People v. Meacham, App. | 190 | P.2d | 262 |
| People v. Noland, Super. | 189 | P.2d | 84 |
| People v. O'Moore, App. | 189 | P.2d | 554 |
| People v. Paiva, Sup. | 190 | P.2d | 604 |
| People v. Raleigh, App. | 189 | P.2d | 70 |
| People v. Ramsey, App. | 189 | P.2d | 802 |
| People v. Sheldon, App. | 189 | P.2d | 816 |
| People v. Smith, App. | 190 | P.2d | 941 |
| People v. Ward, App. | 190 | P.2d | 972 |
| People v. Weber, App. | 190 | P.2d | 46 |
| People v. Westek, Sup. | 190 | P.2d | 9 |
| People v. Winton, Sup. | 189 | P.2d | 257 |
| Phelps v. Pacific Gas & Elec. Co., App. | 190 | P.2d | 209 |
| Police Court of City of El Cerrito, Contra Costa County; Ralph v., App. | 190 | P.2d | 632 |
| Raleigh; People v., App. | 189 | P.2d | 70 |
| Ralph v. Police Court of City of El Cerrito, Contra Costa County, App. | 190 | P.2d | 632 |
| Ramsey; People v., App. | 189 | P.2d | 802 |
| Rankin; Clements v., App. | 189 | P.2d | 725 |
| Reed v. Simpson, App. | 189 | P.2d | 776 |
| Rio Del Mar Country Club v. Superior Court in and for Santa Cruz County, App. | 190 | P.2d | 295 |
| Rio Del Mar Country Club v. Superior Court in and for Santa Cruz County, App. | 190 | P.2d | 306 |
| Rodrigues; Alves v., App. | 190 | P.2d | 649 |
| Rodrigues v. Young, App. | 189 | P.2d | 521 |
| Root v. Pacific Greyhound Lines, App. | 190 | P.2d | 48 |
| Rosenbloom; Etzel v., App. | 189 | P.2d | 848 |
| Rudley v. Tobias, App. | 190 | P.2d | 984 |
| Sacks v. Superior Court in and for Los Angeles County, Sup. | 190 | P.2d | 602 |
| Sandstrom v. California Horse Racing Bd., Sup. | 189 | P.2d | 17 |
| San Francisco, City and County of, v. Boss, App. | 189 | P.2d | 32 |
| Santa Fe Bus Lines; Ferrula v., App. | 189 | P.2d | 294 |
| Santa Fe Bus Lines; Lynch v., App. | 189 | P.2d | 294 |
| Second Baptist Church of Los Angeles; Brewer v., App. | 189 | P.2d | 75 |

| | Vol. | | Page |
|---|---|---|---|
| Security-First Nat. Bank of Los Angeles; Fish v., Sup. | 189 | P.2d | 10 |
| Security-First Nat. Bank of Los Angeles; Wilson v., App. | 190 | P.2d | 975 |
| Selb's Estate, In re, App. | 190 | P.2d | 277 |
| Sheldon; People v., App. | 189 | P.2d | 816 |
| Shinn v. Johnson, App. | 189 | P.2d | 322 |
| Silva v. Superior Court in and for San Joaquin County, App. | 189 | P.2d | 314 |
| Silveira v. Ohm, App. | 189 | P.2d | 782 |
| Simpson, three cases; Kirkner v., App. | 189 | P.2d | 54 |
| Simpson; Reed v., App. | 189 | P.2d | 776 |
| Sjoberg v. Hastorf, App. | 190 | P.2d | 636 |
| Slayman; Fadel v., App. | 189 | P.2d | 771 |
| Smith v. Cantlay & Tanxola, App. | 189 | P.2d | 542 |
| Smith v. City of Los Angeles, App. | 190 | P.2d | 943 |
| Smith; Ingraham v., App. | 189 | P.2d | 721 |
| Smith; People v., App. | 190 | P.2d | 941 |
| Sparks v. Mendoza, App. | 189 | P.2d | 43 |
| Spencer v. Nelson, App. | 190 | P.2d | 40 |
| Spendrup; Abila v., App. | 190 | P.2d | 237 |
| Spitalny, two cases; Gilmer v., App. | 189 | P.2d | 744 |
| Stahl v. City of Los Angeles, App. | 190 | P.2d | 943 |
| Stanley; King v., App. | 189 | P.2d | 46 |
| State; Gregory v., App. | 190 | P.2d | 639 |
| State; Weston Inv. Co. v., Sup. | 189 | P.2d | 262 |
| State Bar; Butts v., Sup. | 189 | P.2d | 1 |
| Steen v. City of Los Angeles, Sup. | 190 | P.2d | 937 |
| Steinman; Bennett v., App. | 190 | P.2d | 987 |
| Stern v. Stern, App. | 189 | P.2d | 536 |
| Stoner v. Calvert, App. | 189 | P.2d | 820 |
| Stowers v. Fletcher, Super. | 190 | P.2d | 338 |
| Strunz; Villafuerte v., App. | 190 | P.2d | 642 |
| Summers v. Tice, App. | 190 | P.2d | 963 |
| Superior Court in and for Alameda County; Willson v., App. | 190 | P.2d | 333 |
| Superior Court in and for City & County of San Francisco; Bank of America Nat. Trust & Sav. Ass'n v., App. | 189 | P.2d | 799 |
| Superior Court in and for City and County of San Francisco; Wilson v., Sup. | 189 | P.2d | 266 |
| Superior Court in and for County of Santa Cruz; Aptos Bldg. Co. v., App. | 190 | P.2d | 303 |
| Superior Court, in and for Los Angeles County; Lillefloren v., Sup. | 189 | P.2d | 265 |
| Superior Court in and for Los Angeles County; Sacks v., Sup. | 190 | P.2d | 602 |
| Superior Court in and for Los Angeles County; Weston v., Sup. | 189 | P.2d | 9 |
| Superior Court in and for San Joaquin County; Silva v., App. | 189 | P.2d | 314 |
| Superior Court In and For San Mateo County; Curtin v., App. | 189 | P.2d | 288 |
| Superior Court in and for Santa Cruz County; Aptos Land & Water Co. v., App. | 190 | P.2d | 305 |
| Superior Court in and for Santa Cruz County; Monroe v., App. | 190 | P.2d | 304 |
| Superior Court in and for Santa Cruz County; Rio Del Mar Country Club v., App. | 190 | P.2d | 295 |
| Superior Court in and for Santa Cruz County; Rio Del Mar Country Club v., App. | 190 | P.2d | 306 |
| Taylor v. J. B. Hill Co., Sup. | 189 | P.2d | 258 |
| Terminix Co. v. Contractors' State License Bd. of Dept. of Professional and Vocational Standards, App. | 190 | P.2d | 24 |
| Thayer; Palpar, Inc., v., App. | 189 | P.2d | 752 |
| Tice; Summers v., App. | 190 | P.2d | 963 |
| Tobias; Rudley v., App. | 190 | P.2d | 984 |
| Tyra v. Board of Police and Fire Pension Com'rs of City of Long Beach, App. | 189 | P.2d | 754 |
| Union Bank & Trust Co. of Los Angeles v. McColgan, App. | 190 | P.2d | 42 |

| | Vol. | | Page |
|---|---|---|---|
| Victor; Bowman v., App. | 189 | P.2d | 876 |
| Villafuerte v. Strunz, App. | 190 | P.2d | 642 |
| Wahrenbrock v. Los Angeles Transit Lines, App. | 190 | P.2d | 272 |
| Walker; Linton v., App. | 189 | P.2d | 79 |
| Ward; People v., App. | 190 | P.2d | 972 |
| Warner v. Harris, App. | 190 | P.2d | 21 |
| Weaver v. Pasadena Tournament of Roses Ass'n, App. | 190 | P.2d | 626 |
| Weber; People v., App. | 190 | P.2d | 46 |
| Wedler; Nordin v., App. | 190 | P.2d | 209 |
| Westek; People v., Sup. | 190 | P.2d | 9 |
| Weston v. Superior Court in and for Los Angeles County, Sup. | 189 | P.2d | 9 |
| Weston Inv. Co. v. State, Sup. | 189 | P.2d | 262 |
| White's Estate, In re, App. | 190 | P.2d | 968 |
| Wilkerson v. Brown, App. | 190 | P.2d | 958 |
| Wilkinson & Co. v. McKinley, App. | 190 | P.2d | 35 |
| Williams v. Graham, App. | 189 | P.2d | 324 |
| Willson v. Superior Court in and for Alameda County, App. | 190 | P.2d | 333 |
| Wilson v. Moore, App. | 190 | P.2d | 975 |
| Wilson v. Security-First Nat. Bank of Los Angeles, App. | 190 | P.2d | 975 |
| Wilson v. Superior Court in and for City and County of San Francisco, Sup. | 189 | P.2d | 266 |
| Winton; People v., Sup. | 189 | P.2d | 257 |
| Wolf; Gill v., Super. | 190 | P.2d | 52 |
| Wolff; Adams v., App. | 190 | P.2d | 665 |
| Young v. Barker, App. | 189 | P.2d | 521 |
| Young; Rodrigues v., App. | 189 | P.2d | 521 |


†

# CALIFORNIA REPORTER

## 189 PACIFIC REPORTER

### SECOND SERIES

31 Cal.2d 453

**BUTTS v. STATE BAR.**

**L. A. 20331.**

Supreme Court of California.

Feb. 6, 1948.

**Attorney and client ⇐44(2)**

Attorney, who mistakenly asserted a right to withhold part of money held by him in a fiduciary capacity as an offset to his personal claim, was not guilty of professional misconduct, where attorney's mistake was result of misconception of law and he practiced no deceit.

Petition for writ of review by Robert Shannon Butts, petitioner, against the State Bar of California, respondent, to review respondent's recommendation that petitioner be suspended from the practice of law for a period of three months

Disciplinary proceeding against petitioner dismissed.

John W. Preston, of Los Angeles, for petitioner.

Jerold E. Weil, of Los Angeles, for respondent.

PER CURIAM.

The State Bar charged petitioner with three acts of professional misconduct, violative of sections 6067, 6068, 6103 and 6106 of the State Bar Act, Business and Professions Code, all committed in connection with his employment as an attorney by Janette Mack.

The local administrative committee concluded that petitioner should be subjected to discipline for only one of the acts charged, that of wrongfully withholding $252.75 contrary to an alleged fiduciary obligation, and recommended that petitioner be suspended from practice for a period of three months. With a slight modification of the committee's findings to show that petitioner had repaid the sum subsequent to the issuance of the notice to show cause, the board of governors, by an eight to six vote, adopted the committee's findings and recommendation. The six members based their negative vote on the ground that the degree of discipline recommended was too severe.

The matter comes before this court on a petition for writ of review. Petitioner contends that he has not committed any act of moral turpitude or dishonesty and that in any event the degree of punishment suggested is not justified by the facts in evidence.

The pertinent facts as found by the committee are these: Petitioner was admitted to practice in 1941. About January, 1946, Robert W. Mack and his wife Janette separated and the husband commenced an action for divorce in Los Angeles County. Mrs. Mack employed petitioner to represent her in the matter. A property settlement agreement was executed by the spouses, but prior to the date set for trial of the divorce suit, and about June, 1946, the parties became reconciled. In August they again separated and a new property settlement agreement was prepared by petitioner and executed by them.

This latter agreement, among other things, provided for the immediate payment to the wife of $1,000 and for delivery by the husband, concurrently with the execution of the agreement, of a check for an additional $1,000 made payable to both petitioner and the wife. The additional sum was to be delivered by petitioner to the wife pursuant to the terms of a trust receipt. This receipt was signed by petitioner on November 4, 1946. It stated, after ac-

knowledging receipt of $1,000 which had been paid to petitioner on September 16th, the following:

"The undersigned agrees to deposit said check to his Trustee Account and to hold the funds represented thereby intact, subject to the fulfillment of the following express provisions:

"Provided only that Janette G. Mack shall secure a decree of divorce in Nevada on or before November 1, 1946, the undersigned will deliver said sum of $1,000 to Janette G. Mack. In the event that the undersigned fails to hold for and deliver to Robert Mack, on or before November 1, 1946, a certified copy of such decree of divorce, the said sum of $1,000.00 shall immediately be returned to said Robert Mack. * * *"

By a letter dated September 24, 1946, counsel for Mr. Mack authorized petitioner to release $250 of the $1,000 to Mrs. Mack, thus leaving $750 in the trust fund.

Mrs. Mack went to Nevada to establish a residence for divorce but before she had completed her compliance with the residence requirements in that state, she returned to California and, ignoring the terms of the property settlement agreement, instituted a divorce suit in the superior court in and for Los Angeles County. In this action she was represented by a new attorney. On October 29th this new attorney wrote petitioner, saying with respect to the $750, "[Y]ou are specifically instructed not to release said funds except with the written consent and approval of my client * * *," and stating that if petitioner did so, he would be held personally responsible.

On October 30th, petitioner wrote Mr. Mack's attorney, telling him of the above letter and saying: "I consider myself to be purely an escrow holder and, not wishing to become personally liable to either party, I must refuse to disburse the fund in my hands until such time as the parties jointly agree upon the disposition. If no such joint agreement is reached I shall interplead in the pending divorce action and pay the money into Court. I have no desire to take sides with either party in this case but under the circumstances I feel that I must adopt a safe attitude and refuse to honor demands of either party until I am properly protected."

On November 9th Mrs. Mack died, and on November 11th petitioner again wrote the attorney for Mr. Mack, saying: "Of course you are aware of the unfortunate demise of Mrs. Mack. By reason of her death I am apparently no longer under restriction to return to you the monies I hold under my trust receipt. These monies total $750.00. I have advanced to Mrs. Mack, from my personal funds $200.00 for her living expenses since she had no personal funds with which to subsist. I hold a cancelled check to her order as evidence of this advance. In addition to this advance there are other small advances either to her or on account of court costs in the actions I handled for her aggregating $52.75. For convenience I have deducted these amounts from the sum I held for Mr. Mack. If this arrangement is not satisfactory to you please inform me and I will send my check for the deductions and seek other means of collection." After the writing of this letter, petitioner drew checks on the $750 fund, reimbursing himself in the sum of $252.75 and making the balance of $497.25 payable to Mr. Mack. Mr. Mack refused to accept the latter sum in full satisfaction of petitioner's obligation in the premises and demanded an additional $252.75.

Subsequently petitioner, as a creditor of Mrs. Mack, applied to the Los Angeles superior court for letters of administration and was appointed administrator of her estate. He then asserted a right to hold the $252.75 to offset the value of certain personal property of Mrs. Mack which he claimed Mr. Mack was withholding from the estate. However, after issuance of the notice to show cause herein, he paid Mr. Mack the $252.75.

Petitioner contends that he practiced no deceit or dishonesty upon anyone. The $252.75 represented amounts which he had advanced to the wife for necessaries, for which he thought he could hold the husband liable. Moreover, he thought that the wife's estate too would be liable for his claim. Further, petitioner contends that the provision of the deposit receipt, con-

strued with the property settlement agreement, making the $1,000 payment to the wife conditional upon her procurance of a Nevada divorce by a certain date, was invalid because promotive of divorce and contrary to public policy, and that with the elimination of this invalid provision, his obligation was such as justified his retention of the $252.75.

The several legal points involving the validity of the challenged provision need not be determined; for purposes of this opinion the provision may be assumed to be valid. It is apparent from the evidence, including the correspondence above quoted, that in the negotiations all of the parties at all times regarded the provision as valid, and acted upon that premise. While the petitioner is in a doubtful position to claim exoneration upon the ground of an invalidity, his conduct should be appraised in the light of the situation as it presented itself to him at the time the alleged wrongful acts were committed.

The undisputed facts show that the error committed by petitioner was not so much one of professional misconduct as one of failure to correctly assess his legal rights upon the death of the wife. That is, petitioner in effect sought, by retaining the $252.75, to compel an accounting between the husband, the wife's estate, and himself, without regard for the fact that he was in possession of the $252.75 in a fiduciary and not a personal capacity, and therefore was not entitled to withhold it to offset a personal claim.

Assuming that petitioner might have been justified had he decided to retain the entire trust fund until proper claim to it was established by either the husband or the wife's estate, on the theory that the unexpected severance of the marriage by death may have altered petitioner's fiduciary obligation, he was mistaken in asserting a right to withhold part of it as an offset to his personal claim. However, in view of the unusual circumstances and the complex legal problems inherent in the situation, the mistake appears to have been one of poor judgment as to the law and the proper procedure to protect his rights. To hold that it involved moral turpitude or constituted an act of professional misconduct would not be justified. Petitioner had befriended a penniless client by supplying her with money for the necessaries of life. He had acted openly and in good faith in asserting a valid claim for $252.75. He erred only in his attempted method of collection. We conclude that the discipline recommended should not be imposed.

The proceeding is dismissed.




31 Cal.2d 426

**GRAY et ux. v. BRACEY et al.**

**Sac. 5835.**

Supreme Court of California, In Bank.

Feb. 3, 1948.

**Judgment ⇐460(1)**

In action to set aside a judgment of foreclosure, where all points made for relief had been presented in trials of or on appeals in previous actions, and appeal from foreclosure judgment, final for many years, had established fact that defendants were owners of property and entitled to possession thereof, complaint alleging that all of the many judgments obtained against plaintiffs in protracted litigation having its genesis in the foreclosure action were rendered in violation of law and deprived them of their property without due process and in denial of equal protection of the laws was insufficient. U.S.C.A.Const. Amends. 4, 5, 14; 8 U.S.C.A. §§ 41, 42.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by John Gray and Dora Stuart Gray, husband and wife, against Arthur Bracey and Adelaide Bracey, husband and wife, and Ruth E. Young, to set aside a judgment in a foreclosure action. From the judgment, plaintiffs appeal.

Affirmed.

John Gray and Dora Stuart Gray, in pro per.

Coyle E. Bybee, of Chico, for respondents.

EDMONDS, Justice.

By their appeal from a judgment which followed an order sustaining, without leave to amend, the demurrer to their complaint, John Gray and his wife present for decision the question of the sufficiency of their pleading to state a cause of action.

The complaint consists of a lengthy recital of alleged acts of the defendants and certain public officials which are said to have been done as a result of conspiracies between these persons wrongfully to take the plaintiffs' property by means of legal proceedings. More specifically, the appellants charge that all of the judgments which have been obtained against them in the protracted litigation which had its genesis in a foreclosure action, were rendered in violation of law. Because of these conspiracies, it is alleged, the Grays have lost the real property which was the subject of the foreclosure action and certain movable cabins and tent platforms which were then on the land.

The Grays declare in their pleading "that the cause of action hereinafter stated is grounded solely on the violation by the State of California" of certain federal rights which are enumerated as those "guaranteed to them by the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and Laws of Congress made pursuant thereto, especially sections 1977 and 1978 of the revised statutes of the United States [8 U.S.C.A. §§ 41, 42]." They ask for the immediate possession of the real property, and for compensatory and exemplary damages.

Before her marriage to Gray, Mrs. Gray owned an interest in certain real property which was subject to a deed of trust. After their marriage, the Grays, by joint declaration, filed a homestead against the property. Later they defaulted on the note, foreclosure proceedings were had and Mr. and Mrs. Bracey purchased the property at the foreclosure sale.

The next suit was brought by the Braceys to secure possession of the property from the Grays. The action was dismissed against Gray after he quitclaimed his interest to the Braceys, and they secured judgment against Mrs. Gray. The judgment was affirmed. Bracey v. Gray, 49 Cal.App. 2d 274, 121 P.2d 770. When a writ of execution was issued to place the Braceys in possession of the property, the Grays filed a petition for certiorari and another for a writ of supersedeas and to quash execution. Both of these petitions were denied by the district court of appeal.

Gray then brought an action for injunctive relief to restrain the levying of the execution. Upon appeal, all questions were decided adversely to the Grays (Gray v. Bybee, 60 Cal.App.2d 564, 141 P.2d 32) and a petition for hearing in this court was denied.

Subsequently, the Braceys filed an action for damages against the Grays, as principals, and others, as sureties, upon the appeal bond filed by the Grays in the first action. The answer of the Grays admitted the judgment previously rendered against them, but alleged that it is void and ineffective because of claimed reversible error in the two previous cases. The Grays also moved the court for permission to file a cross-complaint and took an appeal from the order denying their motion. The order was affirmed upon the ground that the two prior actions were res judicata of the matters sought to be litigated in the proposed cross-complaint, and, in addition, the cross-complaint embraced a cause of action not contemplated by the provisions of section 442 of the Code of Civil Procedure, which sets forth the grounds upon which a cross-complaint may be filed. Bracey v. Gray, 65 Cal.App.2d 282, 150 P.2d 564.

An action brought by the Grays in the Federal District Court was dismissed. Gray v. Bybee, No. 5030/5353 U. S. District Court, Sac. Upon appeal to the Circuit Court of Appeals, the order dismissing the action was affirmed (S. F. No. 5051) and certiorari was denied in the United States Supreme Court, 326 U.S. 686, 66 S.Ct. 86, 90 L.Ed. 403.

The opening brief of the Grays upon the present appeal purports to raise 20 points as grounds for reversal of the judgment. The gist of them is that, by the previous de-

cisions, the Grays have been denied due process and equal protection of the laws. It is contended that the district court of appeal in each of the three previous appeals misstated the facts in the opinions so that appellants "were deprived of a hearing before the State Supreme Court".

All of the points now made have been presented in the trials of the previous actions or upon the appeals from the judgments. Upon the first appeal, it was held that the Braceys "established the fact that they were the legal owners of the property, and entitled to the possession thereof." Bracey v. Gray, 49 Cal.App.2d 274, 278, 121 P.2d 770, 772. It is this holding that the Grays have attacked in subsequent litigation and are attacking here. That judgment has been final for many years and the present complaint states no grounds for setting it aside at this time.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.




31 Cal.2d 395

## In re HOWE'S ESTATE.

## NETZ v. HOWE et al.

L. A. 19838.

Supreme Court of California, in Bank.

Feb. 3, 1948.

**1. Executors and administrators ⇐82**

That the issue of title between the executor and the estate which he is administering may be tried upon the hearing of objections to the settlement of the executor's account does not foreclose the use of a petition for instructions for the purpose of obtaining an adjudication in regard to the ownership of the property. Probate Code, § 588.

**2. Executors and administrators ⇐82**

The probate court had jurisdiction to entertain petition of executor for instructions as to the ownership of certain property as between the executor and the estate. Probate Code, § 588.

**3. Wills ⇐87**

An instrument which does not pass any interest until after the death of the maker is essentially a "will", but not every instrument which provides for performance at or after death is testamentary in character.

See Words and Phrases, Permanent Edition, for all other definitions of "Will".

**4. Wills ⇐88(2)**

An instrument which creates a right in the promisee before the death of the testator is a "contract" rather than a "will", since a will is dispositive and gratuituous, whereas a contract is promissory and requires consideration.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract".

**5. Wills ⇐88(2)**

A contract which provided that, if employer should die or become incapacitated during its continuance or extension, employee should have as additional compensation for services theretofore rendered the employer's entire business, was a valid contract and was not a testamentary disposition of employer's property in whole or in part, and fact that contract could be terminated on 90 days' written notice was immaterial, since there was adequate consideration.

**6. Contracts ⇐1**

The terms of a will, even if inconsistent with contract, cannot change the binding effect of valid contract between the parties.

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Proceeding in the matter of the estate of George Edward Howe, deceased, upon petition of John C. Netz, as executor, etc., for instructions, which was opposed by Myra Howe and to which Alvin Langdon Coburn, a legatee, was made a party. From the order entered, the contestant appeals.

Order affirmed.

Prior opinion 183 P.2d 24.

Hugh Gordon, of Los Angeles, Sanford A. Waugh, of San Francisco, and Powers & Bernard and W. A. Strong, all of Los Angeles, for appellant.

Charles E. Beardsley and S. T. Hankey, both of Los Angeles, for respondents.

EDMONDS, Justice.

In 1928, John C. Netz, then the manager of the plumbing business owned by George E. Howe, entered into an agreement in writing whereby Netz agreed to continue as such manager. Among other obligations of this contract, is a provision that if Netz survived Howe, Netz should have the business as additional compensation for his services. Following the death of Howe, his widow challenged the validity of this disposition of her husband's business, and upon her appeal from an adverse order, the principal question for decision is whether or not the contract violates the requirements in regard to the testamentary disposition of property.

The agreement declares that Howe "employs" Netz as the manager of his business, and it specifies certain amounts to be paid to him as compensation for his services. The provision which occasioned the present controversy reads as follows: "(f) Should * * * [Howe] die or become incapacitated as hereinafter provided, during the continuance of this contract, or its extension, then * * * [Netz] shall have as additional compensation for his said services, rendered prior to the death or incapacitation of * * * [Howe], the entire hardware, plumbing and heating business, now conducted by said * * * [Howe] under the name of Howe Bros. * * *"

As the executor of Howe's estate, following the procedure authorized by section 588 of the Probate Code, Netz filed a petition for instructions, asking for a determination in regard to the ownership of the business. Mrs. Howe presented objections to the executor's petition which were stated in the form of a general demurrer. The court held that the agreement of 1928 is valid, that the business belongs to Netz, individually, and should not be included in the assets of the estate. The appeal is from this order.

The widow's contention upon appeal, as in the probate court, is that the contract of 1928 is an invalid testamentary disposition of the business. She argues that at the time the agreement was executed, Howe did not intend to transfer a present interest in the business to Netz and that, in effect, the provision in question constitutes a gift to take effect upon Howe's death. In support of the order, Netz argues that the contract is not testamentary in character; that consideration passed between the parties; and that the agreement is neither invalid nor unenforceable merely because the receipt and enjoyment of part of the consideration was deferred until the death or disability of Howe.

[1, 2] Although no question has been raised by the parties concerning the jurisdiction of the probate court to determine, as between Netz and the estate of Howe, the ownership of the business, when this matter was before the district court of appeal, the order was reversed upon the ground that the probate court was without power to try an issue of title upon a petition for instructions. In re Estate of Howe, —— Cal.App.2d ——, 183 P.2d 24. However, section 588 of the Probate Code provides: "In all cases where no other or no different procedure is provided by statute, the court on petition of the executor or administrator may from time to time instruct and direct him as to the administration of the estate and the disposition, management, operation, care, protection or preservation of the estate or any property thereof." There is no express statutory procedure for determining an issue of title as between an executor and the estate which he is administering. The fact that such an issue may be tried upon the hearing of objections to the settlement of the executor's account does not foreclose the use of a petition for instructions for the purpose of obtaining an adjudication in regard to the ownership of property. The probate court, therefore, had jurisdiction to entertain the petition of Netz and to determine the issues presented by it and the objections of the widow filed in response thereto.

[3, 4] Considering the merits of the controversy, an instrument which does not

pass any interest until after the death of the maker is essentially a will. In re Estate of Beffa, 54 Cal.App. 186, 201 P. 616. But not every instrument which provides for performance at or after death is testamentary in character. If the instrument creates a right in the promisee before the death of the testator, it is a contract. "A will is dispositive; a contract promissory. A will is gratuitous; while a contract * * * requires consideration." 1 Page on Wills, Lifetime Ed., sec. 83, p. 179.

[5] A leading case on the subject is Patterson v. Chapman, 179 Cal. 203, 176 P. 37, 2 A.L.R. 1467. There the decedent had executed a document instructing the administrator of his estate to pay Chapman $50,000 within one year of his death, plus interest, and further providing that it might be paid in real estate or other property, if cash was not available. The instrument included the recital that the payment was "for value received." In holding that the instrument was a valid contract and not testamentary in character, this court said: "If the instrument created a *debitum in praesenti,* an obligation existing in the lifetime of the obligor, the fact that it was not to be discharged until after Dargie's death renders it none the less enforceable as a demand against his estate. 8 Cyc. 1007. 'Where a testator has not, in a paper payable postmortem, recognized himself either by intendment, or language, as under legal indebtedness to the party in whose favor it is made, such instrument is without consideration, purely voluntary, and testamentary in its character.' Kirkpatrick v. Pyle, 6 Houst., Del. 569. Any memorandum in writing, however, regardless of its form, and whether payable in money or specific property, whereby a debt is *acknowledged* by one as owing to another to whom the memorandum is delivered is sufficient to create such obligation. * * * Hence, conceding the document in question is not a negotiable instrument * * * the want of such character is immaterial if terms are employed therein which at the time of its execution created a debitum in praesenti." 179 Cal. at pages 205, 206, 176 P. at page 37, 2 A.L.R. 1467.

Another leading case is McKinnon v. McKinnon, 8 Cir., 56 F. 409, wherein it was said that the partnership articles in controversy "constitute an executory agreement, which determines the rights of the parties inter se, and provides what disposition shall be made of the partnership property on the happening of a certain event. In the state of Missouri, where these articles were signed, and where both partners at the time resided and carried on business, it is as well settled, as it is in any state of this Union, that an agreement by a person, upon a valuable consideration, to give to another the whole or a part of his property at the promissor's death, will be specifically enforced in equity, both as to real and personal property, if the consideration is duly rendered by the promisee." 56 F. at page 412.

Two recent cases arising in the federal courts concern instruments where a third-party donee beneficiary was to receive the benefits after the death of the promisor. The decision in the latest of these (Robinson's Women's Apparel, Inc., v. Union Bank & Trust Co. of Los Angeles, D.C., 67 F.Supp. 395) was based upon California law, and the court held that an instrument is not testamentary in character where there was "a contractual right asserted either by a party to a contract or by a third party beneficiary." 67 F.Supp. at page 396. The court also declared that "the mere fact that the death of one of the parties to a contract is designated as the contingency upon which a promise turns is not alone sufficient to subject such an agreement to the Statute of Wills. Were that the rule, life insurance contracts, where the insurance is payable to a beneficiary other than the estate of the insured, would be subject to the Statute of Wills." 67 F.Supp. at page 395.

In the earlier case (Mutual Ben. Life Ins. Co. v. Ellis, 2 Cir., 125 F.2d 127, 138 A.L.R. 1478), the court deciding that the instrument there under attack did not constitute a testamentary disposition of property, stated: "A sufficient answer to the argument that it would violate the Statute of Wills to enforce the agreement for the sisters lies in the fact that their right to enforce is based upon a contractual obligation and not on any interest in the property of the decedent." 125 F.2d at page

131, 138 A.L.R. 1478. Other cases in which an instrument has been upheld as a contract rather than a will are cited in the footnotes in 1 Page on Wills, secs. 83 and 84, pp. 179–183.

The appellant relies upon decisions where an instrument which was intended by the grantor to be a conveyance was held not to be operative as such because it did not pass any present interest, and to be void as a will, because not executed in conformity with the statute of wills. Cohn v. Klein, 209 Cal. 421, 287 P. 459; Niccolls v. Niccolls, 168 Cal. 444, 143 P. 712; In re Estate of McEuen, 18 Cal.App.2d 180, 63 P. 2d 332; and cf. In re Estate of Heuler, 207 Cal. 391, 278 P. 1031, where a contract in consideration of marriage was held to be a valid testamentary disposition of certain property. But by the agreement which Howe made with Netz, contractual obligations were created, and determinations which concern conveyances without consideration are not in point.

A further point made by the appellant is that the instrument is in part a binding contract, and in part testamentary. It is argued that the provision for the specified weekly salary and the bonus was a generous consideration for Netz' services as manager, and the transfer of the business was intended as a gift to become effective at the time of Howe's death. In support of her position, the widow points to the provision of the contract that should Netz predecease Howe, then his heirs "shall only be entitled to compensation for his unpaid services, if any, and his share in the net profits of the said business, up to the end of the current year." And although the agreement that Netz should become the owner of the business upon Howe's death was expressed in terms of additional compensation, this was "merely a way of expressing appreciation for a good job done by Netz." She also contends that "the provision for revoking the agreement indicates testamentary intent."

The appellant relies upon Ga Nun v. Palmer, 159 App.Div. 86, 144 N.Y.S. 457, 459, where plaintiff sued decedent's estate as a creditor for $20,000, basing her claim on a contract entered into between plaintiff and decedent. Plaintiff's promise was to care for decedent "'in sickness and health' as long as she lived"; and decedent promised to pay plaintiff "$70 a month for the support of the house and her clothes as long as I live, and at my death she is to have $20,000 * * *." The court held that the instrument was contractual in part "and that the remaining provisions of said instrument (the provisions relating to the $20,000) are testamentary in character." 144 N.Y.S. at page 459. However, the Court of Appeals, speaking through Mr. Justice Cardozo, took a contrary position, holding that there was no basis for the "dismemberment of the contract," and that "each promise in its entirety is the consideration for the other." Ga Nun v. Palmer, 216 N.Y. 603, 111 N.E. 223, 225. It was further stated that the "character of the promise is not changed by the time fixed for its performance. (Citing cases.) It makes no difference that the reward may seem to be extravagant in amount. Unless there is fraud or undue influence, the inadequacy of the consideration does not destroy the obligation of the contract." 111 N.E. at page 225.

This reasoning is particularly applicable to the contract now being considered because of its provision that the transfer was intended as "additional compensation" for Netz' services. There is no reason for a dismemberment of the contract. Likewise, the fact that it could be terminated upon 90 days' notice does not indicate that the agreement was made with testamentary intent, and the possibility of termination does not render the promise of Howe invalid. Because of the required 90 days' written notice, there was adequate consideration. Restatement, Contracts, sec. 79, Illustration 1.

[6] As evidencing some doubt in the minds of Netz and Howe as to the legality of their contract, the appellant relies upon the provision of Howe's will, executed about four years after they made the agreement in regard to ownership of the business. By his will, Howe bequeathed the business to Netz "in the event such contract should be questioned in any way." However, the terms of the will, even if incon-

sistent with the contract, cannot change the binding effect of the former agreement of the parties.

The order is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.




31 Cal.2d 866

**Ken WESTON, petitioner, v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY, Respondent.**

**S. F. 17347.**

Supreme Court of California, in Bank.

Feb. 5, 1948.

Clarence E. Todd, of San Francisco, and John C. Stevenson and Huston T. Carlyle, both of Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, and Douglas DeCoster, Deputy County Counsel, both of Los Angeles, for respondent.

Ivan G. McDaniel, of Los Angeles, for Calavo Growers of California et al., real parties in interest.

CARTER, Justice.

This is a review of a contempt judgment and commitment. Following the commencement of an action for injunctive relief and damages in the Superior Court of Los Angeles County by Calavo Growers of California, a non-profit association, and Calavo, Inc., a corporation, plaintiffs, against petitioner, a member of a union, and various unions, a temporary restraining order was issued enjoining petitioner and other defendants from agreeing to cease performing or to cause any employee of customers, suppliers or carriers of plaintiffs to cease dealing with plaintiffs. Like in Re Blaney, 30 Cal.2d 643, 184 P.2d 892, a judgment of commitment on conviction of contempt was entered reciting that the action was to secure injunctive relief for a violation of the "hot cargo act," and finding several counts of violation of the restraining order similar to those discussed in the Blaney case. For the reasons stated in that case the judgment and warrant of commitment of petitioner on conviction of contempt of court is annulled.

GIBSON, C. J., and EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

SHENK, Justice.

I dissent for the reasons stated in my dissenting opinion in Re Blaney, 30 Cal.2d 643, at page 661, 184 P.2d 892, at page 904.




31 Cal.2d 867

**Felix BUTTE, Jr., and A. J. Perenchio, Individually and as copartners doing business under the firm name and style of Sunnyside Winery, Plaintiffs and Appellants, v. DISTILLERY, RECTIFYING AND WINE WORKERS INTERNATIONAL UNION, LOCAL NO. 45, etc., Defendants and Respondents.**

**S. F. 17355.**

Supreme Court of California.

Feb. 5, 1948.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Dearing, Jertberg & Avery and Kenneth G. Avery, all of Fresno, for appellants.

Robert M. Barnard, of Fresno, and Clarence E. Todd, of San Francisco, for respondents.

CARTER, Justice.

In this action plaintiffs' prayer for injunctive relief is based upon the Hot Cargo Act (Labor Code, secs. 1131–1136), and hence is controlled by the decision in Re Blaney, 30 Cal.2d 643, 184 P.2d 892. Here a judgment of dismissal was entered after a demurrer was sustained. On the authority of the Blaney case, the judgment is affirmed.

GIBSON, C. J., and EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

SHENK, Justice.

I dissent for the reasons stated in my dissenting opinion in Re Blaney, 30 Cal.2d 643, at page 661, 184 P.2d 892.




31 Cal.2d 378

## FISH v. SECURITY-FIRST NAT. BANK OF LOS ANGELES.

L. A. 19629.

Supreme Court of California, in Bank.

Feb. 3, 1948.

Rehearing Denied March 1, 1948.

**1. Contracts ⇐88, 99(1)**
**Gifts ⇐47(3)**

A presumption of fraud, insufficient consideration and undue influence arises where a confidential relationship exists between parties, and one in whom confidence is reposed actively participates in transaction whereby he obtains a gift from or advantage over the other, and such presumption is evidence and casts upon party who has gained the advantage the burden of rebutting it by showing fairness and good faith. Code Civ.Proc. §§ 1957, 1961; Civ.Code, §§ 2219, 2235.

**2. Witnesses ⇐133**

Where action against executor to recover amounts paid to testatrix on notes executed to her and plaintiff as joint tenants was one to declare a resulting trust and not an action upon demand against testatrix' estate, plaintiff's testimony was not barred by dead man's statute. Code Civ.Proc. § 1880, subd. 3.

**3. Executors and administrators ⇐221(4)**

In action against executor to recover amounts paid to testatrix during her lifetime on notes executed to her and plaintiff as joint tenants, evidence supported finding that plaintiff, who over a period of years aided testatrix in management of her financial affairs, was not guilty of fraud or undue influence over testatrix in procuring execution of the notes. Code Civ. Proc. §§ 1957, 1961; Civ.Code, §§ 2219, 2235.

**4. Alteration of Instruments ⇐29**

In action against executor to recover amounts paid to testatrix during her lifetime on notes executed to her and plaintiff as joint tenants, evidence supported finding that alteration appearing on face of one of notes as to names of payees represented merely a correction of an error of the typist, and did not show an improper alteration. Code Civ.Proc. §§ 1957, 1961; Civ. Code, §§ 2219, 2235.

**5. Trusts ⇐86**

Where consideration for a purchase is furnished by one person and title is taken in the name of another, a trust is presumed to result in favor of one furnishing the consideration.

**6. Trusts ⇐86**

In action against executor to recover amounts paid to testatrix on notes executed to her and plaintiff as joint tenants, presumption that a trust resulted in testatrix' favor because all of the consideration for the notes was furnished by her was sufficiently rebutted by evidence of testatrix' past bounties to plaintiff.

**7. Joint tenancy ⇐5**

The proceeds of joint tenancy property, in absence of contrary agreement, retain character of the property from which they are acquired.

**8. Executors and administrators ⇐221(4)**

In action against executor to recover amounts paid to testatrix on notes executed to her and plaintiff as joint tenants, testimony that testatrix paid income taxes on the funds received by her, if admissible, would do no more than create a conflict which trial court was justified in resolving in plaintiff's favor.

**9. Joint tenancy ⇐5**

In action against executor to recover amount paid to testatrix on notes executed to her and plaintiff as joint tenants, evidence supported finding that there was no agreement between testatrix and plaintiff that fruits of joint tenancy notes would

not retain their joint tenancy character upon payment thereof to testatrix, or that plaintiff would relinquish his interest in them. Civ.Code, § 1475

**10. Joint tenancy ⇐8**

Testatrix' receipt of payments on notes executed to her and plaintiff as joint tenants was not in derogation of plaintiff's joint tenancy interest, even though payments were made in name of testatrix only. Civ.Code, § 1475.

**11. Joint tenancy ⇐5**

Where notes were executed to two parties as joint tenants, payments on the notes to one of the joint tenants could be retained or reinvested by such joint tenant without destroying their joint tenancy character. Civ.Code, § 1475.

**12. Executors and administrators ⇐221(4)**

In action against executor to recover amounts paid to testatrix on notes executed to her and plaintiff as joint tenants, statement attributed to plaintiff by testatrix' attorney that plaintiff "was to get only what was left * * *" did not necessarily imply that plaintiff was to get only the balance remaining unpaid on the notes at testatrix' death.

**13. Appeal and error ⇐193(1)**

Where alleged defect might have been cured by simple amendment incorporating necessary allegations in third count of complaint, and defendant did not raise the point or object to sufficiency of pleading, defendant on appeal could not urge alleged defect as reversible error.

**14. Trusts ⇐371(2)**

Allegations in complaint that sums were paid to and received by defendant's testatrix "as trustee for joint use of herself and this plaintiff during their lifetimes, and for the sole use and benefit of the survivor after death of either," sufficiently pleaded existence of a trust under which plaintiff claimed right to recover joint tenancy funds.

**15. Appeal and error ⇐1056(1)**

Exclusion of proffered evidence was not reversible error, where some of the excluded evidence related to collateral matters and other items, though admissible, would have been merely cumulative and would not have affected trial court's conclusion.

---

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by Merle E. Fish against the Security-First National Bank of Los Angeles, as executor of the estate of Gladys Isabel Ferres, deceased, to recover moneys paid deceased for the joint use of herself and plaintiff during their lives and the survivor's sole use and benefit after either's death. From judgment for plaintiff, the defendant appeals.

Affirmed.

Prior opinion, 179 P.2d 356.

Henry T. Moore, of Los Angeles, for appellant.

Oliver O. Clark and Robert A. Smith, both of Los Angeles, for respondent.

CARTER, Justice.

Defendant, as executor of the estate of Gladys Isabel Ferres, deceased, appeals from a judgment which awards to plaintiff $29,012.45 found to have been held by the decedent as trustee for the joint use and benefit during her lifetime of herself and plaintiff and for the sole use and benefit of the survivor after the death of either.

The basic question is that of the sufficiency of the evidence to support the findings and judgment. The evidence shows that between plaintiff, a minister of the gospel, and the decedent, there grew up over a period of years a relationship of great confidence. The husband of decedent passed away in 1931. Decedent had no children or descendants and during the greater portion of the time from 1931 until her death in 1943 she lived alone. She was a woman of wealth, having a constant income in excess of her personal needs. As plaintiff alleged and the trial court found, decedent, after her husband's death, "required assistance in the care and management of her property and affairs and also the companionship of others in relief from loneliness"; "a feeling of high regard and friendship arose between the [decedent] on the one hand and [plaintiff] and

the members of his family on the other, and from about the year 1931 up to the date of her death this plaintiff constantly advised with and assisted [decedent] in the care and management of her property and affairs. In addition thereto, [decedent] spent a large portion of her time visiting in the home of plaintiff; innumerable automobile trips were taken by her in company with plaintiff and members of his family; and [decedent] was contacted almost daily by plaintiff or some member of his family in the performance of some service or other friendly act."

Decedent suffered from an impairment of hearing which caused her some difficulty, particularly at any long or involved conference, but she was unquestionably competent. As the trial court commented, "All of the evidence in the case that touches on that point shows that [decedent] was not only mentally competent but very or exceptionally mentally competent to determine what she wanted to do. * * * There is no question raised on that score at all. * * *"

In February, 1934, the decedent executed a will by which she disposed of her estate of more than $550,000 in value. Defendant executor, as trustee under a charitable trust, was named residuary legatee, and it will receive over $200,000, regardless of whether it also receives the sum here involved. Decedent executed a first codicil to her will in March, 1934, a second codicil in 1935, a third in 1939, and a fourth in 1943. By the second codicil she devised and bequeathed to plaintiff her home and furnishings of an appraised value of $11,100, and an automobile valued at $500. This devise and bequest, standing without change from 1935 to 1943, is indicative of decedent's early intent to reward plaintiff for his service to her.

In July, 1937, decedent established, and during her life maintained, a bank account in joint tenancy with plaintiff, in which she deposited the sum of $35,000. This is indicative of decedent's continuing generosity toward plaintiff.

In May, 1941, decedent made a loan of $30,000 to Pierce Brothers, a mortuary corporation, of which plaintiff was standby minister (the minister called in when the parties have no particular preference). A $30,000 note evidencing the loan was executed by the mortuary to decedent and plaintiff as joint tenants with right of survivorship. On this note the mortuary made sixteen payments to decedent, in her name alone, aggregating $15,012.45. These payments were placed in a bank account standing in the name of decedent alone.

In May, 1942, decedent caused to be issued to herself and plaintiff, as joint tenants with full right of survivorship, a certificate evidencing ownership of 1000 shares of the capital stock of the mortuary corporation of a par value of $25 a share.

In October, 1942, the following transaction took place: The mortuary, by check payable to decedent only, repurchased its stock for $25,000. The $25,000 was immediately loaned back to the mortuary so that it then owed the $25,000, a balance of $16,666.72 on the $30,000 note, and a balance of $35,844.76 on another $45,000 note which it had executed to decedent, or an aggregate debt of $77,511.48. These obligations were consolidated in a single note for $77,511.48, executed by the mortuary to decedent and plaintiff as joint tenants. Thereafter the mortuary made payments on the consolidated note to decedent alone totaling $14,000. The payments were deposited by decedent in the same bank account, in her name only, in which she had deposited the payments of $15,012.45 made on the $30,000 note. This bank account, from the time of the first deposit, contained a balance of more than the amount of the payments made by the mortuary, or more than the aggregate of all payments, to-wit: $29,012.45, at the time of decedent's death.

After the passing of decedent in August, 1943, the funds on deposit came into the possession of defendant executor. It rejected plaintiff's claim in the sum of $29,012.45, and this action followed. Plaintiff's complaint was framed on the theory that the moneys were joint tenancy funds because they were received by decedent as payments upon joint tenancy notes and, having been kept intact by her until her death, they retained their character as joint tenancy property. In the first two

counts of the complaint, one for $15,012.45 and the other for $14,000, plaintiff alleged that the respective sums were received by decedent without any agreement between her and plaintiff that their joint tenancy character would be altered, and that decedent retained possession of the funds for the sole purpose of holding them until a favorable opportunity should arise for reinvestment in some form satisfactory to both parties. In the third count plaintiff alleged that the sums were paid to and received by decedent "as Trustee for the joint use of herself and this plaintiff during their lifetimes, and for the sole use and benefit of the survivor after the death of either." At the time of submission of the cause in the trial court plaintiff elected to stand on the third count, and the court thereupon made findings and gave judgment in his favor.

It was essential to the establishment of plaintiff's claim to the funds, under any theory, that he first establish his joint tenancy interest in the $30,000 and $77,511.48 notes and the validity of the joint tenancy transactions. On this subject the evidence gave rise to conflicting inferences which were resolved by the trial court in plaintiff's favor. The court found that at all times mentioned in the complaint plaintiff was and now is a minister of the gospel and that he so represented himself to decedent; that over a course of several years immediately prior to her death, plaintiff undertook to and did advise decedent upon worldly as well as spiritual matters, particularly with respect to the use, management, and disposition of her property and with respect to business transactions; that as a result of such association, a relation of personal confidence arose between plaintiff and decedent in fact and in law; that on the occasions of the loans made by decedent to the mortuary, and execution of the notes evidencing them, "plaintiff took an active part in said negotiations and was active in procuring the making of said loans by decedent to the maker of said notes and in procuring the preparation and signing of the notes * * *."

But the trial court further found that "it is not true that the conduct of said decedent in creating any joint tenancy relation between herself and plaintiff, or in any management or disposition of her property, or in any business transaction, or in any respect wherein plaintiff benefited thereby, was the result of, or was influenced by, any undue influence by, or fraudulent conduct of, said plaintiff, and it is hereby expressly found, as facts, that the conduct of said decedent in respect of each and all of the matters set forth in the pleadings herein, was her free and voluntary act; was knowingly and understandingly done, and was free of any undue influence, coercion or fraud, upon the part of said plaintiff, and represented an expression of free and independent understanding and desire; that in all matters, and at all times, plaintiff acted in the highest good faith toward said decedent, and plaintiff did not at any time obtain any advantage over the decedent, or any interest in any of her property, by any misrepresentation, threat, concealment, or adverse pressure, of any kind, and plaintiff did not at any time use the influence which his position with said decedent gave to him, to obtain any advantage over or from said decedent."

[1] In challenging the sufficiency of the evidence to support these findings defendant relies upon the presumption of fraud, insufficient consideration, and undue influence which arises where a confidential relationship exists between the parties, and the one in whom confidence is reposed actively participates in a transaction whereby he obtains a gift from or advantage over the other; such a presumption is evidence and casts upon the party who has gained the advantage the burden of rebutting it and showing fairness and good faith. Herbert v. Lankershim, 9 Cal.2d 409, 71 P.2d 220; Estate of Cover, 188 Cal. 133, 204 P. 583; Estate of Nutt, 181 Cal. 522, 185 P. 393; Odell v. Moss, 130 Cal. 352, 62 P. 555; Estate of Miller, 16 Cal.App.2d 141, 60 P.2d 492; Code Civ. Proc., secs. 1957, 1961; Civ.Code, secs. 2219, 2235. Defendant claims that plaintiff failed utterly to sustain the burden cast upon him to rebut the presumption, and complains of the fact that plaintiff did not even undertake to testify in support of his position.

[2] Plaintiff's failure to testify fully is said by him to be due to the fact that he believed that such testimony was barred by section 1880, subdivision 3, of the Code of Civil Procedure, which prohibits a party to an action on a demand against the estate of a deceased person, from being a witness "as to any matter or fact occurring before the death of such deceased person." Since the cause of action upon the third count was one to declare a resulting trust and not an action upon the demand against the estate, plaintiff's belief that his testimony was barred was erroneous. Porter v. Van Denburgh, 15 Cal.2d 173, 176, 99 P.2d 265; Myers v. Reinstein, 67 Cal. 89, 91, 92, 7 P. 192; Alvarez v. Ritter, 67 Cal.App.2d 574, 579, 580, 155 P.2d 83; Corley v. Hennessy, 58 Cal.App. 2d 883, 887, 137 P.2d 857; Humes v. Humes, 56 Cal.App.2d 126, 132, 133, 133 P.2d 39.

[3] But giving full effect to the presumption arising from the confidential relationship, we think it is clear that the evidence adduced and the inferences which may reasonably be drawn from it sufficiently support the trial court's conclusion that plaintiff met the burden cast upon him. The evidence shows a competent donor who over a period of twelve years increasingly looked to the donee for companionship, advice and service, and a continuing practice over those years to frequently reward him. The $30,000 note was executed more than two years and the consolidated note more than ten months before the death of the donor. No person was shown to have a stronger claim to her bounty than plaintiff. The gifts were made in a manner (creation of joint tenancies) affording the donor some protection during her lifetime. The donor successfully handled her valuable properties from 1931 to 1943 so that she left an estate of over half a million dollars. She was familiar with joint tenancies for in 1937 she opened the joint bank account with plaintiff. Officers of Pierce Brothers testified that during the period of the joint tenancy transactions, although most of the talking was done by plaintiff and the instructions were given by him, yet they saw and conversed with decedent on many occasions. The consolidated note was secured by trust deed. Decedent was present when the note and trust deed was negotiated and executed.

Because the voice of decedent was silenced by death and that of plaintiff by his assumption of applicability of the statute, there was no direct testimony that decedent understood the nature of the joint tenancies. But considering the orderly manner in which the transactions appear to have been conducted, and from the testimony given by representatives of Pierce Brothers, it may reasonably be inferred that decedent was fully aware of the nature and implications of her acts and of what was done. That the evidence may also be construed to given rise to conflicting inferences is immaterial.

In Kelly v. McCarthy, 6 Cal.2d 347, 364, 57 P.2d 118, 126, undue influence is spoken of as "influence amounting to moral coercion destroying grantor's free agency and constraining him to do what is against his will but what he is unable to refuse. * * * 'Undue influence comprehends overpersuasion, coercion, or force that destroys or hampers the free agency and will power of the testator, and mere affection or attachment or a desire to gratify the wishes of one beloved, respected, and trusted may not of itself amount to undue influence affecting testamentary capacity.' * * * 'Influence gained by kindness and affection will not be regarded as "undue," if no imposition or fraud be practiced, even though it induce the testator to make an * * * unjust disposition of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made.'"

It must be remembered that the trial court found for plaintiff. The court was justified in concluding that the notes were delivered to decedent and that after recordation she received the trust deed in the mail from the recorder, and that she was fully aware of the implications arising from the manner in which the transactions were negotiated. She received periodic payments on the notes, sixteen on the first and eleven on the second.

[4] Defendant claims support in the fact that an erasure or alteration appears to have been made in the typewritten name of the payees on the consolidated note, and questions the validity of the note, suggesting that it may originally have been made out to decedent alone and later changed to state the names of decedent and plaintiff as joint tenants. The defect shows on the face of the photostatic copy of the note and although it might indicate the inference suggested by defendant, it more reasonably gives rise to the inference that it represents merely a slight erasure to correct an error of the typist. The issue was for the trial court. The transaction was openly conducted as were all the joint tenancy transactions. The trust deed was taken in joint tenancy and the trial court's inference that the note was also so taken seems the one most likely to be true.

[5, 6] Relying upon the presumption that where the consideration for a purchase is furnished by one person and title is taken in the name of another, a trust is presumed to result in favor of the one furnishing the consideration. Goes v. Perry, 18 Cal.2d 373, 379, 115 P.2d 441, defendant argues that under the undisputed evidence that substantially all, if not all of the consideration for the notes was furnished by decedent, it must be presumed that a trust resulted in her favor, and no evidence was adduced by plaintiff to rebut the presumption. This contention is answered by what has already been said, and by the fact that the repeated evidence of decedent's past bounties to plaintiff negatives any intent of a trust or of other than a gift to him. The trial court was justified in resolving all conflicting evidence in favor of plaintiff on this issue.

[7] The conclusion of the trial court, therefore, that the joint tenancy transactions were valid and that defendant was the owner of a joint tenancy interest in the notes may be accepted as a premise in determining the further question whether the evidence sufficiently supports the correlative conclusion that the funds totaling $29,012.45 were also joint tenancy property, although standing in decedent's name. The proceeds of joint tenancy property, in the absence of contrary agreement, retain the character of the property from which they are acquired. In re Kessler, 217 Cal. 32, 35, 17 P.2d 117; Estate of Harris, 169 Cal. 725, 147 P. 967; Bliss v Martin, 74 Cal.App.2d 500, 169 P.2d 61, and cases there cited; Wallace v. Riley, 23 Cal.App.2d 654, 665, 74 P.2d 807; Estate of McCoin, 9 Cal. App.2d 480, 482, 50 P.2d 114.

[8-11] Defendant contends that here the evidence establishes that plaintiff either acquired no interest in the payments on the notes or, if he did acquire any interest, he relinquished it to decedent; that decedent received the payments in her own name, deposited them in her personal account despite the existence of a joint tenancy account with plaintiff; that this was all done with the acquiescense of plaintiff, who made no claim to the funds during decedent's lifetime; that decedent's attorney testified that plaintiff told him that the understanding was that plaintiff "was to get only what was left when she died"; and that testimony was offered, but excluded by the trial court, to show that decedent paid income taxes on the funds.

This evidence, however, does no more than create a further conflict which the trail court was justified in resolving in plaintiff's favor. From the evidence as a whole the court could reasonably conclude that there was no agreement between decedent and plaintiff that the fruits of the joint tenancy notes would not retain their joint tenancy character or that plaintiff would relinquish his interest in them. Decedent's receipt of the payments as a joint tenant was not in derogation of plaintiff's joint tenancy interest even though the payments were made in the name of only the one joint tenant. Delano v. Jacoby, 96 Cal. 275, 278, 31 P. 290, 31 Am.St.Reps. 201; Civ.Code, sec. 1475. The funds could be retained or reinvested by either joint tenant without destroying their joint tenancy character. Wallace v. Riley, supra, and cases above cited.

[12] The statement attributed to plaintiff by decedent's attorney, that plaintiff "was to get only what was left * * *", did not necessarily imply that he was to get

only the balance remaining unpaid on the notes. It equally well implied that he was to get whatever portion of the joint tenancy property which was still in existence at the time of her death, that is, balance unpaid on the notes and the fruits thereof.

That decedent may have paid income tax on the funds might be material as tending to show that she regarded them as her sole property, but if such evidence had been admitted it would not have affected the conclusion reached by the trial court. It would have been merely cumulative, for decedent's exercise of complete dominion over the funds, as though they were her sole property, was shown without dispute by other evidence. The payment of the tax by her would not of course have effected any change of ownership or interest.

There was no direct evidence of the relinquishment by plaintiff of his joint tenancy interest in the proceeds of the notes and the evidence supports sufficiently the trial court's conclusion that the interest remained unchanged at the time of decedent's passing.

[13] Defendant urges that plaintiff's third cause of action does not support the judgment because it pleads nothing but an express trust; that the evidence shows that the trust, if any, under which decedent held the funds could not have been an express trust, but only a resulting or constructive trust, neither of which is sufficiently pleaded because the facts giving rise to such a trust are not alleged. This contention grows out of the fact that when plaintiff elected to submit his case on the third cause of action, it left his pleading void of the probative facts, which were sufficiently alleged in the first and second causes of action only. The defect might then have been cured by a simple amendment incorporating the necessary allegations in the third count. Defendant did not raise the point or object to the sufficiency of the pleading. On appeal it is in no position to urge this alleged defect as reversible error.

[14] The third count sufficiently pleaded the existence of a trust under which plaintiff claimed the right to recover the joint tenancy funds. Altramano v. Swan, 20 Cal.2d 622, 627, 628, 128 P.2d 353; Knapp v. Knapp, 15 Cal.2d 237, 241, 100 P.2d 759; Johnson v. Clark, 7 Cal.2d 529, 61 P.2d 767; American Bible Soc. v. Mortgage Guar. Co., 217 Cal. 9, 17 P.2d 105. The modern tendency is to relax the strict requirements of trust pleadings, and here, regardless of the nature of the trust, it is undisputed that the court had before it all of the probative facts which had been set up in the first two counts and shown by the evidence. The only purpose of requiring the allegation of probative facts, is that the court and opposing parties may not be misled. As said in Knapp v. Knapp, supra, at page 241 of 15 Cal.2d, page 761 of 100 P.2d: "One who has a cause of action should frankly state the facts upon which he relies and not bring them out of a fog of doubt and uncertainty only if required by the lash of a special demurrer." Here the pleading fulfilled its purpose, for both court and opposing parties were fully informed at all times. In view, therefore, of the tardy relinquishment of the allegations of the first two counts, it will not be held reversible error for plaintiff to have failed to amplify the third count at the time of submission of his case to the trial court.

[15] Defendant complains of the trial court's exclusion of various items of evidence; for example, evidence relating to prior stock transactions to which plaintiff was not a party, had by decedent with the mortuary, and to the tracing through these transactions of the funds which constituted the $30,000 loan; evidence relating to decedent's alleged expressed desire to keep under her control during her lifetime the joint tenancy bank account with plaintiff; plaintiff's withdrawal of the funds in it on the day of her death and his comment that they could be redeposited in case of decedent's recovery; evidence of decedent's alleged failure to pay a gift tax on transfers to plaintiff; evidence of her relations with her attorney and comments of the attorney concerning plaintiff's request to be named executor in the will and plaintiff's failure to keep the attorney as fully apprised of events as the attorney felt he should be.

Some of this excluded evidence related to collateral matters and was immaterial;

other items should have been admitted because of their bearing upon the issue of undue influence. Such proof, however, if admitted, would have been merely cumulative and would not have affected the trial court's conclusion; its exclusion was not reversible error.

Defendant dwells upon the equities of the cause. Obviously, however, it is no more inequitable for plaintiff, who was undisputedly held in affection and high esteem by decedent, to receive the funds than it is for them to go into the residuary estate for payment under the charitable trust administered by defendant.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.




31 Cal.2d 401

## SANDSTROM v. CALIFORNIA HORSE RACING BOARD et al.

L. A. 20332.

Supreme Court of California, in Bank.

Feb. 3, 1948.

Rehearing Denied March 1, 1948.

**1. Mandamus ⇐87**

Mandamus is appropriate remedy to compel Horse Racing Board to cancel orders suspending trainer's license. Business and Professions Code, §§ 19420, 19460, 19461, 19513, 19561.

**2. Theaters and shows ⇐3**

A trainer's license may not be revoked by Horse Racing Board without just cause. Business and Professions Code, §§ 19420, 19460, 19461, 19513, 19561.

**3. Constitutional law ⇐81**
**Negligence ⇐63**

Generally there is no individual liability for an act which ordinary human care and foresight could not guard against, and a loss from any cause purely accidental must rest where it chances to fall, but the legislative power, in absence of organic restraint, may, for general welfare of society, impose obligations and responsibilities otherwise nonexistent.

**4. Constitutional law ⇐299**

Imposition of strict liability whether by statute or judicial decision does not of itself contravene due process of law clauses of Federal or State Constitutions. Const. art. 1, § 13; U.S.C.A.Const. Amend. 14.

**5. Gaming ⇐63(1)**
**Theaters and shows ⇐1**

State, in exercise of its police power, may regulate public race tracks and places of public amusement and may absolutely prohibit wagering on result of horse racing. Pen.Code, § 337a.

**6. Constitutional law ⇐81**

Where state sees fit to regulate upon a matter which is within its police power, its authority over the subject is plenary and can be reviewed by courts only to extent of determining whether regulation is reasonable.

**7. Constitutional law ⇐81**

Whether regulation adopted by state under police power is reasonable depends on character or nature of condition to be met or overcome.

**8. Theaters and shows ⇐2**

Rule of the Horse Racing Board providing that a trainer shall be absolute insurer of condition of horses entered in a race on which there is wagering, regardless of acts of third parties, and that he may be suspended or ruled off track, if tests show presence of stimulants or drugs in horses, is designed to afford wagering public a maximum of protection against race horses being stimulated or depressed by making trainer insurer of horse's condition. Administrative Code, § 1930.

**9. Theaters and shows ⇐3**

Rule of the Horse Racing Board providing for suspension of a trainer, if tests show presence of stimulants or drugs in race horses, is an imposition of strict liability on trainer, and does not establish a conclusive presumption to effect that evidence of presence of drug in horse is proof

that trainer drugged the horse within limitations imposed by statute. Administrative Code, § 1930; Code Civ.Proc. §§ 1837, 1978.

**10. Constitutional law ⇐275(1)**

Rule of the Horse Racing Board providing that a trainer shall be absolute insurer of condition of horses entered in a race in which there is wagering, regardless of acts of third parties, and that he may be suspended, if tests show presence of stimulants, is not unreasonable, arbitrary or capricious so as to constitute a denial of due process of law. Administrative Code, § 1930, Const. art. 1, § 13, U.S.C.A. Const. Amend. 14.

**11. Theaters and shows ⇐3**

Finding that petitioner was trainer of certain horse and that analysis of urine sample of such horse taken after race showed presence of a caffeine type alkaloid brought petitioner within rule of the Horse Racing Board providing for suspension of trainer under such circumstances, without additional finding as to whether petitioner administered the stimulant or had knowledge thereof. Administrative Code, § 1930.

**12. Constitutional law ⇐62**

Federal Constitution has no voice in determining whether power conferred on a board or commission set up by a state statute involves an unlawful delegation of legislative power.

**13. Constitutional law ⇐62**

Except when authorized by Constitution the Legislature cannot delegate the power to legislate to any other authority or body. Const. art. 3, § 1; art. 4, § 1.

**14. Constitutional law ⇐62**

Rule of the Horse Racing Board providing that trainer shall be absolute insurer of condition of horses entered in a race in which there is wagering, regardless of acts of third parties, and that he may be suspended if tests show presence of stimulants or drugs in horses, is not invalid on ground that it is not a legitimate exercise of delegated authority under the Horse Racing Act, in view of express constitutional sanction of the act. Business and Professions Code, § 19561; Const. art. 3, § 1; art. 4, §§ 1, 25a.

EDMONDS and CARTER, JJ., dissenting.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Proceeding by W. L. Sandstrom against California Horse Racing Board and Loyd Wright and others, members of the California Horse Racing Board, for a writ of mandate to compel defendants to cancel an order suspending petitioner's license to train horses in the state for a six month period. From a judgment for petitioner, the defendants appeal.

Reversed.

Prior opinion, 183 P.2d 285.

Fred N. Howser, Atty. Gen., and Walter L. Bowers, Asst. Atty. Gen., for appellants.

Joseph Scott, J. Howard Ziemann, and Cuthbert J. Scott, all of Los Angeles, for respondent.

SHENK, Justice.

The California Horse Racing Board appeals from a judgment in a mandamus proceeding the effect of which is to cancel its order suspending a trainer's license for six months. The judgment was entered upon the failure of the board to answer after its demurrer to the petition had been overruled.

W. L. Sandstrom sought the writ of mandate on November 18, 1946, in the Los Angeles superior court. He alleged that he was a duly licensed trainer of race horses possessing License 111 for the year 1946; that on October 7, 1946, and pursuant to notice theretofore given, the California Horse Racing Board held a hearing in San Francisco at which he was present; that both documentary and oral evidence was introduced; that the board's decision ordered that his trainer's license be suspended for six months from and after August 12, 1946, for violating Rule 313 of the board because he was the trainer of the horse Cover Up, and an analysis of a sample of the urine of the horse taken aft-

er running in a race at Del Mar Race Track, San Diego County, on August 12, 1946, showed the presence of a caffeine type alkaloid; that Rule 313 was unconstitutional because it was arbitrary, unreasonable and capricious in that it assumed to make the trainer the absolute insurer of the condition of horses entered in a race regardless of the acts of third persons, thereby making conclusive that which has not been so declared by the Legislature in sections 1837 and 1978 of the Code of Civil Procedure; and that there was no substantial evidence, or any evidence, to support the findings of the board that he administered the stimulant or had knowledge thereof. As a return to the alternative writ the board interposed a general demurrer to the petition. A transcript of the proceedings had before the board was filed. See Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304. The demurrer was overruled, the board failed to answer and judgment was entered ordering that the suspension of Sandstrom be cancelled. On the appeal the board again attacks the sufficiency of the petition to state facts entitling Sandstrom to any relief.

[1] The propriety of mandamus as the appropriate remedy is established. Carroll v. California Horse Racing Board, 16 Cal.2d 164, 105 P.2d 110.

[2] In this state supervision over horse races upon the results of which wagering is permitted is vested in the California Horse Racing Board. Section 19420, Business and Professions Code. A system of licensing is provided for and all licenses are subject to suspension or revocation for noncompliance with any condition of the license, for the violation of any law, or of any rule or regulation of the board. Sections 19460 and 19461, Business and Professions Code. A trainer's license may not be revoked without just cause. Section 19513, Business and Professions Code; Carroll v. California Horse Racing Board, supra, 16 Cal.2d 164, 105 P.2d 110. "The board may prescribe rules, regulations, and conditions consistent with the provisions of this chapter [Horse Racing] under which all horse races, upon the results of which there is wagering, shall be conducted within this State." Section 19561, Business and Professions Code.

Pursuant to this authority the California Horse Racing Board adopted rules relating to trainers, their duties and responsibilities. By Rule 282 (Title 4, California Administrative Code, section 1887) it is provided: "Trainers are responsible for the condition of horses in their care and are presumed to know these rules." Rule 285 (Title 4, California Administrative Code, section 1890) provides: "A trainer shall be responsible for the timely attendance of his horse or horses at the paddock and he shall attend his horse in the paddock and shall be present to supervise the saddling. In case of emergency, he may, with the permission of the Paddock Judge, appoint another licensed trainer as his deputy in these matters." Rule 286 (Title 4, California Administrative Code, section 1891) provides: "In the event any licensed trainer is at any time prevented from performing his duties by illness or other sufficient cause, and shall be absent from the track where employed, the Stewards of the Meeting shall be immediately notified of such fact, and at the same time a duly licensed substitute trainer, acceptable to the Stewards, shall be appointed. The Board of Stewards shall be advised immediately when the regular trainer resumes his duties." Rule 313 (Title 4, California Administrative Code, section 1930) provides:

"Equipment as prescribed by the California Horse Racing Board for the administration of saliva, or urine, or other tests, shall be required at all meetings. All horses will be subject to these tests, or any other tests prescribed by the Board, or ordered by the Stewards, either before, or after the race, or both.

"The Trainer shall be the absolute insurer of and responsible for the condition of the horses entered in a race, regardless of the acts of third parties. Should the chemical, or other analysis of saliva, or or urine samples, or other tests, prove positive, showing the presence of any narcotic, stimulant, chemical, or drug of any kind or description, the Trainer of the

horse may be suspended or ruled off, and in addition, the Foreman in charge of the horse, the Groom signing the Pre-Race Examination Slip and Paddock Certificate, and any other person shown to have had the care, or attendance, of the horse may be suspended or ruled off, in the discretion of the Board."

The import of this rule is to impose strict responsibility upon the trainer for the condition of the horse. The language of the rule can admit of no other conclusion. Two factual elements must exist to bring the rule into operation; first, the licensee must be the trainer of the horse, and secondly, the analysis must show the presence of a stimulating or depressive drug or chemical. Sandstrom's status as trainer of Cover Up has never been disputed, and the petition for the writ of mandate did not attack the finding of the board that the analysis showed the presence of a caffeine type alkaloid. In fact at the hearing before the board, Sandstrom stipulated that he was both the trainer and owner of Cover Up on August 12, 1946, and expressed satisfaction with the accuracy of the laboratory tests. The question is whether strict liability for the condition of a race horse can be constitutionally imposed on the trainer of the horse.

[3] The general rule is well stated in City of Chicago v. Sturges, 222 U.S. 313, 322, 32 S.Ct. 92, 56 L.Ed. 215, Ann.Cas. 1913B, 1349:

"It is a general principle of our law that there is no individual liability for an act which ordinary human care and foresight could not guard against. It is also a general principle of the same law that a loss from any cause purely accidental must rest where it chances to fall. But behind and above these general principles which the law recognizes as ordinarily prevailing, there lies the legislative power, which, in the absence of organic restraint, may, for the general welfare of society, impose obligations and responsibilities otherwise nonexistent.

"Primarily, governments exist for the maintenance of social order. Hence it is that the obligation of the government to protect life, liberty, and property against the conduct of the indifferent, the careless and the evil-minded may be regarded as lying at the very foundation of the social compact. A recognition of this supreme obligation is found in those exertions of the legislative power which have as an end the preservation of social order and the protection of the welfare of the public and of the individual. If such legislation be reasonably adapted to the end in view, affords a hearing before judgment, and is not forbidden by some other affirmative provision of constitutional law, it is not to be regarded as denying due process of law under the provisions of the 14th Amendment."

[4] That the imposition of strict liability whether by statute or judicial decision does not of itself contravene the due process clauses of the Federal or State Constitutions, U.S.Const. Amend. 14, Cal.Const. art. 1, § 13, may not be disputed. Approval of such liability may be found in St. Louis & S. F. Ry. Co. v. Mathews, 165 U.S. 1, 17 S.Ct. 243, 41 L.Ed. 611—railroad liability for fires; Jones v. Brim, 165 U.S. 180, 17 S.Ct. 282, 41 L.Ed. 677—liability for destruction of banks of highway when driving livestock over public highways; Chicago, R. I. & P. R. Co. v. Zernecke, 183 U.S. 582, 22 S.Ct. 229, 46 L.Ed. 339—railroad's liability for injury to passengers; City of Chicago v. Sturges, supra, 222 U.S. 313, 32 S.Ct. 92, 56 L.Ed. 215, Ann.Cas.1913B, 1349; section 4452, Political Code; Agudo v. County of Monterey, 13 Cal.2d 285, 89 P.2d 400; Bank of California v. Shaber, 55 Cal. 322—liability for damage by mobs and riots; Colton v. Onderdonk, 69 Cal. 155, 10 P. 395, 58 Am.Rep. 556—blasting; Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 P. 398—workmen's compensation; section 1, Article 384a, Deering's General Laws, Stats.1931, p. 1095; Goldberg v. Rabuchin, 65 Cal.App.2d 111, 149 P.2d 861—scienter eliminated as condition of liability for injury by a dog; 43 Am.Jur. 113, sec. 309—public official's liability for safe keeping of public funds (cf. section 16508, Government Code); Restatement of Torts, section 504 et seq.—possession of animals; Restatement of Torts, section 519 et seq.—ultrahazardous activities; Wolfe v. Great

Atlantic & Pacific Tea Co., 143 Ohio St. 643, 56 N.E.2d 230—unwholesome food. See also Green v. General Petroleum Corp., 205 Cal. 328, 270 P. 952, 60 A.L.R. 475 (oil gusher); and In re Marley, 29 Cal. 2d 525, 175 P.2d 832 (criminal liability for short weight).

[5] The state, in the exercise of its police power, may regulate public race tracks and places of public amusement (Greenberg v. Western Turf Association, 148 Cal. 126, 82 P. 684, 113 Am.St.Rep. 216, affirmed 204 U.S. 359, 27 S.Ct. 384, 51 L.Ed. 520) and may absolutely prohibit wagering on the results of horse racing. Section 337a, Penal Code; In re Walker, 11 Cal.2d 464, 80 P.2d 990, 117 A.L.R. 825; Matter of Brown, 156 Cal. 632, 105 P. 739; People v. Torrey, 16 Cal.App.2d 470, 472, 60 P.2d 900; see also State Racing Commission v. Latonia Agricultural Ass'n, 136 Ky. 173, 123 S.W. 681, 25 L.R.A.,N.S., 905.

[6, 7] When the state sees fit to regulate upon a matter which is within its police power, its authority over the subject is plenary and can be reviewed by the courts only to the extent of determining whether the regulation is reasonable. Wholesale Tobacco Dealers v. National Candy & Tobacco Co., 11 Cal.2d 634, 82 P.2d 3, 118 A.L.R. 486; State Savings & Commercial Bank v. Anderson, 165 Cal. 437, 132 P. 755, L.R.A.1915E, 675. Whether the regulation is reasonable depends on the character or nature of the condition to be met or overcome. Whyte v. City of Sacramento, 65 Cal.App. 534, 549, 224 P. 1008.

[8] Rule 313 is designed to afford the wagering public a maximum of protection against race horses being stimulated or depressed by making the trainer the insurer of the horse's condition. That the wagering public merits such protection is evident from the magnitude of its patronage. Revenue to the California Horse Racing Board at four per cent of the pari-mutuel wagers amounted to $16,563,763.36 for the fiscal year 1945–1946. State of California Budget for the Fiscal Year 1947–1948, p. 811. Should responsibility be imposed only for actual guilty participation or culpable negligence, as petitioner contends, there would exist a possible field of activity beyond the affirmative protection thereby afforded to patrons of the pari-mutuel system. Remedial action subsequent to the pay-off at the pari-mutuel meetings may in some instances be effective as between competitors for the purse money. Such action may constitute a delay in payment of the prize money until the determination of the saliva, urine or other test. In fact Rule 316 of the board (Title 4, California Administrative Code, section 1933) so provides. The recognized interest of the wagering patrons is sought to be safeguarded by Rule 313. In most instances the very existence of the condemned activities creates a non-remedial situation. Detection of the condition may not be possible until long after the race has been run and the pari-mutuel winners paid off. The closer the supervision to which the trainer is held, the more difficult it becomes for anyone to administer a drug or chemical to the horse. The exaction of the ultimate in that regard is justified by the peril to be avoided. "Legislation for regulatory purposes, which dispenses with the condition of awareness of wrongdoing and places the burden of acting at his peril on a person otherwise innocent 'but standing in responsible relation to a public danger' * * * is a traditional means of regulation." People v. Scott, 24 Cal.2d 774, 782, 151 P.2d 517, 521.

[9] Rule 313 may not be deemed to establish a conclusive presumption to the effect that evidence of the presence of a drug in a horse is proof that the trainer drugged the horse. By express language the rule imposes strict liability for the condition of the horse. Fault in the sense of actual administration of the drug or negligent care by the trainer is neither the basis nor an element of liability. It may not be injected into the case by way of subtle hypothesis. Whether the trainer drugged the horse or knew that it was drugged, or was negligent in not properly seeing that the horse was not drugged are not elements of liability. Since Rule 313 may not be considered as establishing a presumption it is not within the scope of the limitations imposed either by sections 1837 and 1978, Code of Civil Procedure,

or by Schlesinger v. Wisconsin, 270 U.S. 230, 46 S.Ct. 260, 70 L.Ed. 557, 43 A.L.R. 1224; Heiner v. Donnan, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772; or Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L. Ed. 1519.

On the other hand the liablility imposed upon "the Foreman in charge of the horse, the Groom signing the Pre-Race Examination Slip and Paddock Certificate, and any other person shown to have had the care, or attendance, of the horse" is not the strict liability imposed upon the trainer, but is necessarily limited to guilty conduct or culpable negligence. That this is so stems from the wording of Rule 313 and the consideration that strict liability may not be imposed by inference, or indiscriminately, or upon persons having but a minor part in an activity.

Our attention has been directed to three cases in which the validity of the suspension of a trainer's license was involved.

In Smith v. Cole, 1946, 270 App.Div. 675, 62 N.Y.S.2d 226, 228, the suspension was upheld as being "for cause" where the trainer was not present when a 2.6 per cent solution of ephedrine was sprayed into the nasal passages of the horse, but "there was evidence from which his responsibility for the treatment could be found to have been established."

Next is Mahoney v. Byers, Md., 1946, 48 A.2d 600. There the Maryland Racing Commission suspended for one year the license of J. D. Byers, trainer of the horse Cosey, because benzedrine was found in the saliva sample taken after the horse had won a steeplechase. This action was pursuant to sections (a) and (d) of Rule 146 of the Maryland Racing Commission which provided:

"(a) No person shall administer, or knowingly or carelessly permit to be administered to any horse entered for a race, any drug in any way within forty-eight (48) hours before the time of the race."

"(d) If the Commission finds from analysis of the saliva or urine, or blood taken from a horse on the day of a race in which the horse ran, or from other competent evidence, that any drug has been administered to the horse within forty-eight (48) hours before the race, the trainer shall be subject to the penalties prescribed in subsection (e) hereof, whether or not he administered the drug, or knowingly or carelessly permitted it to be administered. The fact that the analysis shows the presence of a drug shall be conclusive evidence either that there was knowledge of the fact on the part of the trainer or that he was guilty of carelessness in permitting it to be administered."

The suspension was cancelled and the license ordered restored by the superior court. In affirming the order, the Court of Appeals held that the rule substituted an irrebuttable presumption for facts necessary to find the trainer guilty; that evidence may not be made conclusive which was not so of its own nature and inherent force, and thus preclude a party from showing the truth; and that a law which prevents one from making a defense to a charge brought against him by substituting an irrebuttable presumption for facts is arbitrary, capricious and unconstitutional.

The third case is State v. Baldwin, Fla., 31 So.2d 627, on rehearing June 27, 1947. There, in an original proceeding in mandate, the Florida Supreme Court considered the validity of the racing board's action in suspending for 12 months the license of Joseph J. Paoli as a trainer. Paoli was the trainer of the horse James Acker when it won the second race at Sunshine Park on January 30, 1947. Benzedrine was found in the urine sample taken immediately after the race. The commission had purported to act under its Rule 117, which provided: "117. The trainer shall be the absolute insurer of and responsible for the condition of the horses entered in a race regardless of the acts of a third party. Should the chemical or other analysis or saliva or urine samples or other tests prove positive, showing the presence of any narcotic, stimulant, chemical or drug of any kind or description, the trainer of the horse may be suspended or ruled off, and in addition, the foreman in charge of the horse, the groom and any other person shown to have had the care or attendance of the horse may be suspended or ruled off in the discretion of the Commission, and for a like second or subsequent finding shall be ruled off." Also

pertinent was Rule 109 which provided: "No person shall administer, or permit to be administered in any manner whatsoever, internally or externally, to any horse entered or to be entered in a race, any stimulant, depressant, hypnotic or narcotic drug, of any kind or description, prior to a race or workout."

The court held that reading Rule 117 with Rule 109 readily showed that Rule 109 prohibited certain acts while Rule 117 purported to specify the proof required to establish the fact that the prescribed acts (Rule 109) had been committed by the trainer; that in effect Rule 117 provided that proof of the fact that a horse entered in a race had been administered a drug should constitute irrebuttable evidence that the trainer violated Rule 109, i.e., that *he* administered the drug; and that Rule 117 violated both the federal and Florida due process constitutional clauses because liability might not be imposed on an assumption of an essential fact, thus denying an opportunity to interpose reasonable and legitimate defenses.

As applied to the present controversy, the foregoing three cases are not controlling. While the suspension was upheld in Smith v. Cole, supra, 270 App.Div. 675, 62 N.Y.S. 2d 226, there was evidence that the trainer was knowingly responsible for the treatment. There was no such evidence here. The rule considered in Mahoney v. Byers, supra, Md., 48 A.2d 600, substituted an irrebuttable presumption for an essential fact. Thus evidence was made conclusive which was not so of its own nature and inherent force. In the case at bar liability is not predicated on administration of the drug nor on the failure to exercise due care, and the presence or absence thereof would neither add nor detract. State v. Baldwin, supra, Fla., 31 So.2d 627, would at first appear persuasive since Rule 117, there considered, somewhat parallels Rule 313 now under attack. But that case did not consider the power of a state to impose strict liability, the existence of which is the fundamental basis of our determination. Also, it would appear that the decision in the Baldwin case was influenced decisively by analogy to Mahoney v. Byers, supra, Md., 48 A.2d 600, where the mechanics rested in the employment of a presumption as conclusive evidence.

[10] From the foregoing considerations it follows that it is not unreasonable, arbitrary or capricious to provide that the trainer guarantee the condition of a horse running in a race upon the results of which there is wagering.

[11] As an additional ground for the issuance of the writ Sandstrom alleged that there was no evidence to support the finding of the board that he administered the stimulant or had knowledge thereof. No such finding was made. Nor would such a finding be essential to the imposition of liability by way of suspension of a trainer's license for violation of Rule 313. That this is so is obvious from a conclusion upholding the imposition of strict liability as a proper exercise of the police power. The board found that Sandstrom was the trainer of Cover Up and that an analysis of the urine sample taken after the race showed the presence of a caffeine type alkaloid. Those findings, supported by undisputed evidence, brought Sandstrom within the operative scope of Rule 313.

[12-14] On appeal Sandstrom has advanced an additional ground for invalidating his suspension. He asserts that Rule 313 is not a legitimate exercise of delegated authority, that is, that insofar as that rule is based on the statutory grant of power to the board to prescribe rules, regulations and conditions under which horse racing is conducted (section 19561, Business and Professions Code), it is an unconstitutional delegation of legislative authority.

The Constitution of the United States has no voice in determining whether power conferred on a board or commission set up by a state statute involves an unlawful delegation of legislative power. Objections that might be worthy of consideration if the court were dealing with an act of Congress are removed. Highland Farms Dairy v. Agnew, 300 U.S. 608, 57 S.Ct. 549, 81 L. Ed. 835; 42 Am.Jur. p. 335. Under the doctrine of the separation of the powers of government the lawmaking function is assigned to the Legislature. Art. IV, sec. 1, California Constitution. It is a cardinal rule that except when authorized by the

Constitution the Legislature cannot delegate the power to legislate to any other authority or body. Art. III, sec. 1, California Constitution; Schaezlein v. Cabaniss, 135 Cal. 466, 67 P. 755, 56 L.R.A. 733, 87 Am. St.Rep. 122; 11 Am.Jur. 921, sec. 214.

In 1933 the Legislature passed the Horse Racing Act, Stats.1933, p. 2046, which created the California Horse Racing Board and granted it "full power to prescribe rules, regulations and conditions" governing the conduct of horse races where there is wagering. By section 19 it was provided that the act should not become effective until the people should ratify a constitutional amendment approving it. At the election held June 27, 1933, section 25a, Article IV of the Constitution was adopted. It provides: "Sec. 25a. The Legislature may provide for the regulation of horse races and horse race meetings and wagering on the results thereof. The provisions of an act entitled 'An act to provide for the regulation and licensing of horse racing, horse race meetings, and the wagering on the results thereof; to create the California Horse Racing Board for the regulation, licensing and supervision of said horse racing and wagering thereon; to provide penalties for the violation of the provisions of this act, and to provide that this act shall take effect upon the adoption of a constitutional amendment ratifying its provisions,' are hereby confirmed, ratified, and declared to be fully and completely effective; provided, that said act may at any time be amended or repealed by the Legislature." The effect of this constitutional amendment as here material is that it expressly "confirmed, ratified, and declared to be fully and completely effective" the legislative grant of power to the California Horse Racing Board. That the Constitution may permit the Legislature to delegate powers may not be doubted. The Constitution may even authorize the Legislature to confer additional powers which are cognate and germane to its purposes upon a constitutional board or commission, and may further provide that such powers are unlimited by any other provisions of the Constitution. See sec. 22, Art. XII, Constitution; Pacific Telephone & Telegraph Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 50 L.R.A.,N.S., 652, Ann.Cas.1915C, 822. The continuance of the grant of power into section 19561, Business and Professions Code, did not affect its status as previously ratified and confirmed. See section 2, Business and Professions Code. The delegation of authority here considered has constitutional support.

The judgment is reversed.

GIBSON, C. J., and TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice.

I concur. While at first thought the rule which we uphold appears to be a harsh one I am persuaded that upon reflection its seeming harshness largely disappears and its justice becomes manifest. The effect of the decision simply is that a trainer is held penally responsible on his warranty that a horse entered by him in a race has not been "doped."

That the public are entitled to protection against the practice of drugging race horses is not disputed; that the trainer who has charge of a horse, who undertakes to condition it for a race and who actually enters it in the race and permits it to compete shall be charged with absolute responsibility for its condition seems within the bounds of moral reason and legislative power. Contrary to the suggestion which has been made in argument the trainer is not defenselessly liable to punishment for the act of another person; he is liable only for his own act or omission; i. e., causing or permitting a horse warranted by him to be free from drugs to participate in a race while drugged.

The trainer can protect himself by protecting the horse and by checking its condition at the last reasonably possible moment before the race. If he finds that despite his earlier care the horse has been drugged he must, of course, withdraw it from the contest; from the time of the last condition check until the race it is not unreasonable that the trainer shall be held to the responsibility of either so guarding the animal as to preclude its being drugged or of withdrawing it from the race.

EDMONDS, Justice (dissenting).

In my opinion, there is no sound legal basis for the decision upholding Rule 313 of the Horse Racing Board. All of the cases relied upon for that conclusion are based upon evidence tending to prove the connection of the defendant with the prohibited act. In each of them, the defendant was found guilty because of his own conduct, or that of his agent, or upon evidence tending to show his negligence. But the horse trainer may be held responsible for the acts of third persons over whom he had no control and against which he may have taken every precaution. The rule in effect declares, "No matter who drugged the horse, or under what circumstances it was done, the trainer must pay the penalty, with no right to show any facts negating his connection with the prohibited act."

Unquestionably, as stated in the opinion, "the recognized interest of the wagering patrons is sought to be safeguarded by Rule 313". But not everything done "in the interest of the public" is valid for that reason. McFarland v. American Sugar Ref. Co., 241 U.S. 79, 36 S.Ct. 498, 60 L.Ed. 899. In cases of alleged violation of due process, it is the invasion of the right of the individual citizen which determines the validity or invalidity of a rule or a statute and not the rights of the public generally.

It may be conceded that Sandstrom's suspension is not upheld upon the ground of a conclusive presumption that he administered a narcotic or other stimulant. But for the same reason that such a presumption would be invalid, the rule, which "operates to deny a fair opportunity" to the trainer to show facts negating his responsibility, should likewise be held void. The situation here is not unlike that in Manley v. Georgia, 279 U.S. 1, 7, 49 S.Ct. 215, 217, 73 L.Ed. 575, where, in reversing a judgment of conviction, the court said: "The proof which makes a prima facie case points to no specific transaction, matter or thing as the cause * * * or to any act or omission of the accused tending to show his responsibility."

For these reasons, I would affirm the judgment.

CARTER, Justice.

I dissent.

The majority opinion sustains as valid a rule of the California Horse Racing Board which imposes liability without culpability—guilt without fault or knowledge that a wrong had been perpetrated or that the rule had been violated. Under this rule an innocent person may be condemned and punished without evidence that he did, or intended to do, or permitted to be done, any wrong whatsoever. In fact, this result could be obtained even if it were conclusively shown that such innocent person did everything possible to prevent the violation of such rule or was overpowered by a wrongdoer and rendered helpless while the unlawful act was being consummated. The exercise of vigilance, diligence, care, precaution and fidelity to duty honestly and faithfully performed is of no avail. The suspended axe falls and the innocent victim is decapitated. "Oh! [justice], what crimes are committed in thy name."

In overruling the demurrer interposed by the California Horse Racing Board to the petitioner's petition in the trial court, the learned trial judge made the following comment:

"Respondents, by this Rule 313, and through counsel on the hearing herein, contend that the Board has the absolute right to suspend a trainer's license upon the proof of the presence of the narcotic in the horse after a race, on the basis of the Rule which proclaims the trainer handling that horse as the 'absolute insurer * * * of the condition of the horse * * * regardless of the acts of third parties.'

"This Rule as written deprives the licensee in question of any possible defense to an attempt or threat of the Board to suspend his license once the presence of the proscribed narcotic was established. To deprive the trainer of his license under such circumstances would not be founded upon 'just cause', and for that reason, the Rule as construed and applied by the Board in this case is arbitrary, unreasonable and

capricious, and inconsistent with the provisions of the chapter on Horse Racing, particularly sections 19512 and 19513. That portion reading 'shall be the absolute insurer regardless of the acts of third parties,' and basis for suspension is inconsistent with the authority of the Board to make reasonable rules and to limit suspension orders to cases where just cause is established."

I am in full accord with the foregoing pronouncement. In my opinion Rule 313, as here applied, violates every precept of justice as established by the Constitution and laws of the United States and this state. It is unconstitutional and out of harmony with the American system of justice, and may appropriately be labeled as "un-American". It cannot stand in the face of the long line of decisions of the Supreme Court of the United States which denounce such strictures on justice as a violation of the due process provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States. Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35, 31 S.Ct. 136, 55 L.Ed. 78, 32 L.R.A.,N.S., 226, Ann.Cas. 1912A, 463; Bailey v. Alabama, 219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 191; Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369, Ann.Cas.1912C, 160; Luria v. United States, 231 U.S. 9, 34 S.Ct. 10, 58 L.Ed. 101; McFarland v. American Sugar Ref. Co., 241 U.S. 79, 36 S.Ct. 498, 60 L.Ed. 899; Manley v. Georgia, 279 U.S. 1, 49 S.Ct. 215, 73 L.Ed. 575; Western & Atlantic R. R. v. Henderson, 279 U.S. 639, 49 S.Ct. 445, 73 L.Ed. 884; Morrison v. California, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664. But the majority argues that since the rule in question may not be considered as establishing a presumption it does not come within the rule announced in the above cited cases. Such argument is fallacious. No rational mind can deny that Rule 313 goes farther than any of the statutes involved in the above cited cases in depriving the complaining party of due process of law. The presumption involved in each of the above cited cases was rebuttable, but it placed upon the defendant the burden of disproving the fact presumed. Can it be said that if the statutes in those cases had imposed liability without fault, that such statutes would not have been stricken down as violative of the due process provisions? I do not think that the majority of this court will so contend. In every case where a statute imposing absolute liability was sustained, such liability was predicated upon proof that the party held liable was in control of the agency which caused the injury from which the damage resulted. The argument on behalf of the defendant in those cases was not that the injury or damage did not result from its operation, but that there was no proof of negligent conduct on its part. This is quite a different matter than holding a defendant liable without proof that it set in motion the agency which caused the injury or damage.

The majority opinion states: "Rule 313 may not be deemed to establish a conclusive presumption to the effect that evidence of the presence of a drug in a horse is proof that the trainer drugged the horse. By express language the rule imposes strict liability for the condition of the horse. Fault in the sense of actual administration of the drug or negligent care by the trainer is neither the basis nor an element of liability. It may not be injected into the case by way of subtle hypothesis. Whether the trainer drugged the horse or knew that it was drugged, or was negligent in not properly seeing that the horse was not drugged are not elements of liability. Since Rule 313 may not be considered as establishing a presumption it is not within the scope of the limitations imposed either by sections 1837 and 1978, Code of Civil Procedure, or by Schlesinger v. Wisconsin, 270 U.S. 230, 46 S.Ct. 260, 70 L.Ed. 557, 43 A.L.R. 1224; Heiner v. Donnan, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772; or Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519."

The foregoing argument is based upon specious reasoning. It is a veiled denial of the obvious—a smoke screen which attempts to obscure the patent objective of the rule. Let us analyze this argument. It states: "Rule 313 may not be deemed to establish a conclusive presumption to the

effect that evidence of the presence of a drug in a horse is proof that the trainer drugged the horse." But what does Rule 313 say? "The trainer shall be the absolute insurer of and responsible for the condition of the horses entered in a race, regardless of the acts of third parties." Does this rule not say in effect: "If a horse is found to have been drugged it will be conclusively presumed that the trainer was responsible therefor?" Certainly there can be no difference in legal effect between absolute liability and a conclusive presumption of liability. The majority opinion calls it "strict responsibility." With this I agree. But this does not render it immune to the due process provisions of the Constitution. Certainly, if a statute which purports to create liability by mere fiat is violative of the due process provisions, a rule of an administrative agency which comes within that category, would likewise fall in the face of those provisions.

It has been said that governments are instituted for the purpose of protecting and advancing the rights and ideals of the people, and that ours is a government "of the people—by the people—for the people." Such concepts contemplate protection of individual and personal rights to the extent at least that all persons under the protecting arm of our government may have the opportunity to enjoy life, liberty and the pursuit of happiness. As a fortress for the protection of these rights our judicial system was established. Out of this system has developed what is commonly termed the American system of justice which contemplates that before a person can be deprived of life, liberty or property he must be accorded due process of law. While the term due process of law has been the subject of various interpretations by the judicial tribunals of this country, I think it can be said that there has been no departure from the basic concept that in order to fulfil the requirements of the due process provisions there must be a charge sufficient to inform the person against whom it is directed, of its nature; such charge must be presented to a legally constituted tribunal having jurisdiction to determine the issues raised thereby; that notice of such charge must be given to the person against whom it is directed and a hearing had, at which evidence must be produced sufficient to sustain the charge. It may be conceded that all of the requirements of due process except the last mentioned (evidence to sustain the charge) have been met in this case. But instead of producing evidence the state relies upon Rule 313 adopted and promulgated by the California State Horse Racing Board which purports to substitute for evidence of guilt a mere fiat, namely, that the administering of a drug to a horse entered in a race is chargeable to the trainer without regard to his knowledge of the fact or ability to prevent it. It is my position that the application of such a rule in the case at bar constituted a denial to petitioner of due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

This position finds ample support in the authorities. In Manley v. Georgia, supra, 279 U.S. 1, at page 6, 49 S.Ct. 215, 217, 73 L.Ed. 575, the Court said: "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Bailey v. Alabama, 219 U.S. 219, 233, 31 S.Ct. 145, 55 L.Ed. 191, et seq. Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property. 'It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' McFarland v. American Sugar [Ref.] Co., 241 U.S. 79, 86, 36 S.Ct. 498, 501 (60 L.Ed. 899)." This holding was reaffirmed in Tot v. United States, supra, where the Court said, 319 U.S. at pages 466, 467, 63 S.Ct. at page 1244, 87 L.Ed. 1519:

"An indictment charges the defendant with action or failure to act contrary to the law's command. It does not constitute proof of the commission of the offense. *Proof of some sort on the part of the prosecutor is requisite to a finding of guilt;* it may consist of testimony of those who witnessed the defendant's conduct. Although the Government may be unable to produce testimony of eye witnesses to

the conduct on which guilt depends, this does not mean that it cannot produce proof sufficient to support a verdict. The jury is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference. In many circumstances courts hold that proof of the first fact furnishes a basis for inference of the existence of the second.

"The rules of evidence, however, are established not alone by the courts but by the legislature. The Congress has power to prescribe what evidence is to be received in the courts of the United States. The section under consideration is such legislation. *But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated.* The question is whether, in this instance, the Act transgresses those limits.

"The Government seems to argue that there are two alternative tests of the validity of a presumption created by statute. The first is that there be a rational connection between the facts proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of opinion that these are not independent tests but that the first is controlling and the second but a corollary." [Emphasis added.]

And again, 319 U.S. 463, at page 469, 63 S.Ct. 1241, 1245, 87 L.Ed. 1519:

"Nor can the fact that the defendant has the better means of information, standing alone, justify the creation of such a presumption. In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. If it were sound, the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible.

"Whether the statute in question be treated as expressing the normal balance of probability, or as laying down a rule of comparative convenience in the production of evidence, it leaves the jury free to act on the presumption alone once the specified facts are proved, unless the defendant comes forward with opposing evidence. And this we think enough to vitiate the statutory provision."

The majority opinion argues: "That the imposition of strict liability whether by statute or judicial decision does not of itself contravene the due process clauses of the Federal or State Constitution * * * may not be disputed." In support of this statement several cases are cited. An examination of these cases discloses that in none of them was a statute or rule involved which created absolute liability without proof that the defendant or his agent or employee was in control of the agency which caused the injury or damage, and none of the cases there cited involve a statute or rule of an administrative agency which purports to create liability without such proof.

The majority opinion also argues that: "The state, in the exercise of its police power, may regulate public race tracks and places of public amusement." And that: "When the state sees fit to regulate upon a matter which is within its police power, its authority over the subject is plenary and can be reviewed by the courts only to the extent of determining whether the regulation is reasonable."

I do not disagree with the legal propositions above announced, but their applicability to the case at bar is rather obscure. There is no question but that the state may regulate and even prohibit gambling and this feature of the horse racing enterprise clearly comes within the purview of the police power of the state. However, when it comes to the matter of training horses and racing them independent of the gambling feature of the enterprise, I doubt if the state has any power to place restrictions thereon. It is obvious that only because people desire to wager upon the

outcome of horse races the state has any power to control the handling or treatment of horses so long as such treatment is humane. But conceding that the entire horse racing enterprise because of its gambling features is now within the purview of the police power of the state, it does not follow that the state may violate the due process provisions of the federal and state Constitutions under the guise of exercising its police power. It may be said that all criminal cases come within the purview of the police power. Yet it is well settled that:

"A law which would practically shut out the evidence for the accused and thus deny him the opportunity for a trial would substantially deprive him of due process of law, and be invalid; a law which makes an act prima facie evidence of a crime over which the party charged had no control, and with which he had no connection, is clearly invalid. Similarly, an ordinance which throws upon the defendant the burden of proving his innocence of a crime is void.

"It is also well settled that the legislature may not arbitrarily create a conclusive presumption of guilt against the accused, as to any element of the crime charged, by giving artificial and evidential force to certain facts which otherwise would be wholly irrelevant and inconclusive." 20 Am.Jur. 42.

The majority opinion argues that: "Rule 313 is designed to afford the wagering public a maximum of protection against race horses being stimulated or depressed by making the trainer the insurer of the horse's condition," and that "Should responsibility be imposed only for actual guilty participation or culpable negligence, as petitioner contends, there would exist a possible field of activity beyond the affirmative protection thereby afforded to patrons of the pari-mutuel system. * * * *The closer the supervision to which the trainer is held, the more difficult it becomes for anyone to administer a drug or chemical to the horse. The exaction of the ultimate in that regard is justified by the peril to be avoided.*" [Emphasis added.]

In substance, this same argument may be made in support of every other unreasonable, arbitrary and capricious statute or rule which was ever enacted or adopted. It is a matter of weighing expediency against injustice, or, putting it in another way, does the benefit to that portion of the public who desire to engage in the "sport of kings" outweigh the injustice to an individual whose right to earn his livelihood in his chosen profession is lost because it is impossible for him to prevent a violation of the rule? Having had some experience in the care and training of horses (not of the racing type) I take judicial notice of the fact that a trainer does not sleep with his horse, nor is with him during all his waking hours. I also think it is reasonable to assume that notwithstanding the utmost vigilance is practiced by the trainer, there is nevertheless a possibility that stealthy culprits may be able to administer a drug to a horse without the trainer's knowledge. Whether the fact could be ascertained by the trainer before he permitted the horse to enter the race, is problematical. The opinion prepared by Mr. Justice SHENK states that: "Detection of the condition may not be possible until long after the race has been run and the pari-mutuel winners paid off." But in the concurring opinion of Mr. Justice SCHAUER he states that: "The trainer can protect himself by protecting the horse and by checking its condition at the last reasonably possible moment before the race. If he finds that despite his earlier care the horse has been drugged he must, of course, withdraw it from the contest; from the time of the last condition check until the race it is not unreasonable that the trainer shall be held to the responsibility of either so guarding the animal as to preclude its being drugged or of withdrawing it from the race." As I have had no experience in the technic of testing horses to determine whether or not they have been drugged, and the record fails to disclose whether such a test would be of any value if made before a horse was entered in a race, I do not know which, if either, of the above quoted statements is correct. It seems, however, that the test applied in this case (urine) would probably

not be possible to apply before the horse was entered in the race. Moreover, it would also seem that if any reliable test could be made before the race, such test would be made under the supervision of the racing board to protect the wagering public against fraud. Be that as it may, such considerations are of little value in testing the validity of Rule 313 in the light of the requirements necessary to satisfy the due process provisions of the federal and state Constitutions. As hereinbefore stated, the rule establishes a conclusive presumption of guilt when a test discloses that a horse entered in a race has been drugged. Such a rule is far more unreasonable and arbitrary than any of the statutes creating rebuttable presumptions which were held invalid as violative of the due process provisions by the United States Supreme Court in the decisions hereinbefore cited.

As stated by Mr. Justice Cardozo in Morrison v. California, 291 U.S. 82, 54 S. Ct. 281, 286, 78 L.Ed. 664, at page 672 (invalidating section 9(a) of the California Alien Land Law): "There is no practical necessity in such circumstances for shifting the burden to the defendant. Not only is there no necessity; there is only a faint promotion of procedural convenience. The triers of the facts will look upon the defendant sitting in the court room and will draw their own conclusions. If more than this is necessary, the people may call witnesses familiar with the characteristics of the race, who will state his racial origin. The only situation in which the shifting of the burden can be of any substantial profit to the state is where the defendant is of mixed blood, the white or the African so preponderating that there will be no external evidence of another. But in such circumstances the promotion of convenience from the point of view of the prosecution will be outweighed by the probability of injustice to the accused. One whose racial origins are so blended as to be not discoverable at sight will often be unaware of them. If he can state nothing but his ignorance, he has not sustained the burden of proving eligibility, and must stand condemned of crime."

The case of Heiner v. Donnan, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772, involved the constitutionality of a provision of the death transfer tax law creating a conclusive presumption that gifts made within two years prior to the donor's death were made in contemplation of death. The Government argued that under a prima facie presumption originally in force there had been a loss of revenue. The court says 285 U.S. 312, 52 S.Ct. 358, 362, 76 L.Ed. 772, at page 780: "This is very near to saying that the individual, innocent of evasion, may be stripped of his constitutional rights in order to further a more thorough enforcement of the tax against the guilty, a new and startling doctrine, condemned by its mere statement, and distinctly repudiated by this court in the Schlesinger (270 U.S. [230] 240, 46 S.Ct. 260, 70 L. Ed. 557, 43 A.L.R. 1224) and (Hoeper [Hoeper v. Tax Commission] (284 U.S. [206], 217, 52 S.Ct. 120, 76 L.Ed. 248. [78 A.L.R. 346]) Cases involved similar situations."

The majority opinion cites and analyzes, but refuses to follow, three recent cases decided by courts of other jurisdictions which have considered the problems here involved. Smith v. Cole, 270 App.Div. 675, 62 N.Y.S.2d 226; Mahoney v. Byers, Md., 48 A.2d 600; State v. Baldwin, Fla., 31 So.2d 627. In my opinion the holding in all three of these cases is contrary to that of the majority of this Court, and the attempt to distinguish them from the case at bar is based upon considerations more fanciful than real. The attempted distinction of the Mahoney case is based upon the fallacy that the Maryland rule substituted a rebuttable presumption for an essential fact. As I have heretofore pointed out, such a rule is much more favorable to the accused than the conclusive presumption provided for in Rule 313 of the California Horse Racing Board. An attempt is made to distinguish the Baldwin case by the statement that the Court which decided that case did not consider the power of a state to impose strict liability. Such a purported distinction is fallacious as the Supreme Court of Florida predicated its decision holding the rule invalid upon the obviously sound theory that the rule was so unreasonable, arbitrary and capricious that it constituted a violation of the due process provisions of

the Federal and State Constitutions. In my opinion the three cases above cited are in full accord with the settled rule announced by the Supreme Court of the United States in the cases which I have hereinbefore cited, and should be followed by this Court.

Finally, it appears that the opinion prepared by Mr. Justice SHENK is rested upon the grounds that under the rule of the horse racing board the trainer is properly made an insurer against the doping of a horse and that there is no unlawful delegation of legislative power in conferring upon the board authority to make such a rule. Accepting those two propositions, there still remains the question of *whether the Legislature did delegate such power.* It is my opinion that the authority to adopt such a rule has not been granted by the Legislature to the board. The trainer, like others engaged in the activity of horse racing, must obtain a license from the board under the horse racing act. The act provides that such licenses *may not "be revoked* without *just cause."* Bus.&.Prof.Code, sec. 19513. It is true that the board is empowered to adopt rules and regulations for horse racing and a violation of a rule is ground for suspension or revocation of a license, but if a license cannot be revoked except for "just cause" then no rule is valid, the violation of which can result in the loss of such license, which does not have a just cause or basis. Otherwise the requirement that there must be "just cause" for revocation of a license would be wholly thwarted. The board could make a rule that no bald headed man could hold a license as a trainer and then proceed to revoke a licensee's license because he lost his hair. Obviously the revocation of a license on that ground would not be for *"just cause."* The issue then becomes one to ascertain whether or not the rule in the instant case is founded upon *"just cause."*

A *"just cause"* is fair and reasonable cause. In re Municipal Garage in and for City of Utica, 141 Misc. 15, 252 N.Y.S. 18; Quick v. Southern Churchman Co., 171 Va. 403, 199 S.E. 489. For illustration, when an officer may not be removed except for "cause," the "Cause must be one which specially relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public." 46 C.J. 986. See, also Good v. Common Council, 5 Cal.App. 265, 90 P. 44; McQuillan, Muni.Corps., 2d Ed., sec. 579. And there must be some element of wilfulness present—some fault or blame attributable to the officer. "It is frequently urged by certain opinions that the law 'providing for removal of unfaithful public officers was not designed as a pitful into which an honest and sincere public officer might be plunged if he unintentionally erred in the discharge of his official duties * * Wilful misconduct in office, wilful neglect of duty, are the vices for which the laws provide a summary removal.' 'The distinguishing characteristic of every official act must be genuine good faith,' and the 'law presumes that a public official thus conducts himself,' and the burden rests upon a complaint 'to show the contrary to be true, by a preponderance of the evidence.'" McQuillan, Muni.Corps., 2d Ed., sec. 579. Likewise with a trainer, the *"just cause"* must have some relation to his qualifications for protecting the public interest.

Applying the foregoing to the rule making the trainer an insurer against the doping of the horse, we find the rule is sufficiently broad, as stated in the opinion prepared by Mr. Justice SHENK, to authorize the revocation or suspension of the trainer's license for the criminal act of a third person over whom he had no control. He may have been rendered helpless by the third person to take any steps to prevent the doping. Although entirely faultless his license would be lost. It is difficult to understand how a trainer who is neither negligent nor intentionally a wrongdoer can be said to lack qualifications to be a trainer—to be a danger to the public—merely because he happened to be a trainer when a horse was doped through no fault of his or by some one over whom he had no control whatsoever. It must be admitted that the rule is a harsh one. Being such, it cannot qualify as *"just cause"*—the mandate laid down by the statute.

For the foregoing reasons the judgment should be affirmed.

Rehearing denied; CARTER, J., dissenting.

83 Cal.App.2d 445

## CITY AND COUNTY OF SAN FRANCISCO v. BOSS.

No. 13519.

District Court of Appeal, First District, Division 1, California.

Feb. 2, 1948.

Hearing Denied April 1, 1948.

**1. Municipal corporations ⇐592(1)**

If subject matter affected by state legislation is of state-wide concern and deals with matters beyond exclusive control of municipality, it is not a "municipal affair" subject to local control.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Affair".

**2. Municipal corporations ⇐592(1)**

State has occupied field of licensing of contractors throughout state to exclusion of municipal regulation thereon in a form other than for revenue only. Business and Professions Code, § 7000 et seq.

**3. Municipal corporations ⇐592(1)**

A city ordinance, though it comes under general police powers as endeavor to protect property and promote safety of citizens, is invalid if it attempts to impose additional requirements in a field which is fully occupied by statute.

**4. Municipal corporations ⇐594(1), 969(1)**

In determining whether an ordinance is for purpose of revenue or for regulation, courts must look at its substance and not merely its form, and fact that particular enactment purports to be either a revenue or regulatory measure is not conclusive.

**5. Municipal corporations ⇐592(1)**

Ordinance of city and county of San Francisco requiring contractor's licenses and providing for use of revenue so received solely for purposes of the ordinance is not for revenue but for regulation, and is invalid on ground that state has occupied such field to exclusion of municipal regulation thereon. Business and Professions Code, § 7000 et seq.; Const. art. 11, § 6.

**6. Municipal corporations ⇐592(1)**

The power of a municipality to impose license taxes either for regulation or for revenue, or for both, is limited by rule that, in matters of state-wide concern where state has occupied the field, the municipality cannot regulate, subject to right of municipality even then to regulate in matters purely local.

**7. Municipal corporations ⇐111(4)**

If part of an ordinance is invalid, other parts, if not dependent for their validity upon the invalid part, will remain undisturbed.

**8. Municipal corporations ⇐111(4)**

Licensing part of ordinance of city and county of San Francisco requiring contractor's license could not be considered valid as for revenue purposes only, disregarding other parts of ordinance which were regulatory in character and invalid on ground that state had occupied such field to exclusion of municipal regulation, where it appeared that licensing part of ordinance, like the other parts, was not for revenue but for regulation. Business and Professions Code, § 7000 et seq.; Const. art. 11, § 6.

Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

Suit by City and County of San Francisco against Harry J. Boss, a painting contractor engaged in business in San Francisco, for unpaid license taxes. From judgment sustaining defendant's demurrer to the complaint without leave to amend, the plaintiff appeals.

Affirmed.

John J. O'Toole, City Atty., and Walter A. Dold, Deputy City Atty., both of San Francisco, for appellant.

Tobriner & Lazarus, of San Francisco, for respondent.

BRAY, Justice.

Plaintiff brought suit against defendant, a painting contractor engaged in business in San Francisco, for unpaid license taxes for the fiscal years 1943–1944, 1944–1945, and 1945–1946. The question presented here is the validity of that portion of ordi-

nance No. 1.075 of plaintiff city and county, requiring contractor's licenses. The lower court found it to be invalid and sustained defendant's demurrer to the complaint, without leave to amend. Plaintiff appeals from the judgment entered thereon.

The portion of the ordinance primarily involved here comprises section 76 and sections 200 to 207, inclusive. (For brevity, it will be referred to as "the ordinance.") Section 200 defines the term "contractor," and, admittedly, is broad enough to include defendant and his business as a painting contractor. Section 201 requires every contractor, before engaging or offering to engage in work in San Francisco, to obtain a "certificate to the effect that he is registered as a licensed contractor in the said Bureau of Licenses" of the plaintiff. Section 202 (a) provides the procedure for registration and requires an application in writing, setting forth certain data. Section 202 (b) provides that no contractor shall be entitled to receive a certificate unless he is registered as a contractor with the State of California as provided by law. A fee of $10 accompanying the application is required by section 202 (c). Section 202 (d) provides that the Bureau of Licenses shall investigate any application "and if the facts set forth in said application are found to be true" the certificate shall be granted to remain in force only until the end of the fiscal year, "thereafter the said certificate shall be renewed each fiscal year by the filing of a request to renew the same and the payment of the sum of Ten ($10.00) Dollars to said Bureau of Licenses." Section 202 (e) provides: "Revocation of Certificate, Grounds for. *Any certificate of registration may be revoked for any act of the person so registered showing said person to be dishonest or guilty of the violation of any rule or regulation, either state or municipal, regulating or governing contractors.*" (Emphasis added.) Section 202 (f) provides an appeal to the Board of Permit Appeals for failure of the Bureau of Licenses to issue, or on the revocation of, a license. Section 203 provides that the Bureau shall keep a register of contractors which shall be open to the public. Section 204 provides that all amounts received from the issuance of these certificates shall be paid daily into the city and county treasury "and shall be used to defray the cost of making the investigations and reports and furnishing the information mentioned in Section 205 of this Article." Section 205 provides that any contractor may apply to the Superintendent of the Bureau of Building Inspection or to the City Engineer for "all information necessary to enable said contractor to prepare for the execution of any contract for construction, alteration or improvement of any building, structure, street, road or way" and that such information shall be made available "in order to enable said contractor to prepare for the execution or performance of such contract; all without charge, and when in order to obtain said information, an inspection or investigation of the site on which said contract is to be performed is necessary, said inspection and investigation shall be made." Section 206 provides that contracts of the city and county of San Francisco shall be awarded only to contractors whose names appear on the Register of Contractors and who have complied with the terms of the ordinance, with certain exceptions not important here. Section 207 provides that no permits shall be issued by the Central Permit Bureau for the doing of any kind of work on which a contractor is to perform labor, furnish materials, or render service, unless the contractor for such work holds a certificate of registration.

Section 76 of the ordinance applies to licenses generally, and makes it unlawful to carry on any business for which a license is required, without having such license. It provides certain percentage penalties in the event of nonpayment of the tax on time and also makes the nonpaying licensee subject to arrest and prosecution.

The state also has enacted legislation in the field of licensing contractors in the State Contractors' Law. Statutes 1929, chapter 791, now found in Business and Professions Code, sections 7000 et seq. Since the primary question herein is whether the state has occupied this field to the exclusion of municipal regulation thereon in a form other than for revenue only, it may be well to note similarities between the ordinance in question and the state act.

Section 7000 provides for a state license board. Section 7026 defines a contractor in practically the identical language used in section 200 of the ordinance. Section 7028 prohibits any person from engaging in the business of contractor without first having obtained a state license permitting him to do so and is similar to section 201 of the ordinance. Section 7065 provides for the investigation, classification and examination of applicants under rules adopted by the board. Section 7067 provides that the application shall state the general nature of the applicant's contracting business, the classification under which he desires to be qualified, and the names and addresses of persons in the business; and section 7068 requires a showing of experience; both are similar to section 202 (a) of the ordinance. Section 7137 provides for an original fee of $10 and $5 for each annual renewal. Section 7090 provides for the investigation and suspension or revocation of a license, and sections 7097 et seq. provide for rehearings and appeal. Section 7027 which provides that subcontractors are included and materialmen excluded is almost identical to the last clause of section 200 of the ordinance.

[1, 2] Horwith v. City of Fresno, 74 Cal.App.2d 443, 168 P.2d 767, in which the city attorney and the deputy city attorney appearing on this appeal filed briefs amicus curiae, and in which the Supreme Court denied a hearing, is practically determinative of the questions raised here. There, the city of Fresno enacted an ordinance requiring electrical contractors to obtain and pay for a business license before engaging in business. Plaintiff applied for such license, but it was refused because he had neglected to pass an examination before the city electrical board of examiners as required by the ordinance. The same contentions were made in that case as here. "Plaintiff contends that the state has provided a comprehensive system for the examination and licensing of all contractors; that the state law has occupied the entire field so that no municipality may provide for any further examination of a contractor licensed under state authority as a prerequisite to his engaging in business within its limits. No question is presented of the right of a city to impose a license fee on such contractor for doing business in such municipality. We understand that right is conceded by the plaintiff.

"On the other hand defendants maintain that the licensing of contractors doing business in the city is a municipal affair solely within the regulatory power of the municipality; that requiring a contractor to pass an examination given by a local board is a proper prerequisite to the issuance of a business license under the police powers of the city. It is also argued that 'the ordinance does not, as a matter of fact, conflict with the State Contractors' Law.'" (Page 445 of 74 Cal.App.2d, page 768 of 168 P.2d)

The court, after stating that the precise question presented is one of first impression in California, and after pointing out the similarity between the provisions of the Fresno ordinance and the State Contractors' Law, states the rules for determining what is strictly a municipal affair, and then says (pages 446, 447 of 74 Cal.App.2d, page 769 of 168 P.2d): "The generally approved rule on the question seems to be that if the subject matter affected by the state legislation is of state-wide concern and deals with matters beyond the exclusive control of the municipality, it is not a municipal affair subject to local control. [Citing cases.] * * *

"It is apparent that the State has adopted a broad and comprehensive plan for licensing contractors throughout the entire State, for examination as to their qualifications and fitness to engage in their various activities, for licensing only those who prove themselves qualified by satisfactorily passing examinations, and for punishing those who prove themselves incompetent or unfaithful to the trust imposed in them. This is a matter of state-wide concern and is not one that can be safely entrusted to regulation by each chartered city. Residents of the smaller municipalities and of rural districts are as much concerned with the safety of their citizens and the property within their limits as those in the larger cities that may operate under charters.

"As the licensing of contractors throughout the State is a matter of general and state-wide concern we must conclude that it is not a municipal affair that concerns only the inhabitants of a chartered city and which is subject to local regulation such as that attempted to be imposed by the city of Fresno."

[3] The case then disposes of another contention similar to one of those made here, namely, that the Fresno ordinance does not, as a matter of fact, conflict with the State Contractors' Law and is a reasonable police regulation passed under the general police powers of the city. The court stated (page 448 of 74 Cal.App.2d, page 770 of 168 P.2d): "We may concede that the examination and licensing of electricians comes under the general police powers as an endeavor to protect property and promote the safety of citizens. * * * However, we regard this matter as unimportant as 'the ordinance is invalid if it attempts to impose additional requirements in a field which is fully occupied by the statute'. Pipoly v. Benson, supra [20 Cal.2d 366, 125 P.2d 482, 147 A.L.R. 515]."

To the same effect, City of Sonora v. Curtin, 137 Cal. 583, 70 P. 674.

The Horwith case further holds (page 448, 449 of 74 Cal.App.2d, page 770 of 168 P.2d): "The state license implies permission to the licensee to conduct his business at any place within the State. This permission should not be circumscribed by local authorities. This does not limit the right of local governmental agencies to protect property and life through the enforcement of local regulations as to the quality and character of the installations. The right to enforce local ordinances is still in the hands of municipalities through the power of inspections and permits."

[4, 5] The ordinance in question here does not attempt to come within the category just mentioned. It attempts in no way to provide the quality and character of the installations, nor for inspection of the work done. The plaintiff does not attempt to support the ordinance on that ground, but on the ground that it is revenue producing, and that under the "home rule" amendment (Sec. 6, art. XI of the Constitution), which home rule is adopted by section 2 of San Francisco's charter, the plaintiff is entitled to license for revenue, even though the state has occupied the field.

But an examination of the ordinance shows that its purpose is not revenue, but regulation. As said in In re Dees, 46 Cal. App. 656, 189 P. 1050, in determining the type of ordinance in question it is the duty of the courts to look at its substance and not merely its form. There the court held the ordinance to be a regulatory one rather than a revenue raising one. "In considering the particular enactment, the fact that it purports to be a revenue measure is not conclusive." (page 660 of 46 Cal.App., page 1052 of 189 P.)

In Davis v. City of San Diego, 33 Cal. App.2d 190, 91 P.2d 640, it was held that whether the actual purpose of an ordinance was regulation or revenue was a question of fact. By section 204, the receipts are to be used to defray the costs of making the investigation and reports which are available to the contractor. Where the city receives any revenue from this does not appear. "If revenue is the primary purpose and regulation is merely incidental the imposition is a tax; while if regulation is the primary purpose the mere fact that incidentally a revenue is also obtained does not make the imposition a tax * * *." Cooley on Taxation, 4th Ed., vol. 4, sec. 1784, p. 3513. To the same effect, Lamere v. City of Chicago, 391 Ill. 552, 63 N.E.2d 863; Hunt v. Douglas Lumber Co., 41 Ariz. 276, 17 P.2d 815; 33 Am.Jur. 340. See, also, John Rapp & Son v. Kiel, 159 Cal. 702, 115 P. 651, where the court held that an ordinance imposing a license fee of $150 per annum, for a license to sell liquor not to be drunk on the premises, was held to be for regulation rather than for revenue producing. "In general, therefore, where the fee is imposed for the purpose of regulation, and the statute requires compliance with certain conditions in addition to the payment of the prescribed sum, such sum is a license proper, imposed by virtue of the police power; but where it is exacted solely for revenue purposes and its payment gives the right to carry on the business without any further conditions, it is a tax * * *." 33 Am.Jur. p. 340.

In Best Foods v. Christensen, 75 Utah 392, 285 P. 1001, 1002, the Legislature of the state of Utah passed an act requiring persons who sell oleomargarine to obtain a license from the city, town or county and pay a $5 fee therefor. "All such license fees shall be credited to the general fund of the city, town or county collecting the same." It was held that as the "expenses of the municipality in enforcing the act may equal or exceed the revenues derived from the fees collected" (page 1004 of 285 P.) the fees so collected were not a tax but "compensation for services rendered to the state by the municipality issuing the permit and assisting the state in the enforcement of the act" (pages 1004, 1005 of 285 P.).

Applying these tests, it appears clearly that the ordinance is not exacted solely for revenue purposes. The revenue received is used solely for the purposes of the ordinance. In spite of the state law which authorizes a contractor holding a state license to contract anywhere in the state, this ordinance limits his right to contract in San Francisco—unless he also obtains a San Francisco license, which shall only be given him if the facts set forth in his application are found to be true by the city authorities. The license may be revoked for any act of the holder showing him to be dishonest, or for a violation of any rule or regulation, either *state* or municipal, regulating contractors. Thus, even though the state may decline to take away his state license for any such act or violation, the city may do so and prevent him from contracting within its limits, in spite of his state license.

[6] Plaintiff takes the position that it has the power to impose license taxes either for regulation or for revenue, or for both, citing among others In re Bruce, 54 Cal. App. 280, 201 P. 789; McKay Jewelers, Inc., v. Bowron, 19 Cal.2d 595, 122 P.2d 543, 139 A.L.R. 1188; West Coast Advertising Co. v. City and County of San Francisco, 14 Cal.2d 516, 95 P.2d 138. While this is true, it is limited by the rule set forth in the Horwith case, supra, where it is held that in matters of statewide concern where the state has occupied the field, the municipality cannot regulate, subject, however, to the right of the municipality even then to regulate in matters purely local. For example, there is the right to provide "local regulations as to the quality and character of the installations." (page 449 of 74 Cal.App.2d page 770 of 168 P.2d.) Here no attempt is made to do this, but the ordinance attempts to provide a means by which a contractor with a state license may be denied the right to contract or work in San Francisco.

As said in Pipoly v. Benson, 20 Cal.2d 366, at page 370, 125 P.2d 482, at page 484, 147 A.L.R. 515: "This general rule permitting the adoption of additional local regulations supplementary to the state statutes is subject to an exception, however, which is important in the present case. Regardless of whether there is any actual grammatical conflict between an ordinance and a statute, the ordinance is invalid if it attempts to impose additional requirements in a field which is fully occupied by the statute. Thus it has been held from an early date that an ordinance which is substantially identical with a state statute is invalid because it is an attempt to duplicate the prohibition of the statute. * * * Paradoxical as it may seem, it is apparent that an ordinance and a statute may be identical under this rule and yet the ordinance is invalid because within the constitutional provision it is in conflict with the statute. Ex parte Daniels, supra, 183 Cal. [636] page 645, 192 P. 442, 21 A.L.R. 1172. The invalidity arises, not from a conflict of language, but from the inevitable conflict of jurisdiction which would result from dual regulations covering the same ground. Only by such a broad definition of 'conflict' is it possible to confine local legislation to its proper field of *supplementary* regulation."

[7, 8] Plaintiff contends that the regulatory part of the ordinance may be disregarded and the licensing part considered valid as for revenue purposes only, citing cases to the effect that if part of an ordinance is invalid, the other parts, if not dependent for their validity upon the invalid part, will remain undisturbed. However, this contention overlooks the fact that the licensing part of the ordinance is not for revenue, but, like the other parts, is for regulation and hence must fall.

In support of its contention that the ordinance is either "a revenue measure, or, at worst, a combination of both regulation and revenue licensing," plaintiff cites three cases. Payne v. De Vaughn, 77 Cal.App. 399, 246 P. 1069, held that ordinances requiring payment of a license and procurement of a certificate to perform the services of contractor and builder, attorney, and certain others, is not to be construed as a revenue law *alone*, but as a police measure. This case was decided in 1926, prior to the enactment of the State Contractors' Law, and hence does not consider the question involved here.

Sivertsen v. City of Menlo Park, 17 Cal. 2d 197, 109 P.2d 928, upheld an ordinance imposing a license fee on painting contractors already licensed by the state. There, the ordinance apparently was one for revenue only. The question involved here was not discussed. The only question considered was whether the city could legally charge painting contractors having no fixed place of business without the city an annual license fee of $20 while those having such a place within the city were only required to pay $10.

Matter of Application of Prentice, 24 Cal. App. 345, 141 P. 220, also decided prior to the enactment of the State Contractors' Law, held valid an ordinance of the city of Stockton requiring master plumbers to take out a city license and pay a license fee of $10 per year in order to engage in business in Stockton. Just what requirements there were other than making application for the license and paying the fee do not appear, except that apparently the examination which the state law required an applicant to take before the city board of health was by the ordinance required to be taken before the city clerk. In holding that the ordinance did not conflict with the state law granting city boards of health the power to regulate the plumbing and drainage of buildings and to provide for the regulation of plumbing, the court did not discuss the regulatory features of the ordinance, if any. It treated the ordinance purely as one for revenue only. It said (page 347 of 24 Cal. App., page 221 of 141 P.): "Where the power to impose a license tax for revenue is conferred upon a municipality, the power becomes a municipal affair within the meaning of those words in the Constitution (Ex parte Braun, 141 Cal. 204 74 P. 780; and ordinances passed for the purposes of revenue are valid exercise of power, if the municipality by its charter has been given such power. (Ex parte Helm, 143 Cal. 553, 77 P. 453; Ex parte Lemon, 143 Cal. 558, 77 P. 455, 65 L.R.A. 946)."

The judgment appealed from is affirmed.

PETERS, P. J., and WARD, J., concur.




83 Cal.App.2d 504

**PEOPLE v. GIBBONS.**

Cr. 2498.

District Court of Appeal, First District, Division 2, California.

Jan. 6, 1948.

**1. Criminal law ⇐304(6), 564(5)**

The facts that preliminary hearing on charge of sex perversion with five year old girl was held in city of Berkeley by judge residing therein, that girl was on her way from school in such city to her home, identified by street and number, therein, just before offense, and that offense occurred in defendant's home, likewise identified, in same city, warranted conclusion from judicial knowledge that offense was committed in Alameda county, wherein venue was laid. Pen.Code, §§ 288, 288a.

**2. Witnesses ⇐40(2)**

In prosecution for sex perversion with five year old girl, where she detailed all circumstances in her testimony on merits and was fully corroborated by testimony, so that there could be no doubt of sufficiency of evidence to support conviction, trial judge, sitting without jury, properly permitted girl to testify, though she was hopelessly con-

fused on voir dire examination. Pen.Code, §§ 288, 288a.

Appeal from Superior Court, Alameda County; Edward J. Tyrrell, Judge.

LeRoy Gibbons was convicted of committing a lewd or lascivious act of sex perversion with a female under 14 years old, and he appeals.

Affirmed.

Everett E. Power of Oakland, for appellant.

Fred N. Howser, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The defendant was charged with a violation of section 288 of the Penal Code and two prior convictions — one of robbery and one of petty theft. He admitted the prior convictions, waived a trial by jury, and was tried and convicted by the court.

He appeals from the judgment and the order denying a new trial.

The victim of the offense charged was a little girl five years of age. She testified that on her way home from school she passed defendant's home; that he was standing on the porch and asked her to come in the house, that "I have something nice for you." He took her to the bedroom, laid her on the bed, removed her underclothing, and committed the act specially denounced in section 288a of the Penal Code. The child left the place and immediately went home and complained to her mother. She then went with her mother and pointed out defendant's house. Later on the same day she accompanied a police officer and pointed out to him the defendant and defendant's house. Both houses were known to be situated in the City of Berkeley, Alameda County. An expert witness testified that on his examination of the clothing worn by defendant, the bedspread taken from the bed, and the clothing of the little girl the "cross-matches" showed that all these garments had been in contact.

Appellant's only contention on this appeal is that the court should have granted his motion for a new trial. The clerk's transcript shows that such motion was made on the grounds stated in section 1181 of the Penal Code, but in his brief he does not specify any one of these statutory grounds as applicable to his case. From his brief, which is a recital of some of the evidence and a history of the proceedings it would appear that appellant complains of the ruling on his motion relating to proof of venue and the ruling on the competency of the little girl as a witness.

[1] The first point seems to be that the prosecution failed by direct evidence to prove at the preliminary hearing that the alleged offense was committed in Alameda County. On that ground the defendant moved in the superior court to set aside the information, and his motion was denied. If this ruling were error no argument is made on the point. The respondent however points to these facts—that the preliminary hearing was held in the City of Berkeley by a judge resident therein; that testimony was given that the little girl was on her way home from a public school located in Berkeley to her home which was identified by street and number, and that the offense occurred in appellant's home which was identified by street and number. On all these facts the court could base the conclusion from judicial knowledge that the offense was committed within the County of Alameda.

[2] Criticism is made of the ruling permitting the little girl to testify. Her voir dire examination showed that she was hopelessly confused, but that confusion was caused largely by the unreasonable character of the examination. If the trial had been before a jury the question of her capacity as a witness might become more serious. But here the learned trial judge had the opportunity of observing the witness and the character of the examination to which she was subjected. If he had been required to rule on the basis of that examination alone he might have been led to reject her as a witness. But when she gave her testimony on the merits of the case there could then be no doubt as to her competency. She detailed all the cir-

cumstances clearly and precisely and was fully corroborated by the physical and expert testimony so that there can be no doubt that the evidence of guilt was sufficient to support the judgment. And the appellant does not contend that it was insufficient for that purpose.

The judgment and order are affirmed.

DOOLING, J., and OGDEN, J. pro tem, concur.




83 Cal.App.2d 471

**PEOPLE v. KAZARIAN.**

**Cr. 2486.**

District Court of Appeal, First District, Division 2, California.

Feb. 5, 1948.

**1. Criminal law ⇐1186(4)**

Admission of robbery confession obtained by police officers after interrogating defendant for not more than an hour and a half was not reversible error, in absence of evidence that defendant requested counsel or was refused such request, or uncontradicted evidence of improper conduct on part of officers. Const. art. 6, § 4½.

**2. Criminal law ⇐1158(4)**

Where evidence was conflicting, question of freedom from coercion in making confession was for triers of the fact and their resolution of the conflicting evidence would not be disturbed on appeal.

**3. Criminal law ⇐1186(4)**

Exclusion of testimony by police officer that accused upon arrival at Hall of Justice had protested his innocence for considerable period was not prejudicial. Const. art. 6, § 4½.

**4. Robbery ⇐24(1)**

In robbery prosecution, evidence of possession of money which circumstantially connected defendant with the crime, and testimony of witness placing defendant in store at time of robbery was sufficient to convict without confession.

Appeal from Superior Court, City and County of San Francisco; Wm. F. Traverso, Judge.

Armand Kazarian was convicted of robbery and he appeals.

Affirmed.

George Devine, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and Carl W. Wynkoop, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The appellant was convicted on a charge of robbery.

There are only two matters raised on appeal, the first and most important being that a confession introduced in evidence was not free and voluntary.

Appellant contends that six officers kept the defendant in a six by six foot room for two and a half hours and interrogated him by "third degree methods".

[1] We are asked to say that admission of the confession was reversible error. This we cannot do. The record (at the place referred to by appellant) indicates that the police testified that there were four of them in the room with the accused. The accused testified that Officer O'Leary was there at all times and that the other officers came in one at a time (and hence, with the stenographer, there would have been not more than three persons other than defendant in the room at one time). The evidence reasonably bears the construction that after being questioned not over one hour and fifteen minutes or one hour and a half appellant admitted his participation in the robbery and that the rest of the time was consumed in reducing the confession to typewritten form. It does not appear in the testimony of the defendant that he at any time requested presence of counsel or was refused such request.

Appellant relies heavily on People v. Borello, 161 Cal. 367, 119 P. 500, 37 L.R.A.,

N.S., 434, although there is no showing in the instant case, by uncontradicted evidence, of any improper conduct on the part of the police officers. In the Borello case the court refers to proven instances of improper conduct by the officers and the cases are distinguishable on this ground.

In People v. Quan Gim Gow, 23 Cal. App. 507, 138 P. 918, the defendant was a Chinese and was held on a murder charge at a time when there was a strong public feeling against the orientals. At times the defendant did not "savey" the interrogation. Thus there is, in the Quan Gim Gow case, an aggravated situation in which the person in custody was in fear of the officers because of his lack of understanding of the English language and his belief that he would be treated inhumanely because of his race. These circumstances were held to have so weakened his mental resistance as to render his answers inadmissible.

In People v. Dye, 119 Cal.App. 262, 6 P.2d 313, we find the interrogation covered a period of days and that the defendant was denied counsel for almost a week, during which time he was kept incommunicado.

[2] The evidence being in conflict the question of freedom from coercion was for the triers of the fact and their resolution of the conflicting evidence will not be disturbed on appeal. People v. Shaffer, 81 Cal.App. 752, 254 P. 666, and cases there cited; People v. Ellis, 33 Cal.App.2d 616, 92 P.2d 431; People v. Gerbel, 71 Cal.App.2d 325, 162 P.2d 946.

But the appellant goes further in saying that regardless of other evidence the admission of the confession would be prejudicial and reversible under People v. Loper, 1910, 159 Cal. 6, 112 P. 720, Ann.Cas.1912B, 1193, which was decided before art. VI, sec. 4½ of the Constitution was adopted. Oct. 10, 1911. This provision vitiates the People v. Loper discussion on prejudicial error.

[3] The second point raised by appellant is that the trial court erred in sustaining an objection to one question of Officer O'Leary as to whether or not the accused had, upon his arrival at the Hall of Justice, protested his innocence for a considerable period of time. The appellant has provided us with no authority on this point, nor has he established its prejudicial aspects, if error it be. But the defendant testified that he had protested his innocence—and it cannot be doubted that such protestations are expected of all accused of crime. That the accused protested innocence could have been inferred by the jury. Furthermore by pleading not guilty the defendant impliedly asserted his innocence throughout the trial. Hence, assuming that the refusal to admit the evidence were error, it does not appear that it prompted a miscarriage of justice. Const. art. VI, sec. 4½.

[4] A reading of the entire record indicates that, since the jury was entitled to discredit the testimony of the defendant, there was sufficient evidence to have warranted the jury in convicting without the confession, i.e., possession of money which circumstantially connected defendant with the crime, and testimony of the witness Caro which placed appellant in the store at the time of the robbery. Mrs. Caro spoke broken English and it is claimed that her testimony was unintelligible. The record indicates that some of it was, but the portions understood and taken down by the reporter are intelligible and explicit. The fact that her evidence was not given through an interpreter was the result of an objection by counsel for codefendant and appellant's counsel at no time suggested any unfairness in the examination of this witness in the English language.

The judgment and order appealed from are affirmed.

GOODELL and DOOLING, JJ., concur.

83 Cal.App.2d 507

**GUTTMAN v. BERRY et al.**

**Civ. 16093.**

District Court of Appeal, Second District, Division 2, California.

Feb. 6, 1948.

**1. Landlord and tenant ⇐285(4)**

In ejectment action against tenants by purchaser of leased premises consisting of two buildings, subject to lease, on ground that tenants had no right to use rear of lot behind buildings, evidence sustained finding that purchaser was not entitled to immediate possession of the property at the rear of the buildings, including garage constructed thereon by tenants.

**2. Landlord and tenant ⇐285(4)**

In ejectment action against tenants by purchaser of leased premises consisting of two buildings, subject to lease, on ground that tenants had no right to use rear of lot behind buildings, evidence sustained finding that tenants were rightfully in possession of the premises, including garage building constructed by tenants at rear of the two buildings.

**3. Landlord and tenant ⇐285(4)**

In ejectment action against tenants by purchaser of leased premises consisting of two buildings, subject to lease, on ground that tenants had no right to use rear of lot behind buildings, evidence sustained finding that lease included property at rear of two buildings and that tenants erected a garage on such property with landlord's consent.

**4. Landlord and tenant ⇐41**

If a tenant takes possession of realty under a lease containing an uncertain description of realty to be occupied, and pays stipulated rent, it will be enforced as a lease if the parties acted on it as relating to particular premises.

**5. Evidence ⇐417(7)**

If a lease is silent as to the quantity of land to which tenant is entitled, parol evidence to determine the amount of land leased is admissible. Civ.Code, § 1647; Code Civ.Proc. §§ 1856, 1860.

**6. Evidence ⇐461(1)**

In ejectment action against tenants by purchaser of leased premises consisting of two buildings subject to lease, on ground that tenants had no right to use rear of lot behind buildings, parol evidence was properly admitted to show what landlord and tenants intended that ambiguous lease should include which described the realty as property located at "346 and 346½ North LaCienega Boulevard, Los Angeles". Civ. Code, § 1647; Code Civ.Proc. §§ 1856, 1860.

---

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Ejectment action by Henry H. Guttman against Denise M. Berry and another. From a judgment for defendants, plaintiff appeals.

Judgment affirmed.

Ben C. Cohen and Irving Cohen, both of Los Angeles, for appellant.

Bloom & Bloom and L. A. Bloom, all of Los Angeles, for respondents.

McCOMB, Justice.

Plaintiff appeals from a judgment in favor of defendants after trial before the court without a jury in an ejectment action.

The evidence being viewed in the light most favorable to defendants (respondents) these are the essential facts:

Several years prior to March 4, 1944, defendants were in possession of premises known as "346 and 346½ North LaCienega, Los Angeles, California." This property was then owned by Charles H. MacDonald. It consists of two stores located upon a lot approximately 135 feet deep which adjoins a 20 foot alley. After taking possession of the property defendants built on the rear of the lot a garage 18 feet wide which was used for sand blasting. When first erected the structure did not meet the building requirements of the city of Los Angeles, and the then owner of the property, Mr. MacDonald, and defendants went to the city attorney's office, discussed the location of the garage, and subsequently with the full knowledge of Mr. MacDonald defend-

ants removed the garage to the rear of the lot. Thereafter on March 4, 1944, Mr. MacDonald as lessor entered into a written lease with defendants as lessees covering the property described as "346 and 346½ North LaCienega Boulevard, Los Angeles."

At the time Mr. MacDonald leased the property to defendants he understood (1) that they were renting the stores and the yard back of them to the alley; also (2) that they could use the space back of the stores for any purpose they desired. On August 24, 1945, plaintiff purchased the above described property subject to defendants' lease from Mr. MacDonald and has been the owner thereof ever since. Plaintiff objected to defendants' occupying the premises in the rear of the two store buildings, and upon defendants' insistence upon their right to use the same the present action was instituted.

Plaintiff urges that the judgment should be reversed for the following reasons:

*First*

*There is no substantial evidence to sustain the trial court's findings: (i) that it is not true that plaintiff is entitled to the immediate possession of the property in the rear of the store building including the garage, and that defendants wrongfully refuse to surrender such premises to plaintiff; (ii) that it is true that defendants are rightfully in possession of the premises including the garage building in the rear of the two stores; and (iii) that it is true that the real property described in the written lease between defendants and Mr. MacDonald is a portion of the property in the rear of the two stores; that defendants are in possession of such property pursuant to such lease; and that they erected with the consent and knowledge of Mr. MacDonald on the rear of the leased lot a garage building to be used in connection with their business.*

This proposition is untenable. Defendants testified that they went into possession of the property in question under an oral agreement with Mr. MacDonald; that thereafter they erected, next to the store building, a garage which was used for sand blasting purposes; that the city building inspector ordered them to move it away from the main building because it was not fireproof and had to be detached from any other building to comply with the city ordinance; and that Mr. MacDonald and defendants went to the city attorney's office where the matter was discussed and the latter suggested that the building would be legal if placed adjacent to the alley. Whereupon the building was moved to its present location. As thus reconstructed defendants were using and occupying the property at the time the written lease was executed on March 4, 1944. The lessor knew the premises were so occupied by defendants and the purpose for which they were using it, to which he consented.

[1-3] Clearly such testimony constituted substantial evidence together with the inferences which may be drawn therefrom to sustain each and every one of the questioned findings of fact. Further discussion of the evidence would serve no useful purpose. (Estate of Isenberg, 63 Cal.App. 2d 214, 146 P.2d 424.)

Bellon v. Silver Gate Theatres Inc., 4 Cal.2d 1, 47 P.2d 462, relied on by plaintiff, is inapplicable for the reason that in the cited case it was an undisputed fact that when the lease between the parties was made the basement room which lessee claimed the right to occupy was not used as a part of the "sweet shop" which was leased, nor was the basement necessarily used with or reasonably necessary to the enjoyment of the demised premises. Likewise during the negotiations for the lease the basement was never mentioned and no request to use it was made. Since in the case at bar there is abundant evidence that the rear portion of the southerly 28 feet of the lot was continuously and constantly used by defendants, and that it was necessary for the business of defendants that it be used for the proper enjoyment of the demised premises, and permission was granted to use it, it was thus included in the lease.

The case of Blair v. Wessinger, 39 Cal. App. 269, 178 P. 545, also relied upon by plaintiff, is not here applicable. In the cited case the question arose whether the small store in the rear of a corner store described by street number in the lease but which was

fronting on another street and had its own street number was included in the lease. The court held that it was not included. However, the circumstances in such case disclosed that one Buttner was the agent of defendants in the negotiation of the lease, and that Sterling Carr was their attorney while George Starr was the agent of plaintiff in the action. A letter from Mr. Starr to Mr. Carr was received in evidence by which the defendants' attorney was directly informed that the subject matter of the lease was the "store for a saloon at the northwest corner of Mason and Ellis streets, *not including the small store.*" From the foregoing evidence the trial court was justified in finding that the small store was not included in the lease, although the space was larger than the actual dimensions of the corner store.

In the present case there is no specific mention of excluding the southerly 28 feet of the lot, but on the contrary the actions of all the parties indicated that it was included in the leased premises.

*Second*

*The trial court committed prejudicial error in permitting parol evidence for the purpose of ascertaining the extent of the property covered by the written lease.*

This proposition is likewise untenable and is governed by these settled rules of law:

[4] 1. If a lessee takes possession of property under a lease containing an ambiguous and uncertain description of the property to be occupied and pays the stipulated rent it will be enforced as a lease if the parties act upon it as relating to particular premises. (Beckett v. City of Paris Dry Goods Co. 14 Cal.2d 633, 637, 96 P.2d 122.)

[5] 2. If a lease is silent as to the quantity of land to which the lessee is entitled, parol evidence to determine the amount of land leased is admissible. (Fricke v. Braden, 55 Cal.App.2d 266, 271, 130 P.2d 727; Scheimer v. James, 53 Cal. App. 207, 210, 199 P. 827; sections 1856, 1860 of the Code of Civil Procedure; section 1647 of the Civil Code.)

[6] Applying the foregoing rules to the facts of the present case it is clear that when the leased property was described as the property located at "346 and 346½ North LaCienega, Los Angeles" the lease was ambiguous as to the extent of the property demised. Therefore it was proper for the trial court to receive evidence showing the agreement between the parties, if any, as to the property which they intended to be covered by the description and the actual conduct of the parties in construing the description as used in the written lease. Here the conduct of the lessee and the lessor clearly shows that they understood the description as including as leased the property in question upon which the garage building was erected by defendants.

The judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.




83 Cal.App.2d 511

**SPARKS v. MENDOZA et al.**

**Civ. 16145.**

District Court of Appeal, Second District, Division 2, California.

Feb. 6, 1948.

Hearing Denied April 1, 1948.

1. Gifts ⇐47(3)

A gift inter vivos from parent to child is presumed to be fraudulent and to have been made under undue influence, where parent has relied on child for advice in business matters, and the gift is without consideration.

2. Deeds ⇐196(2, 3)

If a confidential relationship exists between a grantor and a grantee and there is no consideration for deed, there is a presumption of fraud and undue influence, shifting burden of proof to grantee to show fairness and good faith in the transaction, and on his failure to do so, presumption of fraud and undue influence prevails and will support a finding that there was not a delivery of the deed.

**3. Deeds ⇐196(2, 3)**

Where mother was not familiar with English language, daughter acted as mother's agent and advisor in various business transactions, mother received no independent advice before executing deed to daughter, and there was no consideration for deed, there was a "confidential relationship", and therefore a presumption of fraud and undue influence arose, and burden was on daughter in action to quiet title to realty conveyed by the deed to show that the transaction was free from fraud and undue influence.

See Words and Phrases, Permanent Edition, for all other definitions of "Confidential Relationship".

**4. Deeds ⇐208(1), 211(3, 4)**

In action by grantee to quiet title to realty conveyed to grantee by her mother without consideration while confidential relationship existed, grantee's evidence was insufficient to sustain burden of showing that transaction was free from fraud and undue influence and evidence sustained finding that there was no delivery of deed.

**5. Quieting title ⇐51**

In action by grantee to quiet title to realty conveyed to grantee by her mother without consderation while confidential relationship existed, finding that deed was not delivered to grantee required a judgment for defendants.

---

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Herlinda R. Sparks against Angelina Rios Mendoza and others to quiet title to realty. From a judgment for defendants, the plaintiff appeals.

Judgment affirmed.

Charles E. Hobart, of Los Angeles, for appellant.

Sarah B. Danning, of Los Angeles, for respondent Herman Rios.

McCOMB, Justice.

This is an appeal from a judgment in favor of defendants after trial before the court without a jury in an action to quiet title to a parcel of real property.

The evidence being viewed in the light most favorable to defendants (respondents) the essential facts are:

Herlinda S. Rios, of Mexican descent, came to the United States with her husband from the Republic of Mexico in 1913. The family settled in Alton, Illinois. Thereafter the husband returned to Mexico and later died leaving surviving him his widow and a number of children including the plaintiff, Herlinda S. Sparks. All the children worked and contributed to their mother's support. Out of the money contributed by her children Mrs. Rios purchased and paid for a house in Alton, Illinois. In 1937 plaintiff and her husband came to California. In 1938 Mrs. Rios requested plaintiff to come to Alton, Illinois, "to look after her business affairs there." Plaintiff had assisted her mother in business transactions from the time she was a little girl because the mother was ignorant of business affairs and of the English language. Mrs. Rios spoke broken English and could not quite understand all that she read.

In response to Mrs. Rios's request, plaintiff went to Alton, Illinois, in 1938, and assisted her mother in her business including the arrangement for a loan of $4,000 on the real estate which she owned in Alton. From this loan plaintiff paid some of her mother's bills and then returned to California bringing her mother with her. After their arrival in California they commenced looking for a piece of property for the mother to purchase. In March, 1939, the Lindy-Anne Apartments, 1807 Glendale Boulevard, Los Angeles, California, were purchased by Mrs. Rios for the sum of $25,500 with a down payment of $2,800. The down payment on the property was made from the money borrowed on the Alton, Illinois, property. The purchase price included the furniture, furnishings and equipment of the apartment house. This apartment house is the property which is the subject of the present litigation. All the negotiations for this property were handled by plaintiff for her mother.

Mrs. Rios, plaintiff and plaintiff's husband went into possession of the property and shared an apartment in it until May, 1943. Plaintiff testified that in October,

1940, Mrs. Rios stated to her that "she wished to give this property [the Lindy-Anne Apartments] over to me in case of her death"; and that her mother telephoned to one Richard Madrid [now deceased] who was a secretary in some law office telling him that she wanted to make out a deed and "leave the real estate [Lindy-Anne Apartments] to me [plaintiff]"; that a quitclaim deed dated October 23, 1940, was prepared by Mr. Madrid, delivered to Mrs. Rios and acknowledged before a notary public named Mary L. Carson. The notary public at the time of the trial had left the state of California and did not testify nor was her deposition offered in evidence. After the deed had been signed it was handed to plaintiff.

In May, 1943, the Lindy-Anne Apartments were leased by Mrs. Rios and thereafter Mrs. Rios collected all rents from the apartments and executed receipts therefor. In addition, she paid all installments of principal and interest which became due against the property, and all bills including taxes. Subsequent to the execution of the lease Mrs. Rios consented to an assignment of it to various persons and thereafter she executed an extension agreement for the payment of encumbrances against the property, which was obtained by plaintiff as agent for her mother. This agreement contained the following provision: "*The first party* (grantor) *is the owner* [Mrs. Rios] of said property free and clear, except for the above trust deeds and taxes and she agrees to pay said notes as provided therein and as provided by this agreement, and to be and remain subject to the terms of said trust deed." (Italics added.)

On February 28, 1944, Mrs. Rios died leaving surviving her nine children including plaintiff. A will was left distributing her property among her various childen. On March 24, 1944, plaintiff placed the above mentioned quitclaim deed of record and filed the present action in November, 1944. The trial court gave judgment in favor of defendants.

This is the sole question necessary for us to determine:

*Is there substantial evidence to sustain the trial court's finding that the quitclaim deed dated October 23, 1940, was never delivered?*

This question must be answered in the affirmative and is governed by these pertinent rules of law:

[1] 1. Where the relationship between the parties is that of parent and child and the parent relies on the child for advice in business matters, a gift *inter vivos* from the parent to the child which is without consideration and where the parent does not have independent advice is presumed to be fraudulent and to have been made under undue influence. Campbell v. Genshlea, 180 Cal. 213, 224, 180 P. 336; Laherty v. Connell, 64 Cal.App.2d 355, 362, 148 P.2d 895; Myrick v. Bruetsch, 13 Cal.App. 2d 219, 223, 56 P.2d 591 et seq.

[2] 2. If a confidential relationship exists between a grantor and grantee and there is no consideration, a presumption of fraud and undue influence arises, shifting the burden of proof to the grantee to show fairness and good faith in the transaction, and upon his failure to do so the presumption of fraud and undue influence prevails and will support a finding that there was not a delivery of a deed. (Johnson v. Clark, 7 Cal.2d 529, 534, 61 P.2d 767 et seq.; Estate of Miller, 16 Cal.App.2d 141, 152, 60 P.2d 492 et seq.; Longmire v. Kruger, 80 Cal.App. 230, 239, 251 P. 692 et seq.; Bacon v. Soule, 19 Cal.App. 428, 434, 126 P. 384 et seq.)

Applying the foregoing rules to the facts in the present case it appears that there was a confidential relationship between decedent grantor and plaintiff since the evidence discloses that (a) decedent was not familiar with the English language, (b) plaintiff acted as her mother's agent and adviser in various business transactions, (c) the mother had received no independent advice before executing the deed in question, and (d) there was no consideration for the deed.

[3-5] Hence under rule (1) supra, a presumption of fraud and undue influence arose. The burden was therefore cast upon plaintiff to show that the transaction was free from fraud and undue influence, and in all particulars fair. Since plaintiff failed

to meet this burden, under rule (2), supra, the finding of the trial court that the deed was not delivered was supported by substantial evidence. Since the grantor, Mrs. Rios, was acting under fraud and undue influence at the time she handed the deed to plaintiff she did not have the present intention to convey the property to her daughter. One of the essential elements of delivery is a present intention upon the part of the grantor to part with title to the property conveyed. (Dinneen v. Younger, 57 Cal. App.2d 200, 204, 134 P.2d 323.) The finding that the deed was not delivered necessarily impelled a judgment in favor of defendants.

In view of the fact that we hold that the finding of the trial court that the deed was not delivered was supported by substantial evidence, plaintiff has failed to support by substantial evidence a material allegation of her complaint.

It is therefore immaterial whether other findings of the trial court adverse to plaintiff's contentions are sustained by substantial evidence and we express no opinion upon the subject.

The judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.




## KING et al. v. STANLEY. *

Civ. 15937.

District Court of Appeal, Second District, Division 1, California.

Jan. 19, 1948.

Rehearing Denied Feb. 10, 1948.

Hearing Granted March 18, 1948.

**1. Specific performance ⇐25, 28(1)**

Condition of specific performance is clear, mutual understanding and positive assent on both sides as to terms of contract, and equity requires such a degree of certainty as will enable it at one view to do complete equity.

**2. Specific performance ⇐28(1)**

Contract of which specific performance is sought must not only contain all material terms, but those terms must be sufficiently certain to make precise act which is to be done clearly ascertainable.

**3. Specific performance ⇐28(1)**

Court must be able to ascertain terms of contract from instrument itself and not be compelled to determine them from construction put upon contract in pleading demanding specific performance.

**4. Specific performance ⇐32(1)**

A contract will not be specifically enforced unless it has such mutuality, existing at time action is commenced, that it may be so enforced by either party.

**5. Specific performance ⇐32(1)**

Contract cannot be divided into independent covenants and subsequent conditions, to avoid application of rule as to necessity for mutuality before specific performance will be granted, but whole contract, including conditions subsequent as well as precedent, must be kept in view.

**6. Specific performance ⇐28(2), 32(3)**

Alleged agreement to convey consisting of an interchange of communications in which purchaser stated that he and his father would purchase lots at certain price and in which vendor after stating that expenses of escrow and commission must be met by purchaser, requested "kindly inform me if this meets with your approval", could not be specifically enforced by purchaser and wife because lacking in mutuality and certainty.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by John W. King and another against Madeline M. Stanley for specific performance of agreement to convey real property. Judgment for plaintiffs and defendant appeals.

Reversed with directions.

Abraham Glicksberg, of San Francisco, for appellant.

M. Lewis Lehman, of Los Angeles, for respondents.

DORAN, Presiding Justice.

This is an appeal from the judgment in an action for specific performance.

* Subsequent opinion 197 P.2d 321.

The complaint alleges that defendant, the owner of certain real property, "had agreed in writing to convey the property to plaintiffs by good and sufficient deed in consideration of the sum $4,000.00"; the usual necessary and appropriate allegations were also included. The answer set up a general denial, also three separate defenses which alleged, "that defendant had not agreed to sell the property to plaintiffs; that there was no consideration for the purported agreement sued on; and that no contract in writing for the sale of the property, or note or memorandum thereof, had been subscribed by defendant or, her agent".

The evidence at the trial consisted of a stipulation and six exhibits; the latter were four letters and one telegram and are as follows:

Plaintiffs' first letter reads:

"In looking through the records I find that you are the owner of two lots on 4th Ave. in the 9100 block in Inglewood, Calif.

"If you are interested in disposing of one I would be willing to pay $1,500.00 cash. Please reply to:—1st Lt. John W. King USMCR 8811 3rd Ave., Inglewood, Calif."

Defendant replied:

"In reply to your letter of November 23rd regarding the two lots I own on 4th Ave. in Inglewood, I wish to say I would like to get $2,000 for each of them.

"I thank you for your offer of $1,500 cash. I am sorry I can't accept your offer as I feel the price will go even higher than $2,000 in a short time.

"I thank you for your courtesy."

Plaintiff John W. King wired defendant on November 29, 1945:

"My father and I will purchase your lots at $2000 cash each. will open escrow here and forward papers for signature if arrangements are satisfactory wire collect."

To which plaintiff replied as follows, on December 2nd:

"In reply to your telegram stating you would purchase both lots for $2,000 cash each. If you will take care of all necessary expenses of Escrow & any commission, if any, to be paid so I will net $4,000 in the deal you may start Escrow & send the papers to me for signature.

"The first half of the taxes for the year has been paid & there are no assessments due. Kindly inform me if this meets with your approval."

The foregoing was followed by a letter from an escrow company to defendant enclosing directions and escrow instructions, together with a deed for defendant's signature; the part of the escrow instructions for the purchaser's signature had been signed by plaintiffs; plaintiff John W. King's father was not mentioned. To this last letter defendant replied:

"In reply to your letter Escrow No. 1730 regarding lots 29 & 30 Block 12 Tract 5320 Inglewood, I wish to refer to a letter of Dec. 2nd, 1945, to Lt. J. W. King in which I requested he inform me if contents of the letter met with his approval. Having failed to receive a reply to that letter I assumed he had changed his mind about purchasing said lots.

"The papers you mailed me which arrived here Dec. 7th came as quite a surprise. I therefore decided not to sell the property at this time. Will you kindly cancel all papers regarding these lots & notify Lt. King. Thank you for your courtesy."

The trial consisted of a stipulation to the introduction in evidence of the above-mentioned documents and the further stipulation that the price was "fair" and that "plaintiffs have been ready, able and willing to complete the purchase." Then followed counsel's argument for the defense which in addition to an analysis of the correspondence pointed out that, "we have but to look into the agreement, as set out in the escrow, and see in what way it adds to and brings forth new conditions which necessitate the approval of the defendant in this action or her rejection. She then sees fit to reject it and call the whole deal off. One of the new conditions set out in the agreement which was forwarded provides for an insured title. The Court, from this correspondence before this Court, cannot place such a construction on the agreement. Assuming that there was this purported agreement which they contend was effected between these parties, where, in any of the documents before this Court, is there any reference made to an insured title? We have that added condition. The plaintiffs

say, 'By reason of executing that document, we will purchase if you give us an insured title,' and they go further and say, 'provided that insured title is done on or before January 3, 1946.'

"No such conditions were agreed upon in the exchange of these communications and the proposal of any offers. And we go further. In signing that offer and proposal, as contained in the escrow, plaintiff says, 'In the event that the conditions of this escrow have not been complied with,' he reserves the right to withdraw from the entire transaction. That is submitted with those added conditions, submitted to the defendant in this action for her signature and approval.

"And above her signaure and approval are these words: 'All the conditions and demands above are hereby approved.' She is asked to approve a new proposal and offer. And, going further, we find another new condition there which she is being called upon to approve: 'And you are hereby authorized to pay any bonds, assessments and/or taxes and any encumbrances of record to show title as called for.'

"She never agreed to anything like that in this interchange of communications, these four or five proposals that passed between the parties.

"We then come to the last paragraph: 'All of the demands of the purchaser of the property as set forth above are hereby agreed to.'

"She is asked by that proposed escrow agreement to enter into a duly, fully executed agreement for the sale of this property, setting forth the specific terms and conditions under which the plaintiffs will purchase the property.

"Now, assuming that the telegram, 'My father and I will buy your property', and let us go further and assume that the defendant in this action agreed to that, hasn't there been a change when we find a new party on the scene purchasing the property? She has a right to say who she will sell the property and who she won't.

"As to the law, if the Court please, I will stop there, as to our theory of the case, and counsel may proceed from there on.

"The Court: I am satisfied, from an examination of the documents, that the contract was entered into, which was valid and forceful as against the defendant. The judgment will be for the plaintiffs."

The trial court found for plaintiffs and entered judgment accordingly.

As appellant points out, "The broad question presented is whether the evidence is sufficient to support the judgment. Further narrowed, the question is whether the evidence supports the finding that a written contract for the sale and purchase of the real property was entered into between defendant and the plaintiffs or either plaintiff."

[1-4] In 23 Cal.Jur. at page 429 et seq. may be found the general rules applicable to actions of the type here considered. It is there pointed out that "Equity requires as a condition of specific performance a clear, mutual understanding and a positive assent on both sides as to the terms of the contract, and it will withhold the exercise of jurisdiction in that respect unless there is such a degree of certainty as will enable it at one view to do complete equity. Even on appeal if the reviewing court—giving full credit and weight to all the evidence tending to establish the contract and disregarding conflicting evidence—finds that the terms of the agreement are not clearly ascertainable, the decree of the trial court enforcing it may be reversed. To warrant specific performance, then, the contract must not only contain all the material terms, but those terms must, in the language of the code, be 'sufficiently certain to make the precise act which is to be done clearly ascertainable.' If all the evidence tending to establish the contract leaves the terms thereof in doubt it cannot be specifically enforced, unless the contract, or at least that portion of it claimed to be indefinite, has already been performed. The reason that an indefinite contract cannot be enforced is because the court cannot know what the parties agreed to; meaning and intent must be placed beyond the bounds of mere conjecture by full and clear proof, for the court cannot prescribe or fix the terms and conditions to which the parties are to bind themselves. Furthermore the court must

be able to ascertain the terms from the instrument itself and not be compelled to determine them from the construction put upon the contract in the pleading demanding enforcement. In other words, a complaint in specific performance cannot supply deficiencies which cause the contract to be nonenforceable in equity. * * * A greater amount or degree of certainty is required in the terms of an agreement which is to be specifically executed than is necessary in a contract which is to be the basis of an action at law for damages. A contract expressed in very general terms might not be void for uncertainty and might be the basis of an action for damages for its breach, while it would be entirely too loose and inexact to warrant a decree for specific performance." And with regard to mutuality appears the following at paragraph 19, "A contract will not be specifically enforced unless it has such mutuality that it may be so enforced by either party; and this mutuality must exist at the time the action is commenced. It results that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other. If for any cause, even one arising after the contract is concluded, it becomes wholly impossible for the plaintiff to perform any part of the contract on his part, he cannot enforce a performance against the defendant.

[5] "To avoid the application of the rule as to the necessity for mutuality, the contract cannot be divided into 'independent covenants' and 'subsequent conditions', for the purpose of enforcing a part of it and leaving the parties to some subsequent remedy as to the remainder, but the whole contract, including conditions subsequent as well as precedent, must be kept in view."

In Breckinridge v. Crocker, 78 Cal. 529, at page 535, 21 P. 179, 181 the following appears:

"But, to whatever form of action resort may be had, the burden is upon the plaintiff to show by the writings that a contract definite and certain in its terms was entered into between the parties, and, failing to do that, he must fail to obtain any relief.

"In [Los Angeles Immigration & Land Co-operative] Association v. Phillips, 56 Cal. [539,] 546, it is said: 'A court of equity will not specifically enforce any contract unless it be complete and certain. This rule applies as well to parties as to price, subject-matter, etc. Nor can the aid of a court of equity be had to specifically enforce that which is only the basis of an agreement, and not the agreement or contract itself.' In Magee v. McManus, 70 Cal. [553], 556, 12 P. 451, it is said that 'the thing agreed to be done must be definite and certain in its terms and in itself, and the party who claims performance must make out by clear and satisfactory proof the existence of the contract as he alleges it.' And see Burnett v. Kullak, [76 Cal. 535,] 18 P. 401".

[6] Appellant's contentions are, as above noted, abundantly supported by both the facts and the law. Obviously there was no completed contract as between plaintiffs and defendant. Plaintiff Patricia King was no party to the negotiations at any time and has no cause of action whatever. The parties to the negotiations changed completely; the parties making the original offer were plaintiff John W. King and his father and even this offer was not signed by the "father" nor is there any evidence that John W. King had authority to include his "father" as a party to the offer. In any event, the offer was not accepted. Assuming that defendant's letter of December 2 was a counter offer, it was definitely qualified with the reservation, "Kindly inform me if this meets with your approval." By this reservation defendant remained in a position to give the matter further consideration, even if the conditions mentioned met with King's "approval". And there is no evidence that it was accepted as made. On the contrary, even a new party entered into the negotiations. And as between plaintiff Patricia L. King and defendant the so-called contract lacks such "mutuality" that it may be enforced by either party. And "To avoid the application of the rule as to the necessity for mutuality, the

contract cannot be divided into 'independent covenants' and 'subsequent conditions' for the purpose of enforcing a part of it and leaving the parties to some subsequent remedy as to the remainder."

For the foregoing reasons, the judgment is reversed with directions to enter judgment for defendant and appellant.

WHITE, J., concurs.

YORK, P. J., did not participate.




83 Cal.App.2d 454

**OWSLEY et al. v. HAMNER.**

**Civ. 16082.**

District Court of Appeal, Second District, Division 1, California.

Feb. 3, 1948.

Rehearing Denied Feb. 20, 1948.

Hearing Denied April 1, 1948.

**1. Landlord and tenant ⇐124(1)**

The lease of a part of a building passes with it, as an incident thereto, everything necessarily used with or reasonably necessary to the enjoyment of the part demised.

**2. Landlord and tenant ⇐124(2)**

Rights of ingress and egress by the usual way pass to the tenant although not specifically mentioned in the lease and though the word "appurtenances" is not used, under the general rule that those rights essential to the use of the demised premises pass as appurtenant thereto.

**3. Landlord and tenant ⇐124(2)**

A tenant is entitled to the maintenance of an entrance which is necessary to the full enjoyment of his use of the property, although it may not be the only means of access.

**4. Landlord and tenant ⇐124(1)**

A thing is "appurtenant" to something else when it stands in the relation of an incident to and is necessarily connected with the use and enjoyment of the principal and agrees in its nature and quality with the thing to which it is appended or appurtenant.

See Words and Phrases, Permanent Edition, for all other definitions of "Appurtenant".

**5. Evidence ⇐441(4), 461(1)**

Parol evidence is admissible to show what was said and done after as well as before the execution of a lease in order to indicate what was intended by the parties to be included as an appurtenance, but such evidence is not to be received for the purpose of varying the terms of the written instrument but of arriving at the intention of the parties with reference to the subject matter of the lease.

**6. Evidence ⇐461(1)**

Conversations had between landlord and tenant, together with evidence of circumstances and occurrences that will aid the court, may be shown for the purpose of ascertaining whether the things claimed by the tenant were intended to be included as appurtenances.

**7. Landlord and tenant ⇐124(1, 2)**

The fact that lease gave landlord right to make repairs, alterations, or additions did not authorize a partial or complete elimination of patio and one of the street entrances to demised premises.

**8. Landlord and tenant ⇐124(1, 2)**

The fact that rent was based completely upon a percentage of receipts did not give landlord right to make a complete or partial elimination of patio and one of the street entrances to demised premises.

**9. Landlord and tenant ⇐124(2)**

Whether considered as an easement, consideration of a contract, or an incorporeal right, tenant was entitled to all for which he had contracted at the time when lease was entered into, as respects means of access to demised premises.

**10. Landlord and tenant ⇐124(2, 3)**

Finding that it was the manifest intention in agreement of parties to lease that tenant should have sufficient additional space in the patio for light and air, display of merchandise, and to the doorways on patio and passageway opening into tenant's

interior store area, was sustained by substantial evidence.

**11. Evidence ⇐450(4)**

Where lease contained no definite grant of the use of patio and street entrances to the tenant and did not expressly reserve such matters to the landlord, parol evidence was admissible for purpose of properly construing lease as respects power of landlord to eliminate patio either in whole or in part. Code Civ.Proc. § 1860.

---

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Don G. Owsley and Otille K. Owsley against the Whelan Drug Company, Inc., and Jack Hamner, also known as J. M. Hamner, Jr., doing business under the fictitious firm name and style of Hamner & Son, for a declaratory judgment as to the rights of the parties under a lease, wherein the last-named defendant filed a cross-complaint against the plaintiff.

From the judgment rendered, the plaintiffs and the cross-complainant appeal.

Judgment reversed and cause remanded for a new trial.

Murchison & Myers, Gibson, Dunn & Crutcher, and Frederic H. Sturdy, all of Los Angeles, for appellants.

George R. Maury and Samuel L. Kurland, both of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal by both parties from a judgment which permits the plaintiffs, owners of a store building, to close up one entrance thereto and a portion of a patio therein, against the protests of the defendant Hamner, a tenant. The University Professional Building is located at the corner of Kinross and Broxton Avenues in Westwood Village, and before its completion in 1929, Hamner leased from the then owners, for use as a haberdashery, what is described as Store No. 2 in said building. Mr. Hamner's lease was for approximately 3,000 square feet with a 30 foot frontage on Broxton Avenue, together with certain other space on mezzanine, basement and second floors. The rental was based on a percentage of sales and the lease contains the usual covenant for quiet enjoyment. The lease also provides that the lessors' architect will cooperate with lessees in the placing of wiring, ventilators, electrical outlets, *arranging entrances,* windows, etc. Also provided therein is the following, relied upon by plaintiffs as authorizing the proposed closing of part of the patio and of the Kinross entrance to the building: "The lessor shall have the right *to* all reasonable times to enter into and upon the premises hereby leased for the purpose of inspecting the same and for the purpose of maintaining the building and making repairs, alterations or additions thereto without any rebate of rent to the lessee for any loss of occupancy or a quiet enjoyment of the premises thereby occasioned."

Of particular interest herein is a central patio in the building, roughly 30'x36', which is connected to each street by a passageway approximately 13 feet wide and 30 feet long. There are numerous doorways and windows opening off the patio and passageways including seven display windows and two doorways to the Hamner store. There is evidence that the patio is traversed by the general public and used as a short-cut between Kinross and Broxton Avenues. The written lease makes no mention of this patio which stands today substantially as when the building was erected at the beginning of Hamner's tenancy in 1929. Plaintiffs Owsley acquired title to the building in August, 1945, and have leased the corner store to the Whelan Drug Co., Inc. The present action for declaratory relief was filed by the Owsleys in May, 1946, for the purpose of determining Hamner's rights to the patio area, and to enable plaintiffs to enlarge the drug store by elimination of the patio, either in whole or in part.

The trial court found "that it was the manifest intention and agreement of the original lessor and defendant Jack Hamner, as lessee, that the latter should have occupancy of the interior areas described in his lease * * * and should also have sufficient additional space left open, unobstructed and suitably improved in the area known as the passageway from Broxton Avenue to the patio, and in the patio for light and air, display of merchandise, and room for cus-

tomers and the public to view such displays of merchandise and to have convenient access to such display windows and to the doorways on said patio and passageway which open into and lead from the interior store areas.) * * * The facts were apthings are reasonably necessary for the full and beneficial use of (defendant's interior store areas. * * * The facts were apparent to and were known by plaintiffs when they acquired title to the property."

Notwithstanding the above finding, however, the trial court concluded that there was nothing in the lease which required plaintiffs to keep the building in the condition "as it was originally constructed or as it or any portion of it is now, and plaintiffs are entitled to close off the said Kinross Avenue entrance and passageway," and to enlarge the drug store by taking in a part of the patio. The effect of this change, as stated in appellant's brief, will be to convert the patio into a narrow "cul de sac which by its very nature * * * would discourage exploration by passersby and would of course cease being a short cut" from one street to the other. "Thus under the Court's interpretation, the 'secondary corner' feature, and thus material part of the thing hired, would be destroyed." On the plaintiffs' cross-appeal it is insisted that the trial court should have ordered that plaintiffs were entitled to close up and build upon the entire patio area up to the wall of the defendant's store.

Appellant's brief has presented two questions: "(1) When a lease has been signed prior to the completion of a building which is constructed around a central patio, may the lessor close off a street entrance or fill in the patio, so as to interfere with the light, air, visibility and access of passersby to the tenant's display windows and doorways? (2) In an action to determine the extent of appurtenances passing with the leasehold is parol evidence, by the original parties, admissible to show their intention before and at the time of the execution of the lease, when the lease is silent as to what is to pass as appurtenant?"

[1] The respondents' brief seeks to justify the trial court's judgment by the citation of Section 820 of the Civil Code which provides that "A tenant for years or at will has no other rights to the property than such as are given to him by the agreement or instrument by which his tenancy is acquired." However, it appears to be equally well settled that "a lease of a part of a building passes with it, as an incident thereto, everything necessarily used with or reasonably necessary to the enjoyment of the part demised." Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 10, 47 P.2d 462, 467; Runyon v. City of Los Angeles, 40 Cal.App. 383, 180 P. 837. In 36 Cor.Jur. 30, Sec. 632 [51 C.J.S., Landlord & Tenant, § 293], quoted in the above mentioned cases, it is stated: "As a general rule everything which belongs to the demised premises or is used with, and appurtenant to, them and which is reasonably essential to their enjoyment passes as an incident to them, unless specially reserved. This rule, for example, applies to a lease of a part of a building."

[2, 3] More directly applicable to the present situation is the rule laid down in Mayer v. Hazzard, 10 Cal.App.2d 1, 3, 51 P.2d 189, 190, where the court said: "Rights of ingress and egress by the usual way pass to the tenant, although not specifically mentioned in the lease, or the word 'appurtenances' be not used, under the general rule that those rights essential to the use of the demised premises pass as appurtenant thereto. A tenant is entitled to the maintenance of an entrance which is necessary to the full enjoyment of his use of the property, although it may not be the only means of access. 36 Cor.Jur. 33 [51 C.J.S. Landlord & Tenant, § 295]."

[4-6] In the language of Von Rohr v. Neely, 76 Cal.App.2d 713, 715, 173 P.2d 828, 829, "A thing is appurtenant to something else when it stands in the relation of an incident to and is necessarily connected with the use and enjoyment of the principal * * * and agreeing in its nature and quality with the thing to which it is appendant or appurtenant." The lease involved in the Von Rohr case made use of the word "appurtenances," and the appellate court held that "Parol evidence is admissible to show what was said and done after as well as before the execution of the lease in order to indicate what was intended by the

parties to be included as an appurtenance. Such evidence is not to be received for the purpose of varying the terms of the written instrument, but of arriving at the intention of the parties with reference to the subject matter of the lease. Conversations had by appellant with the lessor and with respondent, together with evidence of circumstances and occurrences that will aid the court, may be shown for the purpose of ascertaining whether the things claimed by the lessee were intended to be included as appurtenances." In view of the general rule hereinbefore stated, that essential appurtenances are demised by a lease regardless of the use of that word "appurtenances" respondent's contention that the Von Rohr case is inapplicable, is without merit.

[7-9] Respondents' argument that no uncertainty appears in the written instrument, and that the lease provision giving the lessor the right to make "repairs, alterations, or additions thereto," in itself authorizes a partial or complete elimination of the patio and one of the street entrances, is untenable. Nor does the fact that "the rent is based completely upon a percentage of the receipts," alter the situation. In any event, as appellant's brief avers: "Whether it is considered as an easement, consideration of a contract, or an incorporeal right, the lessee is entitled to all of that for which he contracted at the time the lease was entered into." The intention of the parties, in this respect, was therefore a vital question.

[10] It will be remembered that the lease in question was executed before completion of the building, and provided, among other things, that the lessors' architect would cooperate with the lessees in the placing of wiring, ventilators, electrical outlets, etc., and in "arranging entrances." It cannot be doubted that the general arrangement on the ground floor in its relation to appellant's store was a matter of some importance. Likewise, it may well be that the patio with its two street entrances, affording a shortcut and public passage way between Kinross and Broxton Avenues, was deemed a most valuable appurtenance. Indeed, the finding of the trial court expressly recognizes that it was the "manifest intention and agreement" of the original parties that the lessee should have "sufficient additional space * * * in the patio for light and air, display of merchandise and to the doorways on said patio and passageway" opening into appellant's interior store area. The record discloses substantial evidence to justify this finding. But while thus judicially recognizing the patio as a valuable adjunct to appellant's store, the trial court, as appellant's brief states, "by its further Findings and Conclusion, substantially deprived the tenant of these very rights when it permitted the closing of the Kinross archway and ruled that the above 'manifest intention' applied to only such of the Broxton archway as was necessary."

[11] Had the written lease contained some definite grant of the use of the patio and street entrances to the tenant, or expressly reserved these items to the lessor, then, obviously, parol evidence as to the intentions of the signatory parties would be unnecessary and inadmissible. But such is not the case. This matter, although of evident importance, is not definitely determined in the lease. Therefore, the only proper method of arriving at a correct decision is that specified in Section 1860 of the Code Civil Procedure, and followed in Von Rohr v. Neely, 76 Cal.App.2d 713, 173 P.2d 828, hereinbefore cited, and other cases. Section 1860 provides that, "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret." The exclusion of parol evidence offered for that purpose in the instant case, constitutes reversible error.

The judgment is reversed and the cause remanded for a new trial.

YORK, P. J., and WHITE, J., concur.

83 Cal.App.2d 483

**In re KIRKNER.**

**KIRKNER et ux. v. SIMPSON (three cases).**

**In re KIRKNER'S GUARDIANSHIP.**

**Civ. 3801–3803.**

District Court of Appeal, Fourth District, California.

Feb. 5, 1948.

**1. Infants ⇐16**

In proceeding to have an illegitimate child declared abandoned, where evidence sustained finding that both father and mother abandoned it, a general finding as to the truth of allegations of petition, alleging among other things that father and mother were husband and wife, though erroneous, was neither material nor prejudicial. Welfare and Institutions Code, § 550 et seq.

**2. Infants ⇐16**

In proceeding to have illegitimate child declared abandoned, evidence sustained finding of abandonment on the part of both father and mother. Welfare and Institutions Code, § 701.

**3. Adoption ⇐13**

In proceeding for adoption of an abandoned illegitimate minor, evidence sustained findings and order permitting adoption by the physician presiding at the child's birth over the objections of the child's father and mother.

**4. Guardian and ward ⇐13(1)**

Where an abandoned illegitimate minor was adopted in an appropriate proceeding, an order appointing a guardian of the person was not necessary, though not prejudicial.

Appeals from Superior Court, San Bernardino County; A. D. Mitchell, Judge.

Proceeding in the matter of the abandonment of Gilda Kirkner, etc., a person who should be declared free from the custody and control of her parents, on petition of Winea Juanita Simpson, objected to by F. M. Kirkner and wife, and proceeding in the matter of the adoption of Marguerite Lavonne Kirkner, a minor, on petition of Winea Juanita Simpson objected to by F. M. Kirkner and wife, and proceeding in the matter of the guardianship of Gilda Kirkner, etc., a minor, on petition of Winea Juanita Simpson objected to by F. M. Kirkner and wife for appointment of a guardian. From orders finding an abandonment, permitting an adoption, and appointing a guardian, objectors appeal.

Orders affirmed.

Duckworth, King & Knauf, of San Bernardino, for appellants.

Lita Bell Campbell, of Los Angeles, and Wilson & Wilson, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

These are appeals from orders granting the petitions, respectively, in an abandonment, an adoption, and a guardianship proceeding, involving a girl baby born on April 28, 1944, at the Loma Linda Hospital. The attending physician was Dr. Loleta Simpson, a member of the staff of this hospital, and she was assisted by her sister Dr. Winea Simpson, who is the petitioner here. We will refer to them as Dr. Loleta and Dr. Winea.

The parents of the child are F. M. Kirkner, who has never been divorced from his wife, and Mrs. Bitzner, a widow. These parties have lived together as man and wife since 1942 and Mrs. Bitzner's son Billy, who was 11 years old at the time of the trial, has lived with them. Mrs. Bitzner took the name of Kirkner and, for convenience, will be referred to as Mrs. Kirkner.

Mr. and Mrs. Kirkner operated a summer resort at Warren, New York. In October, 1943, they came to Palm Springs for the winter. In November Mrs. Kirkner was examined at Loma Linda by Dr. Loleta, who ascertained she was pregnant. Dr. Loleta then had some six consultations with Mrs. Kirkner before labor began and several with Mr. Kirkner. Mrs. Kirkner entered the hospital on April 26, 1944, informing Dr. Loleta that they were anxious to return to New York and at her request measures were taken to hasten the birth of the baby, which was born on April 28, 1944. Mrs. Kirkner left the hospital on

May 7, and they left by automobile for New York on May 13, 1944. The baby was given by Dr. Loleta to the petitioner, Dr. Winea, about June 1, 1944. She named it Marguerite but later changed the name to Gilda, to comply with a request made by Mrs. Kirkner.

Mr. and Mrs. Kirkner spent the next winter in Florida and returned to California in November, 1945. They remained near Palm Springs until the middle of February, 1946, when they returned to New York. They again returned to California on November 7, 1946. In the meantime, neither Mr. nor Mrs. Kirkner had paid anything toward the support of the child, had made any effort to see it, or had made any serious attempt to find out where it was or who had it.

On February 2, 1946, Dr. Winea filed her petition for adoption. After their return to California in November, 1946, Mrs. Kirkner filed a petition for a writ of habeas corpus for the purpose of obtaining custody of the child. Shortly thereafter, Dr. Winea filed a petition for the appointment of herself as guardian of the person of the child and a petition for an order declaring the child free from the custody and control of its parents, pursuant to the provisions of Chap. 2, Pt. 1, Div. 2 of the Welfare and Institutions Code. Mrs. Kirkner filed an answer to each of the other petitions. By stipulation, the four matters were heard together and Mr. Kirkner was joined as an objector. Apparently the petition for writ of habeas corpus was denied. In any event, the court found in all respects in favor of Dr. Winea and all three of her petitions were granted. Both Mr. and Mrs. Kirkner have appealed from each of these orders.

[1] The controlling question here is that raised by the appellants' contention that the evidence is not sufficient to support the finding that Mrs. Kirkner abandoned this child. It is first argued that while there is ample evidence of abandonment on the part of Mr. Kirkner this is not binding on Mrs. Kirkner since the child was illegitimate, and that the court has attempted to give effect to this evidence by erroneously finding that Mr. and Mrs. Kirkner were husband and wife. This finding inadvertently resulted from a general finding that all of the allegations of the various petitions were true, it being therein alleged that these parties were husband and wife. While erroneous, this finding is neither material nor prejudicial here. In an effort to minimize the evidence of abandonment by Mrs. Kirkner it is further argued that she did not speak English well, that she was in poor health at the time, and that she was induced to give up the baby by the fraud of Mr. Kirkner who she says made all of the arrangements, did all of her writing, and deceived her as to the actual situation. However, the record discloses that she had been in this country 15 years and talked English fluently; that she was not in poor health; that she was informed of practically everything which occurred; that she took an active part in the arrangements; that she has been at all times and still is acting in complete accord with Mr. Kirkner; and that she expects to marry him when he secures a divorce.

While a close question would have been presented had the finding been the other way, there is ample evidence to sustain the finding of abandonment as made.

Dr. Loleta testified that at their first interview on November 17, 1943, Mrs. Kirkner told her that she did not wish a baby and asked her to find a home for it, saying "that the conditions were such it would be best for her not to keep the baby"; that her husband had left his former wife because of his four or five children; that she had a boy by a former marriage and felt it was a question of choosing between this baby and her husband; that she was anxious to stay with her husband; and that it would be better for the doctor to find a home for the baby when it was born. That on December 15, 1943, she had a talk with Mr. Kirkner in the presence of Mrs. Kirkner; that Mr. Kirkner concurred in the suggestion that Mrs. Kirkner had previously made and in reply to her question as to whether he wanted to keep the baby he said that he thought it was best not to do so, that he would feel silly to have a baby following him around at his age, that they traveled around a great

deal and the baby would interfere with this, and that he thought it would be best that the baby had another home; and that he asked her to find a home for the baby. That the matter was talked over on several occasions thereafter but no change was suggested and "they always left it the same way." That in a conversation on February 9, 1944, Mr. Kirkner said: "Well, I think it is best for us not to keep the baby. If she really wants to she can." That when Mrs. Kirkner was admitted to the hospital on April 26, 1944, she expressed the hope that the doctor would find a good home for the baby; that Mrs. Kirkner saw the baby only once while she was in the hospital and then said that she was going through with the arrangement; that Mrs. Kirkner left the hospital on May 7, 1944, and she did not see her until a year and a half later, in the fall of 1945; that neither Mr. nor Mrs. Kirkner then mentioned the baby; that they had not mentioned it in several communications she had had from them in the meantime; that shortly before Mrs. Kirkner left the hospital she asked that "the people" be told of her request that the child be named "Gilda"; that in talking to Mrs. Kirkner she asked her why they did not board the child out while they were taking trips so they would have the child when they returned, and that Mrs. Kirkner replied that she didn't think this would work; that Mr. and Mrs. Kirkner brought Billy to the hospital several times in December, 1945, but did not mention this baby; that they did not again mention the baby to her until after this proceeding was brought; and that shortly after the baby was born Mrs. Kirkner told her that she was not going to take the baby and under the circumstances did not want to nurse it.

Mr. Kirkner testified that before the baby was born he had a talk with Dr. Loleta with reference to the disposition of the child, that he told the doctor that he was a pretty old "duck" to have a young child, and that he agreed that the child should be cared for at the hospital "or be given to a young couple or a young person." That he told Mrs. Kirkner of this discussion about leaving the baby and Mrs. Kirkner replied that "she thought it was best to do so"; that he read to Mrs. Kirkner a letter addressed to Mr. and Mrs. Kirkner written on March 25, 1946, by Dr. Winea in which she told them she had applied for adoption papers on "little Gilda"; that in reply to this letter he wrote a letter dated April 18, 1946, the original of which is in evidence, in which he said, among other things, "We felt and still feel that it would be a much greater injustice to the child than to ourselves not to have done what we have" and "we are not the kind of people to go back on our word, so you need not fear that there will ever be any interference from us", and "we are going to be content and happy to know that she will be in good hands." In this letter Mr. Kirkner also said that they were sending a small gold locket for the child's second birthday, which was more than 100 years old and had been given to Mrs. Kirkner by her grandmother. This locket was received and is in evidence. Mr. Kirkner also testified that when he received Dr. Winea's letter dated March 25, 1946, about two years after the child was born, was the first time he had known what had become of the child; that he wrote his letter of April 18, 1946, as a "stall" for the purpose of throwing Dr. Winea off her guard and that he did not mean a word of what he had written; that they received the adoption papers on August 1, 1946, but that he had no time to do anything about them until after they closed for the winter; and that in the nearly three years which had elapsed neither he nor Mrs. Kirkner had contributed anything toward the support of the child.

Mrs. Kirkner testified that before the child was born Mr. Kirkner suggested that she get rid of it and let somebody else raise it; that she told Dr. Loleta Mr. Kirkner was her husband and that she would be very happy to find a young couple to take care of it since Mr. Kirkner thought he was too old; that it was agreeable to her that somebody else have the baby and she decided this was the best thing to do; that Mr. Kirkner also thought this was the best thing to do; that the day before she left the hospital she asked Dr. Loleta "if I may see the baby before she gave it away"; that shortly after she left the

hospital Mr. Kirkner told her he was telling his friends that the baby was dead; that during the six days they remained in California she did not go back to the hospital to see how the baby was getting along; that they came back to California in November, 1945, and remained about three months; that during this time they took Billy to this hospital six times for treatment; that she saw Dr. Loleta only once, usually remaining in the car; that she left all arrangements to Mr. Kirkner and made no effort to find the baby; that they then went back to New York; that Mr. Kirkner read all letters to her except that he kept one letter back; that Mr. Kirkner did all her writing for her; that when they sent the locket in April, 1946, she intended that whoever had the baby should keep the locket for the baby and that she never expected to get the locket back; that she had never sent any money for the baby and supposed that Dr. Loleta was caring for it; and that when she returned to California in November, 1946, she went right to Dr. Winea's home and had no trouble in finding it. Although Mrs. Kirkner claimed that she thought Dr. Loleta was to take care of the baby only temporarily her testimony and Mr. Kirkner's testimony, as a whole, strongly confirm the other view as testified to by Dr. Loleta and as accepted by the court.

[2] There is other correspondence between the parties which strongly tends to support the finding; there is ample evidence of the good financial condition of the Kirkners; and it was stipulated that the child had a good home with Dr. Winea. In spite of any conflicts, the evidence is sufficient to support the finding of abandonment made by the trial court and the orders depending upon it. Sec. 701 of the Welfare and Institutions Code; In re Peterson, 56 Cal.App.2d 791, 133 P.2d 831; In re Creely, 70 Cal.App.2d 186, 160 P.2d 870.

[3] The evidence is sufficient to support the findings and order in the adoption proceeding and no abuse of discretion there appears. Adoption of Kelly, 47 Cal.App. 2d 577, 118 P.2d 479; Guardianship of Peterson, 64 Cal.App.2d 473, 149 P.2d 65; Adoption of Martin, 76 Cal.App.2d 133, 172 P.2d 552.

[4] While an order appointing a guardian of the person of this child may not have been necessary in view of the action taken in the other proceedings, no prejudice or reversible error appears.

For the reasons given, each of the three orders appealed from is affirmed.

GRIFFIN, J., concurs.






83 Cal.App.2d 89

**BAKER v. KALE et ux.**

**Civ. 15936.**

District Court of Appeal, Second District, Division 1, California.

Dec. 23, 1947.

As Modified Jan. 29, 1948.

**1. Trial ⇐139(1)**

A motion for nonsuit must be denied if there is sufficient evidence of a substantial nature to justify a finding for plaintiff.

**2. Trial ⇐165**

In passing on motion for a nonsuit, the evidence must be viewed from a standpoint most favorable to plaintiff, and conflicts must be disregarded.

**3. Libel and slander ⇐32**
**Torts ⇐12**

An action will lie for inducing breach of contract by a resort to means in themselves unlawful, such as libel, slander, fraud, physical violence or threats of such action.

**4. Libel and slander ⇐130**

One publishing, without privilege or justification, untrue matter disparaging another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that third person's conduct as purchaser or

lessee thereof might be determined by such publication is guilty of "slander of title".

See Words and Phrases, Permanent Edition, for all other definitions of "Slander of Title".

**5. Libel and slander ⇐130**

Where purchasers of leased realty attempted to induce prospective purchaser of lease to breach or withdraw from contract with lessee to purchase lease, and prospective purchaser did withdraw from contract, purchasers of realty were guilty of "slander of title" and were liable for damages sustained by lessee, if contract between lessee and prospective purchaser of lease was a binding contract.

**6. Contracts ⇐303(1)**

Generally, in cases where fancy, taste or judgment is involved in a contract, it is sufficient to show as an excuse for failure to carry out the contract that the obligee was, in good faith, dissatisfied, but where question is merely one of operative fitness or mechanical quality, dissatisfaction is no defense.

**7. Libel and slander ⇐139**

In action against purchasers of leased realty by lessee for damages for slander of title, on ground that purchasers induced third person, who had contracted with lessee to purchase lease if he was satisfied that extension of lease was valid, to withdraw from lease by representing that extension was not valid, evidence established that third person was not satisfied that extension was valid and had declined to go through with the contract because of purchasers' representations.

**8. Libel and slander ⇐139**

In action against purchasers of leased realty by lessee for damages for slander of title, on ground that purchasers induced third person, who had contracted with lessee to purchase lease if he was satisfied that extension of lease was valid, to withdraw from lease by representing that extension was not valid, evidence established that purchasers' statements to third person were not made in good faith and were, in fact, malicious, and were therefore not privileged.

DORAN, Acting P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by William H. Baker against Slavko Kale and Mary Kale, his wife, to quiet title to plaintiff's leasehold estate, for declaratory relief and injunction to restrain defendants from remodeling the building leased by plaintiff, and for damages for slander of plaintiff's title. From a judgment for the plaintiff, the defendants appeal.

Judgment affirmed.

John J. Karmelich, of San Pedro, and Charles Kent, of Wilmington, for appellants.

Goudge, Robinson & Hughes, Edgar F. Hughes and Raymond Tremaine, all of Los Angeles, for respondent.

BARTLETT, Justice pro tem.

Complaint contains three causes of action: the first cause of action was one to quiet title to plaintiff's leasehold estate; the second for declaratory relief and for an injunction to restrain defendants from remodelling the property of a building leased by plaintiff; and the third for damages for the sum of $2,000.00 for slander of plaintiff's title. The judgment was in favor of the plaintiff as to all three causes of action. However, on this appeal we are only concerned with the third cause of action as appellant's opening brief starts with the statement that the appeal is taken solely against the third cause of action.

Appellant urges a reversal as to the third cause of action on the ground (1) that the court erred in denying a motion for a nonsuit and, (2) that appellant's statements were privileged.

[1, 2] This brings us to an examination of the record as it was at the time the motion for a nonsuit was made. If there is sufficient evidence of a substantial nature to justify a finding for the plaintiff, then the motion for a nonsuit must be denied. In considering this question, the evidence must be viewed from a standpoint most favorable to the plaintiff and conflicts disregarded. Milana v. Credit Discount Co., 27 Cal.2d 335, 163 P.2d 869, 165 A.L.R. 621. With this in mind, the testimony

showed the following: Plaintiff was the owner of a lease on premises known as the Palace Barber Shop, together with a shoeshine stand in front, located at 211½ East 6th Street in San Pedro, California. The lease was dated March 7, 1944, and was between B. F. Bowman as lessor and plaintiff as lessee. The term of the lease was "for the term of Two years, with an option for three years more, commencing on the 15th day of March, 1944, and ending on the 15th day of March, 1946, at the total rental of Twelve Hundred Twenty Four And No/100 Dollars, Payable at San Pedro, California, in installments of Fifty One And No/100 * * * dollars, lawful money of the United States, each due and payable in advance on the 15th day of each and every month during said term for first two years, then a three-year option commencing March 15th, 1946 and ending March 15th, 1949, at a total rental of Twenty One Hundred Ninety Six And No/100 Dollars ($2196.00) payable in installments of $61.00 per month on the 15th of each and every month during the balance of said term."

There was a covenant in the lease against the assignment or subletting of any portion of the premises, but this provision was rescinded in writing by Bowman and the plaintiff on October 13, 1944. On February 5, 1946, appellants notified respondent that they had acquired the property on which the barber shop was located and that the lease would terminate on March 15, 1946. On the same date respondent notified appellants that he exercised his option to renew the lease for three years.

On February 13, 1946, respondent entered into a contract with one A. A. Birchfield selling the leasehold interest to him for $4,000.00, $2,000.00 down and the balance to be paid in sixty days. As Birchfield was informed by respondent of appellants' notice of February 5, 1946, Birchfield had inserted in the contract a proviso that the purchaser was to be satisfied that the option to extend the lease had been legally exercised and was binding on the lessor. Birchfield entered into possession of the barber shop on the same day.

While occupying the premises, Birchfield had conversations with appellants who told him that he, Birchfield, had no lease and that appellants would put a fence or gate across the place. Appellants stated they would take Baker or him to court if he did not turn the premises over to appellants. Upon being offered the rent by Birchfield on several occasions, appellants refused to accept it. Birchfield testified that he did not want to buy a lawsuit and told appellants that he wanted to get his money back. He went to respondent and told him that he wanted his money back and respondent returned it to him. Birchfield then cancelled the contract with respondent and vacated the premises about April 15, 1946.

The respondent then tried to sell the lease and equipment to others and listed it with four real estate brokers. The only offer he received was on June 1, 1946, from a Mr. Buzolich in the sum of $2,000.-00. He continued his efforts to sell the property until July 29, 1946, but, receiving no better offer by that time, sold it for $2,000.00.

Patrick S. Doney, a licensed business opportunity broker, testified that the value of the lease had dropped from $4,000.00 to a present valuation of $2,000.00.

Appellant in his opening brief, among other things, listed as "undisputed" that the lease of March 7, 1944 was a valid lease; that the option provision to renew the lease for three years from March 15, 1946 was valid; that prior to March 15, 1946, respondent exercised his option to renew the lease for three years and that this renewal of the lease was valid.

A consideration of this record raises two questions: (1) Assuming that the contract between Birchfield and respondent was binding, will an action lie for inducing breach of contract by a resort to means in themselves unlawful such as slander? And, (2) was there a binding contract between Birchfield and respondent? If the first question is answered yes, then, from the evidence, the motion for a nonsuit would have to be denied; if the second question is answered no, it would be equally im-

perative that the motion for a nonsuit be denied.

Appellants base their contention that the nonsuit should not be granted upon the theory that "a land owner who has effected a binding contract of sale with another cannot maintain slander of title against a third person whose utterances have induced the purchaser to refuse to carry out the contract, the owner's remedy being against the purchaser for breach of the contract." 16 Cal.Jur. 160. In behalf of their contention, they rely upon the case of Burkett v. Griffith, 90 Cal. 532, 27 P. 527, 13 L.R.A. 707, 25 Am.St.Rep. 151.

[3] It is fair to state that while the facts in Burkett v. Griffith, supra, are in no way parallel with those in the case at bar, that as an abstract question of law the court does make a holding in accordance with the quoted statement from California Jurisprudence. However, in cases such as are disclosed by the testimony in the instant case, such is not the law in this state today. From the evidence it is inescapable that appellant, by every means in his power including slander and threats, attempted to induce A. A. Birchfield to breach or withdraw from any contract he had with respondent. The rule in such cases is clearly and unequivocally set forth in Imperial Ice Co. v. Rossier, 18 Cal.2d 33, on page 35, 112 P.2d 631, on page 632, as follows: "It is universally recognized that an action will lie for inducing breach of contract by a resort to means in themselves unlawful such a libel, slander, fraud, physical violence, or threats of such action. See cases cited in 24 Cal.L.Rev. 208; 84 A.L.R. 67."

[4, 5] The correct definition of a tort such as the one here, is defined in Gudger v. Manton, 21 Cal.2d 537, 541, 134 P.2d 217, 220, as follows: "The judgment here under attack rests upon the theory of a slander by appellant of the title of plaintiff's property, or more accurately the wrongful disparagement of plaintiff's title hereto to his injury. At the outset it is helpful to have before us an accurate definition of that tort. It may be best stated as follows: 'One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused.' (Restatement, Torts, § 624.)" Later on in the same decision, the court, in referring specifically to the case of Burkett v. Griffith, supra, makes this statement: "Further, it seemed persuaded that where a binding contract exists between the purchaser and plaintiff, and the disparaging matter induced the purchaser to breach his contract rather than preventing him from agreeing to purchase, the plaintiff had an adequate remedy against the purchaser. That reasoning is no longer valid inasmuch as an action will lie for inducing the breach of a contract by a resort to unlawful means such as libel or slander. See Imperial Ice Co. v. Rossier, supra." From all this we conclude that the answer to the first question suggested is yes.

[6] In answering the second question, we come to a consideration of the contract between respondent and A. A. Birchfield. The contract provided that Birchfield was to purchase the property and make his final payment to respondent "within sixty days from the date of delivery to him of title to the property and business, provided that second party, Birchfield, is then satisfied that the option to extend the lease has been legally exercised and is binding upon the lessor". As to whether or not A. A. Birchfield was satisfied was clearly a case where the exercise of judgment was involved. It is the general rule in cases where fancy, taste or judgment is involved, that it is sufficient to show, in the absence of bad faith, that the party was in fact dissatisfied. The class of cases in which dissatisfaction is no defense are those where the question is merely one of operative fitness or mechanical utility. Brenner v. Redlick Furniture Co., 113 Cal.App. 343, 298 P. 62; Coats v. General Motors Corporation, 3 Cal.App.2d 340, 39 P.2d 838; Tiffany v. Pacific Sewer Pipe Co., 180 Cal. 700, 182 P. 428, 6

A.L.R. 1493; 6 Cal.Jur. 417. That the appellant recognized this rule is evidenced by the statement in his brief, "At the time Birchfield exercised his power to withdraw he was satisfied that the extension was valid". If we view the evidence in the light most favorable to the respondent, as we must, this contention cannot be upheld.

[7] The respondent had frankly told A. A. Birchfield, at the inception of the deal, of the notice from appellants of February 5, 1946. The testimony shows that on account of that A. A. Birchfield had this particular language inserted in the contract. He wanted protection in just such an eventuality as arose. When Birchfield tendered payment of the rent, it was refused. He was told by appellant that he had no lease; that if he continued to stay there, appellant would sue him; that he would build a wall in front of the barber shop. It is evident that these statements and threats, made so positively, would tend not to satisfy him of the validity of his title. That this is so is further shown by the evidence that A. A. Birchfield asked appellants if they would release it to him, and, upon appellants' refusal, even offered them a small bonus to do so. On cross-examination, Birchfield stated that his reason for not going ahead was that he did not want to buy any lawsuit. When asked if that was his only reason, he said, "That is my only reason; if the lease had been good my money was up". When appellant Kale told Birchfield that he had no lease, Birchfield said, "Well, I merely asked him—he said, 'I am the landlord.' He said, 'You know you do not have a lease after I have bought this place.' I said, 'I don't know whether I have or not.' He said, 'What are you going to do about it?' I said, 'I cannot lose my money.' and I called Mr. Baker and told him that he had better be there at the expiration of the 60 days. But he did clarify that, that he would not o.k. that lease, and that is why I called Mr. Baker." This testimony certainly indicates a lack of satisfaction on his part.

We come to the conclusion, therefore, that whatever view we take of the contract between respondent and Birchfield, in view of the testimony before the court, it should have denied the motion for a nonsuit.

[8] The appellants also urge that the statements by appellants to Birchfield were privileged. They state their argument on this phase of the matter by setting out the following quotation from Gudger v. Manton supra, as follows: "A rival claimant of property is conditionally privileged to disparage or justified in disparaging another's property in land by an honest and good-faith assertion of an inconsistent legally protected interest in himself." We fail to see how this helps him. The quotation shows that the privilege is conditional on an honest and good faith assertion. The preceding paragraph of the decision shows that the privilege invoked was that found in 47(3) of the Civil Code, which refers in all instances to communications made without malice. Appellants answer this by contending that the statements were in fact made in good faith and without malice. In the case before us it was pleaded and specifically found by the court, who had the parties and witnesses before it and had an opportunity to note their demeanor and attitude, that appellants' statements were not made in good faith, and were, in fact, malicious.

We have, heretofore, set forth the facts concerning these statements, and it would serve no good purpose to repeat them here. In his talks with respondent, appellant Kale gave no reason as to why he wanted to break the lease, except that he desired to have the premises occupied by the barber shop for a saloon or restaurant. He made no statement as to what would make the lease invalid. In fact, when this suit was brought to test its legality, he admitted in his answer that it was valid. His statements were reckless and coupled with threats to put a wall in front of the barber shop, and so on.

The court's findings of malice and lack of good faith were justified by the evidence, and hence there was no privilege.

The judgment is affirmed.

WHITE, J., concurs.

DORAN, Acting P. J., dissents.

## PALMER v. CITY OF LONG BEACH.*

Civ. 15915.

District Court of Appeal, Second District, Division 3, California.

Jan. 30, 1948.

Rehearing Denied Feb. 25, 1948.

Hearing Granted March 30, 1948.

1. Appeal and error ⇐930(1)

On defendant's appeal, the evidence must be viewed in the light most favorable to plaintiff.

2. Appeal and error ⇐607(1)

The rule that appellant in his notice to the clerk to prepare a clerk's transcript shall designate any exhibits which he desires incorporated in the record on appeal means that the appellant must designate all exhibits which he desires to have before the reviewing court on appeal. Rules on Appeal, rule 10(b).

3. Appeal and error ⇐598

Counsel must see to it that exhibits are either copied in the clerk's transcript or that the originals are transmitted to the clerk of the reviewing court. Rules on Appeal, rule 10(b).

4. Appeal and error ⇐607(1)

It is not the function of the reviewing court to see that the exhibits are transmitted to it and the reviewing court should not be burdened with that task. Rules on Appeal, rule 10(b).

5. Appeal and error ⇐607(1)

The designation by appellant in request for preparation of clerk's transcript that there be copied therein "such original exhibits as may not be conveniently transmitted to the reviewing court" was wholly insufficient for any purpose. Rules on Appeal, rule 10(b).

6. Appeal and error ⇐607(1)

The burden is on counsel and not on the clerk to determine which exhibits, if any, may not be conveniently transmitted to the reviewing court. Rules on Appeal, rule 10(b).

7. Appeal and error ⇐714(5)

Where the exhibits were not before the court on appeal, the court could not consider any statement in the briefs as to what the exhibits showed. Rules on Appeal, rule 10(b).

8. Municipal corporations ⇐821(6)

In action by pedestrian for injuries resulting from a fall on defective sidewalk on a dark night, where evidence showed that hole in sidewalk was at least three inches deep and eight or nine inches wide and ten or eleven inches long, that sidewalk had been in bad condition for a number of years and had been torn up and had holes of varying depths, city's motions for a judgment of nonsuit and for a directed verdict were properly denied.

9. Trial ⇐171

The power of the court to direct a verdict is subject to the same limitations as is the power to grant a motion for a judgment of nonsuit.

10. Appeal and error ⇐1003

The District Court of Appeal may not weigh the evidence.

11. Appeal and error ⇐905

Where record did not show what occurred between court and counsel at the bench before court dictated the stipulation of the parties, and record showed that appellant did object to the admission in evidence of the stipulation, appellate court was required to assume that appellant stipulated to and admitted the truth of the facts set forth in the stipulation, but objected to their admissibility in evidence.

12. Evidence ⇐215(1), 217, 219(1)

The statements or conduct of a party tending to refute his position are admissible. Code Civ.Proc. § 1870, subd. 2.

13. Negligence ⇐124(3)

Evidence of a custom of a defendant and its violation is admissible as some evidence of negligence.

14. Evidence ⇐330

An ordinance prescribing rules and regulations for the conduct of municipal employees is admissible in evidence as an act or declaration concerning such matter.

15. Evidence ⇐209

In action by pedestrian for injuries sustained from fall on defective sidewalk, stipulation that city had adopted and pur-

* Subsequent opinion 199 P.2d 952.

sued specified rules for the repair of sidewalks and for the conduct of its employees with respect thereto was admissible since stipulation was virtually an admission as to what was reasonably necessary for the safe maintenance of streets.

**16. Trial ⇐252(8)**

In action by pedestrian for injuries sustained from fall on defective sidewalk where there was no evidence that city street department had adopted a standard of conduct, an instruction that fact that city street department had adopted a standard of conduct with regard to defects in sidewalks which should be repaired was not to be taken as evidence that such defects necessarily constituted dangerous and defective conditions which would render city liable, etc., was properly refused.

**17. Trial ⇐29(1)**

Where defendant rested its case and stated that it wished to make a motion in chambers, the court's statement "Make the motion and I will rule" did not constitute misconduct.

SHINN, Acting P. J., dissenting.

---

Appeal from Superior Court, Los Angeles County; Allen W. Ashburn, Judge.

Action by Sarah J. Palmer against City of Long Beach for personal injuries resulting from fall on defective sidewalk. From a judgment for plaintiff, the defendant appeals.

Judgment affirmed.

Irving M. Smith, City Atty., Clifford E. Hayes and Dewey L. Strickler, Deputies City Atty., all of Long Beach, for appellant.

A. J. O'Connor and George J. Hider, both of Los Angeles, and James F. Curtin, of Long Beach, for respondent.

VALLÉE, Justice pro tem.

Appeal by defendant from a judgment for plaintiff entered on a verdict of a jury in an action for damages for personal injuries.

[1] The evidence viewed in the light most favorable to respondent-plaintiff (In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689), establishes the following facts.

On a very dark night in February, 1944, respondent, a woman seventy years of age, accompanied by her granddaughter, an adult, was walking on the public sidewalk on the west side of Pine Avenue, in a residential section of Long Beach. As she was walking along, her foot caught in a hole in the sidewalk, causing her to fall and suffer severe injuries. The hole was at least three inches deep. It was irregular, eight or nine inches wide, and ten or eleven inches long. The hole was of such size and depth that respondent's granddaughter was able to stick her hand into it. Respondent's whole shoe went into the hole. After she fell, respondent had difficulty getting her foot out of the hole. The night was so dark that respondent could not see the sidewalk as she walked along. The sidewalk at the point where respondent fell had been in bad condition for a number of years. It had been torn up and had holes of varying depths. Before the accident one hole had been filled by a person living near the scene. Respondent had not, previous to the accident, used the sidewalk on the west side of Pine Avenue. There was no evidence of actual notice to appellant of the condition of the sidewalk.

The record presents a situation which should be called to the attention of the Bar. It occurs frequently. In arguing the points it urges for reversal, appellant repeatedly refers to exhibits introduced in evidence at the trial. The exhibits are not before us. In its notice to the clerk of the superior court to prepare a clerk's transcript, appellant requested that there be included therein "such original exhibits as may not be conveniently transmitted to the reviewing court." So far as appears, no other move has been made by either party to see that the exhibits were transmitted to the clerk of this court.

[2] The Rules on Appeal (22 Cal.2d 1), provide that the appellant in his notice to the clerk to prepare a clerk's transcript shall designate any exhibits which he desires incorporated in the record on appeal. This provision means that the appellant

must designate all exhibits which he desires to have before the reviewing court on the appeal. He is required to specify such exhibits as he desires copied in the clerk's transcript. The rules make similar provision for designation and specification by the respondent. The originals of exhibits designated but not specified by either party for copying go to the reviewing court provided Rule 10(b) is complied with. The clerk copies in his transcript only such exhibits as he is directed to copy by the notice of one of the parties. Rule 10(b) provides, "When the parties shall have been notified by the clerk of the reviewing court that an appeal has been set for hearing, each party shall file with the clerk of the superior court a notice specifying such of the original exhibits or affidavits designated by any party for inclusion in the record, as he desires transmitted to the reviewing court, and the clerk shall immediately transmit them to the reviewing court. * * * The reviewing court at any time may order that any original exhibits or affidavits designated by the parties as a part of the record be transmitted to it by the clerk of the superior court."

[3-7] It is the duty of counsel, in the proper representation of his client, if he desires the reviewing court to consider exhibits admitted in evidence or rejected, to see to it that the exhibits are either copied in the clerk's transcript or that the originals are transmitted to the clerk of the reviewing court. It is not the function of the reviewing court to see that the exhibits are transmitted, and it should not be burdened with that task. The designation of appellant in its request for preparation of the clerk's transcript that there be copied therein "such original exhibits as may not be conveniently transmitted to the reviewing court" is wholly insufficient for any purpose. The burden is on counsel and not on the clerk to determine which exhibits, if any, "may not be conveniently transmitted to the reviewing court." The Rules on Appeal became effective July 1, 1943, and counsel should not longer be permitted to plead ignorance of their provisions. The result in the present case is that we may not consider any statement in the briefs as to what the exhibits show.

Appellant urges (1) that the court erred in denying its motion for a judgment of nonsuit, (2) that the court erred in denying its motion for a directed verdict, (3) that the court erred in admitting a stipulation of facts in evidence over the objection of appellant, (4) that the court erred in refusing to give an instruction requested by appellant, and (5) that the court committed prejudicial "misconduct" in the presence of the jury.

[8, 9] Appellant's first and second points will be considered together. A cursory reference to the facts, all of which were in evidence before the motions, demonstrates the complete lack of merit in these claims. The rules governing the decision of a motion for a judgment of nonsuit and for a directed verdict are well known and need not be repeated. As to a motion for a judgment of nonsuit see Blackman v. Howes, 82 Cal.App.2d —, 185 P.2d 1019. The power of the court to direct a verdict is subject to the same limitations as is its power to grant a motion for a judgment of nonsuit. Pellett v. Sonotone Corporation, 26 Cal.2d 705, 708, 160 P.2d 783, 160 A.L.R. 863.

Appellant's argument is that although witnesses for respondent testified that the hole was at least three inches deep, the photographs of the sidewalk introduced in evidence as exhibits by respondent show that it was less than an inch in depth and that therefore the testimony of the witnesses should be disregarded. As we have said, the exhibits are not before us; but if they were here, we would be compelled to assume that the jury accepted the testimony of the witnesses and disregarded the photographs either as inaccurate or as not portraying the hole, or that the jury concluded that the photographs did not show the depth of the hole. It is further argued that the testimony of the witnesses was uncertain and unreliable.

Thus premising its argument, appellant says that the hole was less than one inch in depth; that it was therefore a minor and inconsequential defect; that being such, its long continued existence did not constitute constructive notice to appellant. It says that under the cases construing the Public Liability Act of 1923, Stats. 1923, p. 675,

Deering's Gen.Laws, 1937, Vol. 2, Act 5619, under which liability is sought to be imposed, in order to constitute constructive notice, the "hole" must be dangerous in character so that its use by the public would be likely to cause injury and that its existence has been long continued, citing Nicholson v. City of Los Angeles, 5 Cal.2d 361, 54 P.2d 725, and Whiting v. National City, 9 Cal.2d 163, 69 P.2d 990.

[10] The flaw in appellant's argument is in its assumption that the hole was less than one inch deep. Respondent's evidence was that the hole was at least three inches deep. We may not weigh the evidence. DeYoung v. DeYoung, 27 Cal.2d 521, 526, 165 P.2d 457. It was held in Nicholson v. City of Los Angeles, supra, that the long continued existence of a break in a sidewalk, with a difference in grade of an inch and a half, did not give constructive notice of such condition; that to charge the city with constructive notice, some element of conspicuousness or notoriety must be shown, that it must be made to appear that a reasonable inspection would have disclosed the defect or condition and that the existence of a conspicuous defect or dangerous condition of a street or sidewalk for a considerable length of time will create a presumption of constructive notice. In Whiting v. National City, supra, it was held that a square of concrete sidewalk which was raised about three-fourths of an inch above the surface of the adjoining square, which condition had remained unchanged for about six years, was a minor defect as a matter of law and was not sufficient to charge the city with constructive notice. Patently, these cases have no application here, where the general condition of the sidewalk had been bad for years, where for a number of years there had been holes of varying depths in the sidewalk, and where the hole which caused the fall was at least three inches deep.

Eastlick v. City of Los Angeles, 29 Cal.2d 661, 177 P.2d 558, 170 A.L.R. 225, is parallel to the instant case. In the Eastlick case the court stated (pages 672, 673 of 29 Cal.2d, page 565 of 177 P.2d): "The broken condition of the sidewalk consisted in a three to four-inch overlapping of the cement above the adjoining surface. There was testimony that this condition had existed for at least two years prior to plaintiff's accident. Whether such break in the sidewalk created a dangerous condition and the city was chargeable with notice of its existence were questions of fact for the jury to resolve. George v. City of Los Angeles, 11 Cal.2d 303, 308, 79 P.2d 723; Bauman v. City and County of San Francisco, 42 Cal.App.2d 144, 157, 108 P.2d 989; Lorraine v. City of Los Angeles, 55 Cal.App.2d 27, 30, 31, 130 P.2d 140; Sheldon v. City of Los Angeles, 55 Cal.App.2d 690, 693, 131 P.2d 874. * * * The cases of Nicholson v. City of Los Angeles, 5 Cal.2d 361, 54 P.2d 725, and Whiting v. National City, 9 Cal.2d 163, 69 P.2d 990, have no application here in relation to the establishment of defendant's liability, where it cannot be said that the break in the sidewalk was a minor or trival defect as a matter of law. Balkwill v. City of Stockton, 50 Cal.App.2d 661, 669, 123 P.2d 596; Sheldon v. City of Los Angeles, supra, 55 Cal.App.2d 690, 693 [694], 131 P.2d 874." See, also, Laurenzi v. Vranizan, 25 Cal.2d 806, 811, page 812, 155 P.2d 633, at page 636, where the hole in the sidewalk was two to two and one-half inches deep, and it was held that: "it cannot be said as a matter of law that the defect was such a minor defect to be insufficient to impose liability upon the city for injuries resulting therefrom," and that the trial court erred in granting a motion for judgment of nonsuit; Fackrell v. City of San Diego, 26 Cal.2d 196, 205, page 206, 157 P.2d 625, page 630, 158 A.L.R. 773, in which it is said that: "Whether a given set of circumstances creates a dangerous or defective condition is primarily a question of fact"; Jones v. City of Los Angeles, 74 Cal.App.2d 183, 168 P.2d 480, where the hole in the sidewalk was four inches deep; and Perry v. City of San Diego, 80 Cal.App.2d 166, 170, 181 P.2d 98.

We cannot say as a matter of law that had appellant exercised reasonable supervision over the sidewalk it would not have discovered the condition a sufficient time before the accident to have had a reasonable opportunity to guard against injury from it. The issue as to the city's liability on the evidence was properly for the jury

and the court did not err in denying appellant's motion for a judgment of nonsuit or its motion for a directed verdict.

During the progress of the trial and before the plaintiff rested, a consultation took place between the court and counsel at the bench in the absence of the jury. The record is silent as to what occurred until the court said: "Stipulated that James Kincaid at and prior to the time of the accident involved in this case was Superintendent of Streets of the City of Long Beach; that at the time of the accident there were about 16 employees working under him in the street department; that the city had adopted and did pursue, as a standard of conduct with respect to the maintenance and repair of its streets the following rule, namely: That whenever any defect in a sidewalk actually was known or reported to the Department of the same to the depth of one-half inch or more, it was repaired by the city; that the city was divided into five areas or districts for the purpose of maintenance and repair; that because the Street Department was at that time shorthanded, no particular individuals were then assigned to the task of inspecting these respective areas, but that it was the duty of all of the employees of said Department from day to day, as they pursued their various duties, to make an observance of the city streets to ascertain if there were any such defects in the sidewalk as needed repair, pursuant to the above-mentioned standard of conduct; that Mr. Kincaid, Superintendent of Streets, was the official charged with the performance or supervision of the performance of the duties abovementioned." Counsel for appellant then said: "I desire to object to the introduction of any evidence on the ground that it is incompetent, irrelevant and immaterial and doesn't tend to show whether or not this was a dangerous or defective condition; is merely a standard set up to prevent further deterioration of the street and was not to be taken as an indication in any manner that we believed it to be a dangerous or defective condition, but was merely a precautionary measure that has nothing to do under the law to set up any standard other than is defined in the law itself. It does not prove or disprove any of the issues involved in this case."

The court did not rule upon the objection at that time. After further testimony the attorney for respondent asked that the stipulation be read to the jury. Counsel for appellant then renewed and enlarged upon his objection to the reception of the stipulation in evidence. The objection was overruled. The stipulation was then read to the jury by the reporter.

[11] Appellant claims that the court erred in admitting the stipulation in evidence. In the absence of any record as to what occurred between the court and counsel at the bench before the court stated the stipulation, we must assume that appellant stipulated to and admitted the truth of the facts set forth in the stipulation, but objected to their admissibility in evidence. The trial judge admitted the stipulation in evidence upon the theory that the facts therein stated constituted an admission "as to what was reasonably necessary for the safe maintenance of the street." The stipulation was that the "City" had adopted and did pursue the rule stated. Appellant's argument that the Superintendent of Streets had adopted and pursued the rule and that therefore it was not an admission of the city is not borne out by the stipulation.

[12] Evidence may be given upon a trial of the act, declaration or omission of a party. Code Civ.Proc., sec. 1870, subd. 2. Any fact is admissible in evidence from which the facts in issue are logically inferable. Code Civ.Proc., sec. 1870, subd. 15. It is an elemental rule of evidence that the statements or conduct of a party tending to refute his position are admissible. Mr. Justice Holmes, in Texas & P. R. Co. v. Behymer, 189 U.S. 468, 23 S.Ct. 622, 623, 47 L.Ed. 905, said that: "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." Mr. Wigmore says that, "the regulations adopted by an employer for the conduct of a factory or a transportation system, may be some evidence of his belief as to the standard of care required, and thus of the negligent nature of an act violating those rules." Wigmore on Evidence, 3d Ed., Vol. 2, p. 132, sec. 282. Shearman and Redfield say that, "It has been said that 'a violation

of rules previously adopted by a defendant in reference to the safety of third persons has generally been admitted in evidence as tending to show negligence of the defendant's disobedient servant for which the defendant is liable,'" citing King v. Interborough R. T. Co., 233 N.Y. 330, 333, 135 N.E. 519. Shearman and Redfield on Negligence, Vol. 3, p. 1281, sec. 506.

[13] Evidence of a custom of a defendant and its violation is held admissible as some evidence of negligence. Scott v. Gallot, 59 Cal.App.2d 421, 138 P.2d 685, was an action arising out of alleged negligence of the defendant. It was held that a motion for a new trial was properly granted because the court had erroneously stricken evidence introduced by the plaintiff of a custom of the defendant which it had violated. See, also, Thomas v. Southern Pacific Co., 116 Cal.App. 126, 131, 2 P.2d 544; Mace v. Watanabe, 31 Cal.App.2d 321, 323, 87 P.2d 893; Burke v. John E. Marshall, Inc., 42 Cal.App.2d 195, 203, 108 P.2d 738.

[14] An ordinance of a municipality prescribing rules and regulations for the conduct of its employees is admissible in evidence as an act or declaration of a party concerning a matter involved in the suit. Jordan v. City of Lexington, 133 Miss. 440, 97 So. 758; Hebenheimer v. City of St. Louis, 269 Mo. 92, 189 S.W. 1180; McLeod v. City of Spokane, 26 Wash. 346, 67 P. 74; City of Indianapolis v. Gaston, 58 Ind. 224; Smith v. City of Pella, 86 Iowa 236, 53 N.W. 226.

[15] We are dealing here with rules and regulations of the party itself. They are admissible, as they are virtually admissions, in the language of the trial judge, "as to what was reasonably necessary for the safe maintenance of the street." Wigmore on Evidence, 3d Ed., Vol. 2, p. 501, sec. 462.

Appellant engages in an extended argument and citation of cases from other jurisdictions to the effect that rules and regulations of a railroad company for the conduct of its servants in the operation of its trains should not be admitted in evidence in this state. It says that even if such rules should be held admissible the principle should not be extended to rules and regulations of a municipal corporation for the conduct of its servants in the maintenance of its streets. Counsel apparently overlooked the recent case of Simon v. City and County of San Francisco, 79 Cal.App. 2d 590, pages 597, 598, 180 P.2d 393, page 397, where the court stated:

"Defendants argue that the rules of a carrier are not admissible and may not be considered on the issue of a carrier's negligence where the injured party has no knowledge of the rules and did not rely upon them. That was undoubtedly the rule announced in Smellie v. Southern Pac. Co., 128 Cal.App. 567, 18 P.2d 97, 19 P.2d 982, by the District Court of Appeal, but, the Supreme Court, in denying a hearing in that case, added the following comment at page 583 of 128 Cal.App., at page 982 of 19 P.2d: 'Such denial, however, shall not be construed as an approval by this court of that portion of the opinion of the District Court of Appeal which holds that admission of evidence of the rules adopted by the defendant for the government of its business was incompetent and prejudicial.' In thus qualifying the appellate court opinion the Supreme Court undoubtedly had in mind its earlier decision in Gett v. Pacific G. & E. Co., 192 Cal. 621, 221 P. 376. In that case, the court, after referring to the action of the motorman of defendant's streetcar in suddenly stopping his car in such manner as to blockade a cross-street, stated at page 625 of 192 Cal., at page 378 of 221 P.: '* * * his act in so doing was in violation of an operating rule of the defendant, forbidding its employees to stop the cars so as to block cross-streets or crosswalks. The existence of this rule, of course, did not render its violation by defendant's employees negligence per se, but it was a circumstance proper to be considered by the jury in determining whether or not they were negligent.'

"In the more recent case of Nelson v. Southern Pacific Co., 8 Cal.2d 648, 67 P.2d 682, the Supreme Court negatively reaffirmed the doctrine of the Gett case in the following language at page 654 of 8 Cal.2d, at page 685 of 67 P.2d: 'It cannot be said that the exclusion of the respondent's time-table was erroneous. While the rules of operation are admissible (Gett v. Pacific

Gas & Electric Co., 192 Cal. 621, 221 P. 376 * * *), we fail to see the materiality of the time-table to the situation under scrutiny.' It follows that the rules were admissible and that it was a question of fact for the jury and not a question of law for the court to determine whether the conduct of the motorman, under the circumstances, constituted negligence." See Shearman and Redfield on Negligence, Vol. 3, p. 1202, sec. 481; Chicago & A. R. Co. v. Eaton, 194 Ill. 441, 62 N.E. 784, 88 Am. St.Rep. 161; Stevens v. Boston Elevated R. Co., 184 Mass. 476, 69 N.E. 338; Bilodeau v. Fitchburg & L. St. R. Co., 236 Mass. 526, 128 N.E. 872; McNeil v. New York, N. H. & H. R. Co., 282 Mass. 575, 185 N.E. 471.

Appellant misapprehends the purpose and effect of the introduction of the stipulated facts in evidence. It argues that the consequence was that the jury was told thereby that the legal standard of conduct required of appellant was that stated in the stipulation. Appellant was not charged with nor was the jury told that appellant was charged with, a violation of the stipulated facts. The jury was not told that the city was liable for injuries to a person resulting from a failure to enforce or obey its rules or regulations. The jury was specifically instructed, in detail and at length, that respondent's cause of action, if any she had, "is based upon, and must meet the requirements of, a law of this state known as the Public Liability Act." The stipulation was purely evidential. Proof of the rules and regulations of appellant did not make their infraction by its employees a violation of the Public Liability Act. By admission of the stipulation the court did not hypothesize liability of the city on a violation of the stipulated facts. The stipulated facts did not serve as the legal standard of liability. The admission of the stipulation in evidence was proper.

[16] Appellant's next point is that the court erred in refusing to give the following instruction requested by appellant to the jury: "You are further instructed that the fact that the City Street Department may have adopted a standard of conduct with regard to defects in sidewalks which should be repaired, is not to be taken as evidence by you that said defects necessarily constitute dangerous and defective conditions which would render the City liable in damages in event of accidents occurring at the location of such defects." The instruction was properly refused. There was no evidence that the "City Street Department" had adopted a standard of conduct. The stipulation was that the "City" had adopted and did pursue specified rules and regulations for the repair of sidewalks and for the conduct of its employees with respect thereto.

[17] Appellant's last point to the effect that the trial judge committed prejudicial error in the presence of the jury is frivolous. After resting its case, appellant's attorney stated he desired to make another motion "in chambers," to which the court replied, "Make the motion and I will rule." It is this statement which appellant claims constituted "misconduct." The motion was one for a directed verdict. Appellant says that the motion was made and ruled upon at the bench out of the hearing of the jury. As heretofore stated, it was denied. The court's statement was entirely warranted. It is one which is frequently heard in the trial courts. It was merely a request to counsel to state his motion. The argument that the statement indicated that there were no motions which could be made by appellant's counsel which would be meritorious is droll. The record shows that the learned trial judge was extremely patient with, considerate of, and courteous to the parties, the witnesses and counsel.

Judgment affirmed.

WOOD, J., concurs.

SHINN, Acting Presiding Justice.

I dissent. I think the learned trial judge fell into error when he placed the stipulation in evidence over the objection of the defendant, and again when he declined to give defendant's requested instruction bearing on the stipulated facts. My associates have joined him in those errors.

It is a well-recognized rule that orders or instructions given by an employer to his employees for the purpose of promoting safety in their work may generally be re-

ceived in evidence against the employer, in a negligence action. The sole justification for admitting such evidence is that the orders or instructions are such as to amount to an admission of the employer with respect to his duty toward the public. This rule of evidence should be used with discrimination, if not with caution. Not every order or instruction is admissible—only those which constitute admissions of the employer as to his duties. The court must determine, before admitting the evidence, whether it amounts to such an admission. If it does not it should not go before the jury. The instructions in question here, which are referred to as a "standard of conduct" adopted by the city, were that workmen in the street department, upon learning of a hole in a sidewalk one-half inch or more in depth, should repair it. It is clear that this practice did not constitute an admission that every hole with a depth of a half inch or more constituted a dangerous or defective condition, or that the city was under a duty to repair it, and yet respondent argues that it constituted such admissions. Her argument runs somewhat as follows: the city admitted that it had a duty to repair holes when they reached a depth of one-half inch, this was an admission that such holes made the sidewalk dangerous and defective, it failed to repair the one in question and thereby, according to its own admission, was guilty of negligence. Doubtless the same argument was made to the jury. It is unsound and specious, but it has at least an ostensible basis in the evidence that was improperly admitted. Its unsoundness inheres in the fact that the evidence of the practice tended to prove only that the city was endeavoring to exercise a high degree of care in the maintenance of its sidewalks by repairing minor and trivial defects. It is well settled, as a matter of law, that a depression or a protuberance of a half inch, or even an inch, in a sidewalk, is a minor defect which the city is under no duty to repair. The city's commendable policy has been seized upon as an admission that it was under a duty to make such repairs. I do not see how the rules or orders of an employer, which require the exercise of more than ordinary care, can tend in the slightest degree to prove what he understood would be required of his employees in the exercise of ordinary care. Nor do I believe that such rules are admissible in evidence where there could be noncompliance without negligence. The only tendency of the evidence was to prove that the city had a duty greater than that imposed by law, namely, a duty to keep its sidewalks free from defects, whether dangerous or not.

If it had been established by the evidence, without substantial conflict, that the hole was three or more inches deep, admission of the stipulation, while erroneous, would not have been prejudicial. But there was ample evidence from which the jury could have found that the hole was an inch deep, at most. The city employee who repaired it testified that it was not over three-quarters of an inch deep, an inch at the deepest point. A neighbor who was present when it was repaired testified that some of the hole was a quarter of an inch, some a half inch, "something like that" and none of it as deep as one inch. The jury might have believed that the hole was an inch, or even less, in depth, and a minor defect, and yet have found the city guilty of negligence in the belief that it had admitted a duty to repair such defects.

The question is one of considerable importance. The main opinion will stand as authority affecting the conduct of all municipalities and other public bodies subject to the Public Liability Law. Policies and practices for the repair of sidewalks and streets before they become dangerous, which of course should be encouraged, will be adopted by them at their peril, and will be used against them to their prejudice and disadvantage. The courts should not lay down a rule which would make cities and other public bodies fearful to exact a high degree of care of their employees, in the repair of streets and sidewalks, or in other work.

Having admitted the evidence, the court should have given the city's requested instruction to the effect that the practice followed by the city should not be taken as evidence that the defects to be repaired under that practice "necessarily constitute dangerous and defective conditions which

would render the city liable" etc. The charge to the jury, while a model in other respects, did not touch on the point. The jury could scarcely have been expected to know what significance the evidence had. The attorneys in the case have different notions about it. My own views differ from those of my associates and the trial judge, and a respectable minority of the courts hold that an employer's rules, orders or instructions, are not admissible in evidence on the issue of negligence.

It is not clear to me why the instruction was not given. It stated the law correctly. Surely the jury should have had some guidance, and the requested instruction was the least the city could have expected. An instruction could properly have been given that a hole in the sidewalk an inch or less in depth would not create a defective or dangerous condition, within the meaning of the other instructions. The failure to give any instruction on the subject only rendered more grave the error in the admission of the evidence.

I think the holding of the main opinion on these points is in error and that the judgment should be reversed.




83 Cal.App.2d 435

## PEOPLE v. RALEIGH.

Cr. 2492.

District Court of Appeal, First District, Division 1, California.

Jan. 30, 1948.

1. Criminal law ⇐371(12)

In prosecution for violation of Dangerous Weapons' Control Law, where witness had testified that he had seen gun in defendant's possession two or three times in an automobile, prosecution was entitled to have witness state what defendant was doing with gun at such times though jury were thereby informed that defendant and witness were then on way to commit burglaries, even though charges, on which defendant and witness had been temporarily held, had been dismissed. St.1923, p. 695, as amended.

2. Criminal law ⇐706

Persistent asking of questions which court has ruled inadmissible may constitute misconduct on part of prosecutor, even though ruling was erroneous according to the circumstances, including the good faith of the prosecutor.

3. Criminal law ⇐1171(1)

Persistent asking of questions which trial court erroneously excluded was not prejudicial to defendant, where matter was already legally before jury and defendant was given opportunity of presenting the only defenses he had to the testimony and the court gave a full and fair instruction to the effect that jury must draw no inferences from any questions asked to which objection had been sustained, nor to the statements made by prosecutor.

4. Criminal law ⇐1037(1)

Generally alleged misconduct of district attorney cannot be considered on appeal in absence of assignment of error made during trial of cause, except that, where misconduct is so prejudicial that an instruction to jury could not cure it, appellate court will consider the matter.

---

Appeal from Superior Court, City and County of San Francisco; Daniel R. Shoemaker, Judge.

William J. Raleigh was convicted of violating the Dangerous Weapons' Control Law, and he appeals.

Judgment affirmed.

Joseph P. Lacey and Harmon D. Skillin, both of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Defendant, an ex-convict, was convicted of violating the Dangerous Weapons' Control Law of 1923, Stats.1923, p. 695, as amended, in that he had in his possession

and under his custody and control a certain firearm capable of being concealed on his person. Defendant does not challenge the sufficiency of the evidence to justify the verdict, but makes two contentions: First, that the district attorney was guilty of prejudicial misconduct; and secondly, prejudicial error of the court in admitting certain testimony.

Defendant lived in a home on Clay Street in San Francisco, owned by Jensen, his stepfather, and occupied by a number of people as tenants. The house is divided into three apartments. Jensen and one Adams occupied a kitchen and bedroom on the second floor. A Mr. and Mrs. McCune occupied another apartment on that floor. Defendant, his wife, her two married daughters and their husbands, her three younger children and two grandchildren occupied the first floor. There is a basement below the Raleigh kitchen, to which everyone in the house has access. The basement is entered through an outside door which has a combination lock on it to keep the children out. The combination was written above the door so that anyone could read it. Defendant, who was a painter by trade, stored his tools and paints and brushes in this basement.

On February 23, 1947, while defendant was in the county jail, two police officers acting upon information they had received, went to the Raleigh home. They were admitted by Mrs. Raleigh, and although they had no search warrant, upon being informed that they had come to search the house, she willingly allowed a complete search to be made. One of the officers, accompanied by Mrs. Raleigh, went to the bedroom occupied by her and defendant. In her presence, the officer found concealed up under a mattress a loaded .45 calibre automatic clip in a black velvet bag. Mrs. Raleigh stated that she had never seen it before.

In the meantime the other officer went to the basement. Defendant's stepson, 12 years of age, opened the combination lock on the door to let him in. In the presence of one Giandrea, the husband of one of Mrs. Raleigh's daughters, and who lived on the premises, the officer found two fully loaded .45 calibre automatics. They, together with two fully loaded separate clips, were in a manila bag or envelope which was reinforced by another light-proof bag or envelope, the kind used for photographic materials. The bag and contents were concealed in a "little niche" between the walls. Another officer testified that after defendant's arrest upon the charge here he asked defendant about the guns and how they came to be where they were found. "At first, he said he had no knowledge of them and then he said, 'I know how they got there and I know who put them there,' and I said, 'Who?' and he just laughed." Mrs. Raleigh, Mrs. McCune, Mr. and Mrs. Giandrea, Jensen, and a man named Petersen, who worked with defendant as a painter and had been in the basement many times, all denied owning the guns or ever having seen them in the basement or in defendant's possession.

To connect defendant directly with the ownership or possession of the guns, the prosecution called one Ramos. It is in connection with his testimony that the claimed error and misconduct arises. Ramos testified, without objection, that he was in the county jail on a charge of three counts of burglary. He had known defendant for about six or eight months. One Viles, a son-in-law of Mrs. Raleigh, had brought defendant to him. (Mrs. Raleigh testified that Ramos came to the house any time he felt like it. Another son-in-law, Giandrea, had also seen Ramos there on occasions.) When shown one of the guns in evidence, which had an ivory handle, Ramos stated that he had seen defendant with a similar gun in defendant's home, and two or three times in an automobile; that on one occasion, apparently January 28th, while defendant and a third party were in "the car" (the witness did not know whose car it was) Ramos took the gun out of the glove compartment, put it on the floor of the car or in a brief case, and later handed it to defendant. Ramos went with defendant to the latter's home and defendant did not hand the gun back or put it in the glove compartment. Witness saw the gun in defendant's home on three or four occasions. He had never seen the other gun before it was shown him on the witness stand. On cross-

examination Ramos testified that he was a professional photographer; that the type of black bag found in defendant's bedroom and the type of envelope were ones generally used in photographic work, the bag being used for carrying a reflector or flash gun, and that he had owned such a bag, and that it had been in witness' home and in defendant's basement. Also he testified that he had seen the ivory-handled gun before in such an envelope in defendant's basement. The forgoing evidence, which was clearly admissible, is sufficient to establish the defendant's guilt, if the jury believed Ramos, and it is evident that in spite of the fact that Ramos was then in jail on three burglary counts, the jury believed him.

This brings us to the incidents as to which prejudicial error is claimed. Ramos had just testified, without objection, that he had seen the ivory handled gun two or three times in the car. The district attorney then asked a question indicating that the two men were going on a burglary with the guns. The defendant's objections to these questions were sustained by the court. The district attorney then offered to prove that the defendant used the gun in a burglary about a month before the officers found it. The court refused to admit the evidence. Again, later, the district attorney attempted to bring out the same matter. The objection was sustained. In spite of the ruling he asked practically the same question again. The court once more sustained an objection.

On cross-examination, the attorney for defendant asked Ramos if, in April, he, defendant, and one other were in the municipal court on three charges of burglary growing out of a confession by Ramos. The witness replied that he did not know whether they did or not. She then asked him if the charges against Raleigh had all been dismissed, and he stated they had. On redirect examination the district attorney referred to the three burglary charges and then started to ask "In those three burglaries—" He was interrupted by defense counsel who strenuously objected to the prosecution proceeding on these lines. The court made no ruling. The district attorney then asked: "Any of those jobs or burglaries that you were brought up before the Municipal Court for, was Raleigh the possessor of this gun?" The court overruled the objection. Upon a repetition of the question by the district attorney the following occurred:

"Q. On any of those three burglaries that you were charged with, did you ever see this gun, People's No. 3 in evidence, on Mr. Raleigh? A. No, we didn't pack any guns on the jobs.

"Q. You didn't pack any guns on the jobs? A. They were left in the automobile.

"Q. Let's put it this way: when you went out of the automobile to go on these jobs, were these guns, also this gun, People's No. 3, carried by Mr. Raleigh? A. He never packed it.

"Q. Never packed it to the job? A. No.

"Q. Was it in the automobile? A. It was in the automobile.

"Q. Now—is that one of the three occasions on which you already told the Jury that you took this gun from the glove compartment of the automobile and handed it to Raleigh; is that one of those three jobs? A. Yes."

Defendant contends that the admission of this testimony was prejudical error.

Thereafter the district attorney asked the following questions: "Q. Now, going back to the three charges of burglary you were asked about by Mrs. Cofer [attorney for defendant], Mr. Ramos, could you tell us the first one—the date the first one took place?" The court sustained the objection. The district attorney then asked: "Q. Tell us the second of those three burglaries you were with the defendant?" The court again sustained the objection. The district attorney persisted: "Q. Tell us the third, or the last one in which the defendant participated, in which the defendant had the bone-handled gun?" The court again sustained the objection.

Defendant contends the admission of the above-quoted testimony and the persistent asking by the district attorney of questions which the court had ruled inadmissible deprived the defendant of a fair trial.

Before discussing the alleged misconduct of the district attorney, we will consider the admissibility of the admitted testimony, and of that which the district attorney was trying to get into evidence.

[1] In view of the fact that a number of people had access to the Jensen basement (it was the theory of the defendant that almost anyone could have entered the basement and placed the guns there), it was important, in order to convict defendant of having the guns under his custody and control, to show that the defendant had the ivory-handled gun in his possession on other occasions. Ramos testified that he had seen that gun in defendant's possession on other occasions and that on one occasion he had taken the gun from the glove compartment of the car and handed it to defendant. Defendant contends that that is as far as the prosecution could go; that it is immaterial what defendant was doing or going to do with it. The fact of possession could be shown but not the purpose. That is limiting the testimony too narrowly. The defendant, although he did not testify, by his plea of not guilty, denied any connection whatever with the gun. When the defendant Ramos testified that he had seen the defendant with the gun, the jury were entitled to be told what the defendant was doing with it, not for the purpose of connecting defendant with another crime or other crimes (although incidentally, it would do that), but so that the jury could determine whether Ramos was telling a reasonable story or not. For a witness to say, in effect, "Oh, yes, on a certain day I saw the defendant with the gun in an automobile," and stop there, would not be too convincing. The witness is entitled to explain what the defendant was doing with the gun in order for the jury to determine whether the witness' story is reasonable or unreasonable, believable or unbelievable.

People v. Canales, 12 Cal.App.2d 215, 55 P.2d 289, in which a hearing was denied by the Supreme Court, is a closely analogous case. There the defendant, an ex-convict, was charged with the same offense as the defendant here, except that the deadly weapon was a "billy." To prove his ownership of the billy which was found in the car in which were defendant and two others, the trial court admitted evidence, first, that defendant had engaged in a fight some two months previous to the trial; secondly, that he had told a strike breaker, "You are not going to last very long on that job, we are going to fix you fellows"; thirdly, that he had previously drawn a knife on a strike breaker; and fourthly, that he previously drove in front of a boarding house catering to employed miners, and shouted vile names at the proprietors. While the admission of such evidence seems to be going a long ways, the rule announced by the court is sound. The court said, at page 220 of 12 Cal.App.2d, page 291 of 55 P.2d: "It is the claim of appellant that these 'other offenses' are so different in their elements to the offense for which he was on trial that it was error to admit them.

"It will be recalled that appellant denied possession or ownership of the weapons in evidence, intimating they had been planted in the car; therefore, where there is a denial of the possession of the instrument any evidence which tends to show a motive or reason to possess such an instrument is admissible as bearing upon the fact of possession."

In People v. Cato, 13 Cal.App.2d 391, 56 P.2d 1245, also a case in which the Supreme Court denied a hearing, defendant denied owning the shotgun used in a holdup. Evidence was admitted showing that in a previous crime, defendant had a shotgun in his hands. The court said, page 394 of 13 Cal.App.2d, page 1246, 56 P.2d: "Appellant, Cato, claims that the trial court committed error in the admission of evidence disclosing the commission of another offense, and in the giving of instructions relative to the defense of alibi, and also the degree of the offense and the imposition of the particular sentence in the case. It is true the rule is well established that a defendant in a criminal cause can be tried for no other offense than that charged and it is not competent for the prosecution to prove the commission of independent crimes by the defendant, the evidence of which has no tendency to prove some material fact in connection with the particular crime charged. However, the rule has many exceptions. Where the evidence is otherwise competent, it cannot be

excluded merely because, in producing such evidence, there is shown the commission of other offenses or wrongful acts. 8 Cal.Jur. 60–73. Thus where a person denies knowing another it is competent to show that the person knew the other, even though such a showing tends to bring out the commission of an independent offense. People v. Morales, 143 Cal. 550, 77 P. 470. So, also, where a defendant denies that he had a particular instrument used in the commission of an offense it is competent to show by other evidence that such instrument was possessed by the defendant at a previous time, even though the testimony tends to show independent wrongful acts. People v. Madison, 3 Cal.2d 668, 46 P.2d 159. This is the precise situation here presented. Defendants had denied knowing each other and had likewise denied having in their possession, or ever having seen, a sawed-off shotgun. It was competent, therefore, for the prosecution to show that on a previous occasion appellant was seen with a shotgun in his hands, even though such evidence tended to reveal the commission of another wrongful act." See also People v. Bingham, 44 Cal.App.2d 667, 669, 112 P.2 941, to the same effect.

The court very properly gave an instruction limiting the use which the jury could make of the admitted testimony. It pointed out that it was not admitted to show that defendant had committed other crimes, but was limited to any bearing the jury might believe it had in tending to show that the defendant was the owner of the gun and that it was in his custody when found in his house.

It is clear that under the rule of the foregoing authorities, evidence of defendant's prior possession of the gun, and the circumstances thereof, was admissible even though such evidence tended to show independent wrongful acts. It is contended, however, that even though such rule might apply under ordinary circumstances, it cannot apply where, as here, there was a court dismissal of the independent crimes shown. However, the rule is well settled in England as well as in this country that an acquittal (and of course a dismissal at the preliminary examination is not even as strong in effect as an acquittal) does not prevent the admissibility of the evidence. As said in Wharton's Criminal Evidence, 11th Ed., vol. I, p. 571, sec. 363: "The question has been raised, in criminal trials, whether a previous indictment for, or acquittal or conviction of, the other crime, has any effect upon the admissibility of the evidence of such other crime. It may be safely stated that the almost universal judgment is that neither of these circumstances will operate to the rejection of such evidence. And it is believed that most of the cases that have touched the subject have not only so held, but, on requirement, have decided that in cases of indictment and conviction, the record itself may be introduced. It has been sometimes strenuously urged that, while an indictment or a conviction might be admissible, yet, where the fact is that the accused has been acquitted of the crime sought to be used as evidence, that fact should render it inadmissible, since to receive it would be to put the accused again in jeopardy and also to contravene the record. The courts which have spoken upon the subject have all said, in substance, that the accused could not be put in jeopardy of a crime of which he had been acquitted, but that he was in jeopardy of the crime for which he was being tried; and that evidence of the transactions which had resulted in his acquittal was admissible if competent to show a fact material to the issue being tried; and that, as to the other objection, the particular ground of his acquittal was not matter of record, but matter of presumption only, which would be allowed only until the fact itself appeared; and that, under these circumstances, it could not be said that the record was contravened. Moreover, in some instances, such evidence has been held not barred by the Statute of Limitations." See also People v. Lachuk, 5 Cal.App.2d 729, 43 P.2d 579; People v. Spahn, 28 Cal.App.2d 294, 297, 82 P.2d 474; People v. Berry, 191 Cal. 109, 122, 215 P. 74; People v. Follette, 74 Cal. App. 178, 212, 240 P. 502.

[2] The final question in the case is whether the district attorney was guilty of prejudicial misconduct in continually asking questions which the court had ruled (although erroneously) inadmissible. Gen-

erally speaking, such conduct could constitute misconduct. Whether it does or not depends upon a number of circumstances, including the good faith of the prosecutor. In any event, such questions and offers of proof should be in the absence of the jury. Wigmore on Evidence, 3rd Ed., vol. VI, sec. 1808. Where the court has ruled that certain evidence is inadmissible, even though the court is wrong, to persist in repeating the same questions, even though in different form, gives the jury the impression that had the witness been permitted to answer, the answer would have been favorable to the prosecution. This leaves the defendant ordinarily in a helpless situation. He either has to leave that impression with the jury, or attempt to explain and thereby admit evidence which both the court and he believe to be inadmissible. It may be, too, that in such case, if the witness had been permitted to answer the question, his answer would have been the opposite of the one the jury would assume from the question itself.

[3] Did the defendant here suffer prejudice by the conduct of the district attorney? The record shows that he did not. In the first place, the court, although at first sustaining objections to similar questions and even later again ruling similarly, did, on one occasion, admit the testimony, so that the matter legally got before the jury. The answer of the witness showed that the district attorney was acting in good faith in his questioning. In the second place, the defendant was given the opportunity of presenting to the jury the only defenses he had to the testimony in view of the fact that he refused to take the stand, namely, that the three burglary charges testified to by the witness had been dismissed, and that the gun had not been used in the burglaries, but had only been present in the car which took defendant and the witness to and from the scenes of the crimes. These matters were brought out in the testimony of Ramos. It was for the jury to determine whether the fact that the charges had been dismissed weakened in any way the testimony of Ramos that the gun belonged to defendant.

[4] It is interesting to note that at no time during the trial did the defendant at any time assign the action of the district attorney as misconduct. It has been held that where there has been no such assignment, the error, if any, will not be considered on appeal. People v. Webster, 36 Cal.App. 540, 172 P. 768; People v. Brown, 71 Cal.App. 181, 235 P. 72. There is, however, an exception to that rule to the effect that where the misconduct, if any, is so prejudicial that an instruction to the jury could not cure it, this court will consider the matter even though no assignment was made in the lower court. However, that exception is unimportant here, for as we have pointed out, it is extremely doubtful if even without it the action of the jury would have been different. The court gave a full and fair instruction to the effect that the jury must draw no inferences from any questions asked to which objection was sustained, nor to statements made by counsel.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.




## BREWER et al. v. SECOND BAPTIST CHURCH OF LOS ANGELES et al. *

Civ. 16023.

District Court of Appeal, Second District, Division 2, California.

Feb. 6, 1948.

Rehearing Denied Feb. 25, 1948.

Hearing Granted April 1, 1948.

**1. Libel and slander** ⇨42(3)

An action will not lie in the absence of malice for words actionable per se spoken between members of the same church during religious proceedings connected with the discipline of the church. Civ.Code, § 47, subd. 3.

**2. Libel and slander** ⇨42(3)

An article appearing in a paper which is published for circulation among members of a particular church denomination is

* Subsequent opinion 197 P.2d 713.

privileged in the absence of proof of actual malice.

**3. Libel and slander ⚖101(4)**

Malice is not inferred from the fact of publication of a written communication which is conditionally privileged, but when the communication is shown to have been conditionally privileged the burden is cast upon plaintiff of proving malice.

**4. Libel and slander ⚖42(3)**

Documents containing accusations against defendants actionable per se were privileged communications between church members and not actionable in absence of evidence of malice on part of defendants where the preparation of the documents and the reading of them to church members assembled at regular business meeting were exclusively in connection with disciplinary action then pending against plaintiffs before members of the church.

**5. Libel and slander ⚖42(3)**

A published article giving an account of expulsion of plaintiffs from church to which plaintiffs had belonged and containing accusations actionable per se was a privileged communication not actionable in absence of evidence of malice where the publication was for circulation among members of the church. Civ.Code, § 47, subd. 3.

---

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Reverend A. L. Brewer and W. W. Fisher against the Second Baptist Church of Los Angeles, a religious corporation, Reverend J. Raymond Henderson, John H. Hilton and R. A. Hudson for the publication of alleged libelous statements. From a judgment in favor of plaintiffs, defendants Henderson, Hilton and Hudson appeal.

Judgment reversed.

Jerry Giesler, Meyer M. Willner and Thomas L. Griffith, Jr., all of Los Angeles, for appellants.

A. Brigham Rose, of Los Angeles, for plaintiffs-respondents.

McCOMB, Acting Presiding Justice.

From a judgment in favor of plaintiffs after trial before a jury in an action to recover damages for the publication of alleged libelous statements, defendants Henderson, Hilton and Hudson appeal.

Facts Disclosed by the Record

On July 16, 1945, Reverend William A. Venerable and plaintiffs herein filed an action in equity to void certain elections conducted by the Second Baptist Church of Los Angeles, et al. A demurrer was sustained to the complaint and thereafter the action was dismissed by Mr. R. C. W. Friday who appeared as attorney for plaintiffs in the action.*

Early in October, 1945, there was a meeting of the deacons of the Second Baptist Church of Los Angeles, at which was discussed the question of taking proceedings to oust plaintiffs herein from the church. Defendant Hilton, who was chairman of the board, defendant Hudson, who was secretary, and defendant Henderson, pastor of the church approved of the following letter dated October 6, 1945, which was mailed to plaintiff Brewer:

"Dear Sir: This is to inform you that at a regular meeting of Deacon Board of Second Baptist Church it was unanimously agreed to summon you to appear before the regularly church quarterly conference on Friday, October 12, 1945, where charges will be filed against you. Said charges have to do with your recent attempt, aided by others, to bring our church into court. Your complaints were so utterly false that the Judge would not permit the matter to come to trial. You have done the officers, minister, and entire church a serious injury which you can never correct and for which you are responsible. Disciplinary action by the church will be recommended. If you wish, you may make any statement you desire to the church, but whether present or absent the matter will come before the

* The reason for the dismissal is stated by plaintiffs as follows:

"It appears that the Reverend Venerable's counsel, Mr. Friday, was having difficulty in preparing a pleading which was not vulnerable to demurrer, and recognizing that his counsel was not qualified, asked him to dismiss the case * * *, and the same was dismissed on September 11th * * *."

church. By order of Board of Deacons, John H. Hilton, Chairman, R. A. Hudson, Secretary."

Two yellow sheets accompanied the letter which read thus:

"October 12, 1945. To the membership of the Second Baptist Church, Los Angeles, California, we, the Deacon Board of the above church, at our regularly monthly meeting took under serious consideration the recent attempt on the part of two members of our church, aided by a third, recently dismissed from the church, to bring our church into court. One of these men was the Reverend W. A. Venerable, who because of a recent vile attack upon the deacons and minister, was dismissed from our fellowship. The other was Reverend A. L. Brewer, a noncontributing member, and the other was Mr. Eugene Fisher, former trustee, who was put out of office because of his vile spirit and utter disregard for leadership. We can bring no action against the Reverend Venerable, who, under the role of a minister of Jesus, is one of Satan's choicest tools, because he is not a member of our church. If the case had gone to trial this fact would have been brought to light. We do hold the other two, Brewer and Fisher, responsible and do charge them before the church as follows: We charge that they both complained to the civil authorities that our elections of 1942 of both deacons and trustees when we enlarged our board were illegal. The Judge ruled their complaint false and would not permit trial.

"We charge that they complained that the officers of the church were planning to withdraw church funds from the Liberty Savings Loan Company and the Security-First National Bank and misuse them, and that the Judge ruled their complaint false.

"We charge that they amended their complaint to the effect that in our business meetings we failed to send written notice to each and every member. The Judge ruled that they were again in error, due to the fact that the church has a constitution, which provides, not for a written notice but for the notice of said meetings 'twice on Sunday, morning and evening prior to said meeting' Article 13, Section C.

"We charge that they both in reality admitted their own error by reason of the fact that they could not find another ground on which to amend their complaint. On the other hand, through their lawyer, they offered not to even try to amend their complaint if we, the Second Baptist Church, would allow them to drop the matter, and we, the church, pay $175.00 court costs which they would have to pay if they lost. We refused to let them drop the case.

"We charge that on September 20th, when they had their final opportunity to attempt to amend their complaint and try to get us into court trial, not one of the complainants appeared in court. This was an open acknowledgment of failure and a clear vindication of the correctness with which the business affairs of the Second Baptist Church are conducted. In consequence of their failure, the attempted effort to embarrass the officers, minister and the church was automatically dropped, and the Judge signed the order compelling them to pay to the court the $175.00 which had already been paid by our church. The money will be refunded to the Second Baptist Church by the complaining parties.

"We further charge that the action of both of these men in attempting to bring us before the civil authorities on grounds of proven falsity has hurt the prestige and the good name of the church, its officers, and minister, because of the widespread newspaper publicity given to it.

"We charge that this attempt to bring the church into court has caused us to spend considerable and unnecessary funds of the church for attorneys' fees which we might have used for our church work.

"We finally charge that both of these men have by their unwarranted actions and downright falsehood revealed themselves as totally unworthy of the continued confidence, respect and fellowship of a great church which they have so grieviously wronged.

"We do therefore unanimously recommend that the hand of fellowship be withdrawn from them and they both be excluded from the church.

"The Deacon Board of Second Baptist Church, John H. Hilton, Chairman, R. A. Hudson, Secretary."

A similar set of documents was addressed and sent to defendant Fisher. Thereafter on October 12, 1945, a business meeting was held by the church and the aforementioned documents presented to the meeting. Plaintiffs did not appear at such meeting, and the "hand of fellowship" was withdrawn from both plaintiffs and they were excluded from the church.

Subsequently there appeared in the National Baptist Voice an article giving an account of the expulsion of plaintiffs from the Second Baptist Church of Los Angeles. Defendants, did not report to the publication the action of the church in expelling plaintiffs. There was, however, placed in a local negro newspaper an account of the action of the board of deacons taken on October 12, 1945.

Question

*Were defendants liable for the publication of the libelous matter contained in (1) the papers sent to plaintiffs, and (2) the account of plaintiffs' expulsion from the church published in the National Baptist Voice?*

This question must be answered in the negative and is governed by these rules:

[1] 1. An action will not lie in the absence of malice for words actionable per se spoken between members of the same church during religious proceedings connected with the discipline of the church. (Sec. 47, subsection 3, Civil Code; Anderson v. Malm, 198 Ill.App. 58, 62; Landis v. Campbell, 79 Mo. 433, 440, 49 Am.Rep. 239. See also Snively v. Record Pub. Co., 185 Cal. 565, 574, 198 P. 1.)

[2] 2. An article appearing in a paper which is published for the circulation among members of a particular denomination is privileged in the absence of proof of actual malice. (Redgate v. Roush, et al., 61 Kan. 480, 59 P. 1050, 48 L.R.A. 236.)

[3] 3. Malice is not inferred from the fact of publication of a written communication which is conditionally privileged, but when the communication is shown to have been conditionally privileged the burden is cast upon plaintiff of proving malice. (Simmons v. Dickson, 110 Tex. 230, 232, 213 S.W. 612, 218 S.W. 365.)

Applying the foregoing rules to the facts of the present case it appears that the alleged defamatory statements upon which plaintiffs rely were statements contained in the documents mailed to plaintiffs and the article published in the National Baptist Voice. With respect to the documents mailed to plaintiffs the evidence discloses that plaintiffs were members of the Second Baptist Church of Los Angeles; that some time prior to October 12, 1945, at a meeting of the board of deacons of the church a discussion occurred relative to the taking of disciplinary action against plaintiffs by reason of the fact that they had prior thereto joined with Reverend Venerable in instituting an action against the church and certain members thereof, including the defendants in this case; that demurrers were sustained to the original and amended complaints; that plaintiffs in such action had failed to amend their amended complaint and the action had been dismissed. When the matter of disciplinary action against plaintiffs come up before the board of deacons, defendants Hilton and Hudson were authorized and directed by the board to prepare a statement against Messrs. Brewer and Fisher. Defendant Hilton, acting as chairman of the board, and defendant Hudson, acting in his capacity as secretary, under authority conferred upon them by the board, prepared and presented to the board the charges contained in the documents sent to plaintiffs Brewer and Fisher, who were notified to appear before the meeting of the board on October 12th to answer the charges. However, neither plaintiff saw fit to attend this meeting. The statements contained in the documents were accusations prepared by defendants in connection with church disciplinary action against plaintiffs.

The matter was exclusively a church affair, concerning plaintiffs' membership in the church and their right to continue as members thereof. The preparation and presentation of these exhibits to the board of deacons and the reading of them to the members assembled at the regular business

meeting were exclusively in connection with disciplinary action then pending against plaintiffs before members of the church.

[4, 5] Therefore under rule 1, supra, such documents were privileged communications between the members of the church, and under rule 2, supra, the publication in the National Baptist Voice was likewise a privileged communication. Under rule 3, supra, since the publications were privileged, neither was actionable in the absence of evidence of malice on the part of defendants.

As an examination of the record fails to disclose any evidence which would sustain a finding of malice upon the part of defendants, or any of them, and plaintiffs in their brief by failing to direct our attention to any such evidence concede the lack thereof, the judgment predicated upon the alleged libelous publications must be reversed.

It is so ordered.

WILSON, J., concurs.

MOORE, P. J., deeming himself disqualified, did not participate in the foregoing opinion.




## In re KESSLER'S ESTATE.

## LINTON v. WALKER et al. *

Civ. 16276.

District Court of Appeal, Second District, Division 2, California.

Feb. 5, 1948.

Rehearing Denied Feb. 25, 1948.

Hearing Granted April 1, 1948.

**1. Appeal and error ⇐151(3)**

Under statute permitting any "party aggrieved" to appeal, executors, administrators and trustees, being in their official capacities, indifferent persons as between real parties in interest and having no concern as to who shall bear the costs of litigation are not "aggrieved parties" entitled to maintain an appeal from an order of probate court directing payment of funds from an estate. Code Civ. Proc. § 938.

See Words and Phrases, Permanent Edition, for all other definitions of "Aggrieved Party".

**2. Appeal and error ⇐151(1), 782**

Under the statute permitting any "party aggrieved" to appeal, an appellant must be aggrieved by the order from which the appeal is taken, and if not aggrieved and a party, his appeal will be dismissed. Code Civ.Proc. § 938.

**3. Appeal and error ⇐151(3)**

Under statute permitting any "party aggrieved" to appeal, coexecutors and testamentary trustees under a will who were neither legatees nor devisees nor beneficiaries of the trust, were not "aggrieved parties" entitled to maintain an appeal from an order of the Probate Court allowing payment of fees from the estate for services rendered to the minor beneficiary by her guardian ad litem. Code Civ.Proc. § 938.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Proceeding in the matter of the estate of Dorothy Walker Kessler, also known as Dorothy A. Kessler, deceased, by C. M. Linton, guardian ad litem for Karen Dee Kessler, a minor, contested by Fred Walker and Lulu Walker, for payment of guardian ad litem fees. From an order allowing the fees, contestants appeal. On motion to dismiss the appeal.

Appeal dismissed.

Boller, Suttner & Boller, by Thomas R. Suttner, all of Los Angeles, for contestants-appellants.

C. M. Linton in pro. per.

McCOMB, Justice.

Appellants Fred Walker and Lulu Walker are Co-executors and testamentary trustees under the last will and testament of Dorothy Walker Kessler, decedent. The sole beneficiary under the will of decedent and of the testamentary trust created by

* Subsequent opinion 196 P.2d 559.

such will is Karen Dee Kessler, the minor child of decedent.

On July 14, 1947, the probate court upon application of respondent allowed and ordered payment of fees from the estate of decedent for services rendered to Karen Dee Kessler, a minor, by this respondent as her guardian ad litem. An appeal has been taken from this order by the executors.

Respondent now moves to dismiss the appeal for the reason that:

*Appellants are not aggrieved parties and are therefore not entitled to appeal.*

This proposition is tenable and is governed by these general rules:

[1] 1. Executors, administrators and trustees are in their official capacity indifferent persons as between the real parties in interest. They therefore have no concern as to who shall bear the costs of litigation and are not *aggrieved parties,* within the meaning of section 938 of the Code of Civil Procedure, entitled to maintain an appeal from an order of the probate court directing payment of funds from an estate.[1] (Goldtree v. Thompson, (1890) 83 Cal. 420, 422, 23 P. 383.)[2]

[2] 2. In order to maintain an appeal an appellant must be aggrieved by the order from which the appeal is taken. If not an aggrieved party he has no reason for taking an appeal and his appeal will be dismissed. (Rodgers v. Transamerica Corporation, 6 Cal.App.2d 340, 341 et seq., 44 P.2d 635; Nichols v. Nichols, 135 Cal.App. 488, 491, 27 P.2d 414.

[3] Applying the foregoing rules to the facts of the instant case, since it appears that appellants were merely co-executors and testamentary trustees under the will of decedent, and that neither of them is a legatee or devisee under the will or a beneficiary of the trust established thereby, they are not under rule 1, supra, aggrieved parties entitled to maintain an appeal. Therefore, under rule 2, supra, the appeal must be dismissed.

In re Estate of Rawitzer, 175 Cal. 585, 166 P. 581, relied on by appellants, is here inapplicable for in the cited case the appellant was a direct devisee of certain real property of the estate of Rawitzer, by which bequest the appellant was empowered to take immediate possession of the property, and title vested on the death of the testator. Therefore it was held that appellant had a vested interest in the property which entitled him to oppose a petition for the sale thereof and was entitled to appeal from an adverse decision of the probate court. Such a situation does not obtain in the instant case. Here the estate consists only of personalty, title to which did not vest at the time of the death of decedent.

The appeal is dismissed.

MOORE, P. J., and WILSON, J., concur.

---

[1] To this general rule there are certain well recognized exceptions which are not applicable to the present appeal:

First: In cases involving the construction of the proper exercise of the duties of a fiduciary officer, his interest is such as to permit appeal from an order of the trial court defining his powers and duties. (District Bond Co. v. Cannon, 20 Cal.App.2d 659, 664, 67 P. 2d 1090.)

Second: An executor may appeal from an order (a) directing the payment of a family allowance from an estate, or (b) where an order presents a question as to the right or power of a trustee to comply with it when obedience to such order may result in personal liability attaching to the fiduciary officer. (In re Estate of Snowball, 156 Cal. 235, 237, 104 P. 446; In re Welch's Estate, 106 Cal. 427, 429, 39 P. 805.)

[2] The mere fact that the rule as announced in Goldtree v. Thompson, supra, has been accepted by the legal profession and not questioned for over half a century is cogent evidence of the soundness of the rule.

83 Cal.App.2d 474

## PARKER v. OWEN.

Civ. 16191.

District Court of Appeal, Second District, Division 2, California.

Feb. 5, 1948.

**Appeal and error ⇐105**

An order denying motion to dismiss action before any evidence was received was not appealable.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Gladys L. Parker against Margaret M. Owen. From order denying plaintiff's motion to dismiss action before any evidence was offered, the plaintiff appeals.

Appeal dismissed.

Kimpton Ellis, of Los Angeles, for appellant.

Joseph N. Owen, of Los Angeles, for respondent.

McCOMB, Justice.

This is a motion to dismiss an appeal from an order of the trial court denying plaintiff's motion to dismiss the action before any evidence was offered.

This is the single question presented for determination:

*Is an order denying a motion to dismiss an action before any evidence is offered an appealable order?*

This question must be answered in the negative for the reason that an order denying a motion to dismiss an action before any evidence is received is not an appealable order. (Perry v. Magneson, 207 Cal. 617, 620, 279 P. 650; Andersen v. Superior Court, 187 Cal. 95, 97, 200 P. 963; Garthwaite v. Bank of Tulare, 134 Cal. 237, 243, 66 P. 326; Halsey v. Sears, 90 Cal.App. 306 et seq., 265 P. 858; Forrester v. Lawler, 14 Cal.App. 170, 171, 111 P. 284.)

In view of the foregoing rule the appeal must be dismissed. It is so ordered.

MOORE, P. J., concurs.

WILSON, Justice.

I concur.

It should be said, however, that the motion to dismiss ought to have been granted since the answer does not state an affirmative defense.






## KROG v. KROG. *

Civ. 16143, 16224.

District Court of Appeal, Second District, Division 1, California.

Jan. 28, 1948.

Hearing Granted March 25, 1948.

**1. Divorce ⇐195, 311**

Whether trial court erred in deciding matters of law at trial of divorce action and whether findings were justified by the evidence were not pertinent to decision of respondent's motion to stay proceedings upon appeal until appellant should comply with orders of Superior Court relating to attorneys' fees, costs, support of minor child, etc.

**2. Divorce ⇐195, 311**

Proceedings upon husband's appeal from divorce decree and orders for payment of attorneys' fees, costs and for support of minor child would be stayed pending compliance with such orders, where wife was unable to pay attorneys' fees or costs on appeal or to support child without borrowing money and husband had sold property in state and departed and his whereabouts were unknown to wife.

**3. Divorce ⇐195, 311**

Where husband, failed to comply with orders requiring payment of attorneys' fees, costs and for support of minor child, motion to stay proceedings upon his appeal from divorce decree and such orders pending compliance therewith was the proper remedy.

* Subsequent opinion 198 P.2d 510.

Motion to stay proceedings upon an appeal from Superior Court, Los Angeles County; Elmer D. Doyle and Paul Vallee, Judges.

Action for divorce by Darinka Krog against Roy Krog. From a judgment granting plaintiff a divorce and orders concerning payment of attorneys' fees, costs and for support of minor child, defendant appeals, and plaintiff moves to stay proceedings upon appeal until defendant shall comply with such orders.

Motion granted.

Gordon W. Levoy, of Los Angeles, for appellant.

Hahn, Ross & Goldstone and E. L. Saunders, all of Los Angeles, for respondent.

BARTLETT, Justice pro tem.

On January 7, 1947, a final decree of divorce was entered in this action by the terms of which appellant was ordered to pay respondent $100.00 per month for the support of the child, $300.00 for medical expenses, $1,750.00 attorneys fees, and $75.00 costs. From this judgment the defendant appealed.

At a hearing on April 15, 1947 the court found that appellant had the ability to comply with these orders, had failed to comply with any of them, held him in contempt and issued a bench warrant for his arrest. Also at that time the court ordered that he pay forthwith $1,000.00 on attorneys fees and $20.00 costs on appeal, and further that he deposit with the court trustee $7,500.00 as security for the sums then due and to become due. Appellant has complied with none of these orders. He appealed from them on June 12, 1947. On July 25, 1947, appellant filed a petition for a writ of certiorari seeking a review of the jurisdiction of the court on these matters, which was denied by the District Court of Appeal on August 5, 1947 (Civil No. 16110). A petition for rehearing was denied August 18, 1947, and a petition for a hearing in the Supreme Court was denied October 18, 1947.

Appellant has sold his property in California, departing from the state, and his whereabouts are unknown to respondent.

Respondent's affidavit on this motion discloses that she has no money attorneys fees or costs on appeal, and that she is supporting the minor child by borrowing money. No affidavit of appellant himself is filed by him in opposition to this motion. There is an affidavit of his lawyer which meets none of the issues involved herein but is noteworthy in that it fails to disclose where appellant is located.

[1] Appellant's opposition to this motion is based upon his claim that the court erred in deciding certain matters of law at the trial and that certain findings are not justified by the evidence. These matters may be properly before the court in a consideration of the appeal but are not pertinent to the decision of this motion.

Appellant relies on Pugliese v. Pugliese, 200 Cal. 652, 254 P. 266, as authority that this motion should be denied. The denial of the motion in that case was strictly on the ground that there had been an insufficient factual showing to justify granting of the order. The record there showed that the appellant had made all payments required for the support of the minor child and for respondent's costs. The only matter in which he was delinquent was in regard to attorneys fees. Upon a hearing charging the appellant with contempt for nonpayment of the attorneys fees the superior court held that he did not have the ability to pay and dismissed the proceedings. Furthermore, there was no showing that respondent, herself, in Pugliese v. Pugliese, supra, was not able to pay counsel to represent her on appeal. As the facts in that case in no manner parallel those of this case, it is not persuasive on the matter before us. In a proceeding of this nature it is elementary that it must depend upon the facts before the court.

[2, 3] Taking into consideration all of the circumstances involved herein as shown by the record, if appellant desires to proceed with his attack on the judgment, there is every reason why he must expect to furnish respondent with the money to make a defense. The motion in this case affords a proper remedy for the situation shown to exist. Borenstein v. Borenstein, 11 Cal.2d 301, 79 P.2d 388.

The motion is granted and it is hereby ordered, that all proceedings on appeal be and the same are hereby stayed until such time as appellant has complied with the orders of the Superior Court made April 15, 1947 and entered in that court on April 28, 1947.

DORAN, Acting P. J., and WHITE, J., concur.




83 Cal.App.2d 459

**PEOPLE v. HADDOX.**

Cr. 4163.

District Court of Appeal, Second District, Division 1, California.

Feb. 3, 1948.

**Larceny** ⚖65

Evidence sustained conviction of grand theft for "purse snatching".

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Clarence Haddox was convicted of grand theft and from the judgment and an order denying his motion for new trial, he appeals.

Judgment and order affirmed.

Crispus A. Wright, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Wm. E. James, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment and from an order denying a motion for a new trial following a verdict of guilty of grand theft.

Defendant was charged by information with two offenses of grand theft after a prior conviction of a felony. The prior conviction was admitted; the jury returned a verdict of guilty of count one and not guilty of count two.

It is contended on appeal that "the evidence is insufficient to justify the verdict". The act that constituted the alleged offense was "purse snatching". The record reveals that the offense was committed at night but on a well-lighted street. The defendant was arrested shortly thereafter and was identified the same night about two hours later, by Mrs. Brown, the victim. As to identity, Mrs. Brown testified on cross-examination:

"Q. Can you tell us whether or not his hair was all the way down his neck as it is now? A. At the time I saw this man his hair was longer than it is now, and seemed to be—his hair was kind of red, like they had done something to it."

And referring to a conversation with the police officers:

"Q. When you told the police officers the description did you describe them in any other way? A. Yes. I told them that he was a colored man."

On redirect examination, Mrs. Brown testified:

"Q. Mrs. Brown, do you recall whether or not he had reddish-black hair? A. It was kind of reddish-brown. As I saw it, it was gassed. * * *

"Q. By Mr. Carr: Now, Mrs. Brown, from what you saw of the defendant's hair there now when you are looking at it, was that about the same colored hair that the man had at the time your purse was snatched? A. I told you it was still a little bit browner, because it had stuff on it. I can't explain it, because you have never seen any of it."

Defendant's counsel explained for the benefit of the court and jury that "gassed" meant as follows: "Well, your Honor, some of the young men, and particularly on the east side, they like to straighten their hair, and there is a certain form of solution known as gas, and they wash their hair out with that gas, and it makes it extremely straight, and that is what is known as 'gassed'."

There can be no question as to the sufficiency of the evidence to support the judgment. The appeal is without merit.

The judgment and the order denying defendant's motion for a new trial are and each is affirmed.

YORK, P. J., and WHITE, J., concur.




83 Cal.App.2d Supp. 819

**PEOPLE v. NOLAND.**

**Cr. A. 2325.**

Superior Court, Appellate Department, Los Angeles County, California.

Jan. 22, 1948.

**1. Automobiles ⇐324**

The term "right of way", as used in statute requiring vehicles turning right or left to yield right of way to pedestrians lawfully within intersection or adjacent to cross-walk, does not refer to a duty which pedestrian must exercise but something which may be waived. Vehicle Code, §§ 87, 476; Civ. Code, § 3513.

See Words and Phrases, Permanent Edition, for all other definitions of "Right of Way".

**2. Estoppel ⇐52**

A "waiver" is the intentional relinquishment of a known right after knowledge of facts.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

**3. Estoppel ⇐119**

"Waiver" is ordinarily a question of fact.

**4. Criminal law ⇐824(4)**

In prosecution of motorist for failing to yield right of way to pedestrian lawfully in adjacent cross-walk in intersection, where defendant and his witnesses testified that pedestrian stopped at place safely out of way of defendant's vehicle at time when defendant could easily have yielded right of way and signaled defendant to go on, failure to instruct jury that pedestrian's conduct could have constituted a waiver of the right of way was error, even in absence of request therefor, especially in view of colloquy between trial judge and defendant in presence of jury. Vehicle Code, §§ 87, 476, 560; Civ.Code, § 3513.

Appeal from Municipal Court of City of Los Angeles; Chas. P. Johnson, Judge.

Wm. D. Noland was convicted of failing to yield right of way to pedestrian lawfully on an adjacent cross-walk and he appeals.

Reversed and remanded.

Wm. D. Noland, in pro. per.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and John W. McElheney, Deputy City Atty., all of Los Angeles, for respondent.

SHAW, Presiding Judge.

The defendant appeals from a judgment convicting him of violating section 476 of the Vehicle Code. The part of that section here involved reads:

"Whenever traffic is controlled by official traffic control signals exhibiting the words 'Go,' 'Caution,' or 'Stop,' or exhibiting different colored lights successively, one at a time, or with arrows, the following colors only shall be used, and said terms and lights shall indicate and apply to drivers of vehicles and pedestrians as follows:

"(a) Green alone or 'Go.'

"1.Vehicular traffic facing the signal shall proceed straight through or may turn right or left or make a semicircular or U turn unless a sign at such place prohibits any such turn. But vehicular traffic, including vehicles turning right or left, shall yield the right of way to other vehicles and to pedestrians lawfully within the intersection or an adjacent crosswalk at the time such signal is exhibited." More specifically the charge is that defendant violated the requirements of the last sentence just quoted by failing to yield the right of way to a

pedestrian lawfully in an adjacent crosswalk.

The evidence for the prosecution shows that the defendant, driving west on Pico Street, stopped his car at Vermont Avenue to wait for the signal. When the signal light changed to green for him he started slowly and at the same time a pedestrian eastbound in the south crosswalk of Pico Street left the curb and proceeded east across the intersection. Defendant made a left turn to go south on Vermont Avenue, and when his car entered the crosswalk, the pedestrian, who was then twenty feet out in the street, looked up and stopped. Defendant's car went through the crosswalk, missing the pedestrian by about a foot. Had the pedestrian continued walking, instead of stopping, he would have hit the side of defendant's car. This evidence, taken alone, would support the conviction, under our views of the law, as hereinafter stated; but other evidence which presents a different picture, and an erroneous declaration of the trial court as to the law applicable to it, lead us to a reversal of the judgment.

The defendant and two passengers in his car agreed in testifying that defendant's car was already in the crosswalk when the pedestrian stepped off the curb, that the defendant then stopped his car, and that the pedestrian stopped about one foot from the curb and several feet from defendant's car and motioned for the defendant to go on. The defendant then drove on past the pedestrian.

[1] The requirement of section 476 of the Vehicle Code is that vehicular traffic "yield the right of way * * * to pedestrians." The term "right of way" is defined in section 87 of the Vehicle Code as "the privilege of the immediate use of the highway." A privilege is "an advantage; an option; * * * a peculiar benefit, favor, or advantage." (50 Cor.Jur. 400.) It is "'a right * * * not enjoyed by all, a special right or power conferred or possessed by one or more individuals,'" and when used with reference to an official power it "imports a discretionary power." (Cope v. Flannery (1925), 70 Cal.App. 738, 747, 234 P. 845.) "In its natural meaning, the word privilege may be defined as a right peculiar to an individual or body." (Sacramento Orphanage etc., Home v. Chambers (1914), 25 Cal.App. 536, 542, 144 P. 317.) The right of way is not, then, a duty which the pedestrian must exercise, but something which may be waived; it comes within the rule of section 3513, Civil Code, that "Anyone may waive the advantage of a law intended solely for his benefit."

[2-4] "A waiver is an intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right and may result from an express agreement or be inferred from circumstances indicating an intent to waive." (Bastanchury v. Times-Mirror Co. (1945), 68 Cal.App.2d 217, 240, 156 P.2d 488.) "Waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts." (Roesch v. De Mota (1944), 24 Cal. 2d 563, 572, 150 P.2d 422.) "Waiver is ordinarily a question of fact." (Lyons v. Brunswick-Balke, etc., Co. (1942), 20 Cal. 2d 579, 583, 127 P.2d 924, 141 A.L.R. 1173.) Under the rule of the cases above cited, circumstances will not suffice to establish a waiver of the right of way unless they show an *intention* to relinquish it. This will not appear from a mere showing that a pedestrian whose course is likely to intersect that of a vehicle at a crosswalk hesitates, stops, jumps back or does any other act apparently impelled by uncertainty as to the safe course or desire to escape impending danger. But here the defendant's showing is that the pedestrian stopped at a place safely out of the way of defendant's vehicle and at a time when defendant could easily have yielded the right of way, and then and there signalled to defendant to go on. Such conduct could well be found to constitute a waiver of the right of way. It was, therefore, important to the defendant that the jury be properly informed as to the law applicable to the evidence presented by him.

After such a waiver by a pedestrian, the law does not require the driver to wait for the pedestrian to change his mind

and pass in front of the vehicle, or to stop and attempt to argue the pedestrian into taking the right of way or lead him across in front of the vehicle. Such a procedure could only serve to hinder and delay other traffic, without any corresponding benefit to the pedestrian, and certainly should not be read into a law whose terms do not plainly require such interpretation. See People v. McLachlan (1939), 36 Cal.App. Supp.2d 754, 758, 93 P.2d 280, where, under the similar provision of section 560 of the Vehicle Code requiring a driver to "yield the right of way" to a pedestrian in a crosswalk, we held that "when a pedestrian crossing a roadway in a crosswalk is so far from the path of an approaching automobile and proceeding in such a manner that no interference between them is reasonably to be expected, the driver of the automobile need not wait for it to develop."

The trial here took an unusual course, for the defendant, in addition to giving his version of the facts of this case, testified to a subsequent experience in which he stopped for another pedestrian he encountered, who stepped off the curb, "walked back and motioned me on." Thereupon a traffic officer asked defendant "What are you doing," the defendant replied "I am waiting for the pedestrian," and the officer threatened him with a citation for interfering with traffic if he did not go on. Defendant further asked the officer "Is that the law?" and the officer said "Yes, do as you are told." After this testimony by the defendant, the following colloquy occurred between the defendant and the court: "The Court: That is where you found out what the law was? The Witness: I know the law. The Court: What do you mean? The Witness: I mean as a layman. The Court: Now, this pedestrian at Hollywood and Vine you say walked back and got on the curb? The Witness: He did not walk back on the curb, he jumped back, he was almost up to the middle. I stopped. The pedestrian stepped back in the other lane and motioned me to go on. The Court: If some police officer told you that was the law, he didn't know what the law was."

This statement of the court in the presence of the jury was the only information they ever received as to the law applicable to the facts stated by defendant and his witnesses, and it was plainly erroneous. When the court instructed the jury, it merely read to them the part of section 476, Vehicle Code, which we have above quoted, without any explanation as to its proper interpretation in such a case as was presented by defendant's evidence. It is true, the defendant, who appeared without counsel both in the trial court and in this court, did not request any further instructions; and it may be that if this remark had not been made by the trial court, we would conclude that, in the absence of such request, the court was not required to give further instructions than the words of the statute. But we must note that two witnesses, besides the defendant, testified to his version of the facts, and the police officer, who was the only witness for the prosecution, did not deny that the pedestrian motioned the defendant to go on. Such a situation occurs so frequently that no jury would be likely to regard testimony depicting it as inherently incredible. It seems quite probable that, had the jury been instructed that the law is as we have above stated it, instead of hearing only the contrary statement made to the defendant, they would have regarded defendant's defense as established and returned a verdict accordingly.

The judgment is reversed, and the cause is remanded for a new trial.

BISHOP, and STEPHENS, JJ., concur.

31 Cal.2d 467

## PEOPLE v. WINTON.

No. Crim. 4860.

Supreme Court of California.

Feb. 10, 1948.

**Homicide** ⇐253(1)

Evidence sustained convictions of murder of the first degree.

Appeal from Superior Court, Mendocino County; Lilburn Gibson, Judge.

Paul Charles Winton was convicted of three murders in the first degree and sentenced to death. An appeal to the Supreme Court automatically followed.

Affirmed.

No appearance for appellant.

Fred N. Howser, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

CARTER, Justice.

Defendant was charged by information with the murder in October, 1947, of his wife, daughter, and son-in-law. He pleaded not guilty and not guilty by reason of insanity to all three charges. His counsel then requested his examination by alienists and suggested that he be held in the Mendocino State Hospital for a reasonable time for that purpose. Defendant also personally requested the court to send him to the hospital for a week so that he might be under observation and examination by two alienists on the medical staff. The request was granted. It was the opinion of the alienists that defendant was sane both at the time of commission of the crime charged and at the time of examination.

Upon defendant's return to court after his hospital stay, he withdrew his pleas of not guilty and pleaded guilty to the three murders. This was done with the knowledge and consent of his counsel. The court thereupon took testimony to determine the degree of the crimes. At the conclusion of the hearing the court found that the murders were all of the first degree and sentenced defendant to pay the extreme penalty. An appeal to this court automatically followed. Pen. Code, sec. 1239. Defendant is not prosecuting the appeal and has filed no briefs. He has repeatedly admitted his guilt and expressed his desire to pay the penalty imposed.

Notwithstanding these facts the record has been closely scrutinized for possible error prejudicial to defendant. None can be found. Therefore a brief statement of the facts will suffice to dispose of the appeal.

Defendant, a 52 year old half-breed Indian laborer, was born on the Del Norte County Indian reservation. His education stopped at the fourth grade. In 1916 he married a Yankee Dutch woman who later became blind as a result of syphilis. In 1930 defendant was sent to San Quentin for sexually assaulting one of his daughters, then thirteen years of age. He was paroled in 1935, returned to prison in 1936, and again released in 1942. He worked irregularly and eventually went to live with his wife. She was then receiving a pension as a needy blind person, including the rent of a small cabin owned by a lumber company.

Early in October, 1947, over defendant's strenuous objection, a daughter, her husband, and their two children also moved into the cabin. Defendant claimed that they refused to work, used up the groceries, treated him badly, and that all his efforts to oust them, including an appeal to the authorities, were in vain. For about a week preceding October 22nd, defendant considered killing the offenders. During this time he absented himself from the cabin for considerable periods and drank wine to excess. On the evening of October 22nd, after having consumed two to four quarts of wine, defendant entered the cabin, shot the son-in-law, then the daughter, and lastly his wife. He intended to kill himself also but first wished to see that the two grandchildren were safe. He drove them to the house of another daughter, and was there arrested. He admitted the killings but expressed regret only over having killed his wife. He said that the

death of the daughter and son-in-law were well deserved. Thereafter defendant made numerous statements to the same effect.

His various statements and testimony are lucid, consistent, and substantially without self-contradiction, although given at different times. They cover every phase and detail of the commission of the crimes. No ground whatsoever for reversal of the judgments is shown.

The judgments are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.




31 Cal.2d 373

## TAYLOR v. J. B. HILL CO.

L. A. 20251.

Supreme Court of California.

Feb. 2, 1948.

**1. Contracts ⇐155**

In case of uncertainty in a contract, the contract is construed most strongly against the party drafting the contract. Civ.Code, § 1654.

**2. Sales ⇐71(1)**

Under a contract for the sale of barley drawn up by defendant, any doubt in the contract whether a quoted clause limited the quantity of barley to be delivered to a defined source was required to be construed against the defendant. Civ.Code, § 1654.

**3. Sales ⇐87(3)**

In action by buyer against seller of barley under ambiguous contract for damages sustained by buyer when seller failed to deliver quantity of barley set forth in contract, evidence sustained finding that seller's obligation under contract was to deliver a certain minimum quantity to buyer, as against contention that seller was only obligated to deliver quantity harvested from a certain growing crop.

**4. Brokers ⇐8(3)**
**Joint adventures ⇐1**
**Partnership ⇐52**

Evidence indicating that a grain broker was endeavoring to find a purchaser for defendant's barley and that he broached the subject to plaintiff indicated that the broker was defendant's agent and that there was no joint venture, or partnership, in the purchase of the barley between plaintiff and broker.

**5. Evidence ⇐590**

Trial court was not bound by the testimony of interested parties as against inferences which were deducible from other facts in the case contrary thereto.

**6. Sales ⇐87(2)**

In buyer's action for damages when seller failed to deliver quantity of barley set forth in ambiguous contract where grain broker testified to a conversation with defendant indicating that contract referred to a particular lot of barley and was governed by amount harvested from a particular ranch, but plaintiff testified that broker did not inform him that defendant was selling only a particular lot of grain, evidence of conversation was properly excluded as having no bearing upon construction of contract.

**7. Appeal and error ⇐1008(3)**

Supreme Court would not disturb interpretation placed on ambiguous contract by trial court where conflicting parol evidence was introduced.

---

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by D. L. Taylor against the J. B. Hill Company, a corporation, to recover for damages sustained by plaintiff because of defendant's failure to deliver the full amount of barley that defendant allegedly agreed to sell plaintiff. From a judgment in favor of plaintiff, defendant appeals.

Judgment affirmed.

Prior opinion 180 P.2d 403.

Clyde E. Cate, of Fresno, and Alfred E. Cate, of Los Angeles, for appellant.

Ogden, Crocker & Steelman and Samuel Steelman, all of Los Angeles, for respondent.

CARTER, Justice.

Defendant appeals from a judgment awarding $1421.50 damages to plaintiff for breach of contract.

By the terms of a contract dated June 6, 1943 (a written instrument drawn by defendant), which is the basis of the action, defendant agreed to sell and plaintiff to purchase a quantity of barley. The quantity, price, quality, grade, etc., are set forth as follows:

| "Quantity | Commodity | Price | Unit | How Packed | Sample & Grade |
|---|---|---|---|---|---|
| 10–12000 | sacks Barley | 1.95 | CWT | sked | H 10 |

* * * Sack Count Indefinite acct. Remarks Now Harvesting May be More or Less."

Defendant delivered 6,612 sacks, failing to meet the minimum requirement of 10,000 sacks, and for that breach the damages were awarded. It was stipulated that when the contract was negotiated a sample bag of barley marked "H 10" was delivered by defendant to plaintiff.

Defendant asserts that it was obligated to deliver only so much barley as was produced that season on the ranch of Pedro Erro and that such quantity was delivered. It urges that the symbol "H 10" mentioned in the contract referred to the barley it was to obtain from Erro and limited the quantity to be delivered to the amount produced by Erro on his ranch. It purchased barley from Erro to perform the contract. Plaintiff contends that there was no such contingency affecting the quantity delivered, and that the obligation was to deliver the minimum quantity of 10,000 sacks mentioned in the contract.

[1, 2] It is a settled rule that in case of uncertainty in a contract it is construed most strongly against the party who caused the uncertainty to exist—the party drafting the instrument. Civ.Code, sec. 1654; Estate of Rule, 25 Cal.2d 1, 13, 152 P.2d 1003, 155 A.L.R. 1319; Pacific Lbr. Co. v. Ind. Acc. Com., 22 Cal.2d 410, 139 P.2d 892; 6 Cal.Jur. 307, 308. Viewing the instant contract and circumstances in the light of that rule it may reasonably be inferred that the symbol "H 10" referred to a certain quality of barley as shown by a sample thereof and not to the source of the barley as limiting the quantity that was sold. The quantity of barley is expressly stated to be 10,000 to 12,000 sacks. The designation "H 10" rather than appearing under the column heading "Quantity" is found under the heading "Sample & Grade," that is, the *quality* of the barley. A sample is "A part of anything presented for inspection, or shown *as evidence of the quality of the whole.*" [Emphasis added.] Webster's International Dictionary, 2nd Ed., p. 2210. Likewise "Grade" deals with quality. It is a position in a scale of quality. This points cogently to the conclusion that the term "H 10" concerned quality and not quantity, or source of the barley. Moreover, a sample—specimen of barley labelled "H 10" was exhibited to plaintiff advising him of the quality of the barley he was buying. The "H 10" referred to in the contract must, therefore, be the sample exhibited to the buyer to show the quality of the barley. The only reference in the contract which may imply a certain source or amount of grain to be delivered (other than the 10,000 to 12,000 sacks) is the statement that "Sack Count Indefinite acct. Remarks Now Harvesting May be More or Less." It is reasonable to infer that the "Sack Count" refers to the 10,000 to 12,000 sacks theretofore mentioned, and as stated, that count was "indefinite" to the extent of 2,000 sacks. It may be that the statement merely explained why the quantity was not fixed at a certain figure without variation, that is, the harvesting was the reason for the variation. It is also reasonable to conclude that the barley was not to be limited to any particular source, and by such limitation, the quantity restricted to the productive capacity of that source. If there is doubt whether the last quoted clause (assuming it limits the quantity to a defined

source), or the figures under the word "Quantity" controls the quantity, then the latter may prevail under the rule of construction heretofore announced.

The following testimony of a witness familiar with grain transactions and contracts supports the foregoing interpretation: "Q. * * * Referring to the last word on that line, 'H-10,' does that 'H-10' have any significance in the trade? * * * A. 'H-10' in that case would represent *the seller's sample* or designation number of that particular lot of barley.

"Q. By Mr. Steelman: As a matter of trade significance does it indicate the source of the barley? A. That is merely a designating sample. The *barley would have to equal that lot of barley. It could be shipped from any part of the United States, or a foreign country, as long as it equaled that particular sample.*"

In regard to the meaning of "Sack Count Indefinite" that witness testified on cross-examination: "Well, the contract says 10,000 to 12,000 sacks, sack count indefinite. Inasmuch as they didn't know the exact sack count I would say it would be a minimum of 10,000 and a maximum of 12,000 sacks." And in speaking of the difference between buying a fixed amount and being limited by the particular amount raised on a certain ranch, he further testified: "Q. Let us take it from this standpoint, Mr. Devendorf. In the event that the farmer that you bought from was just starting in to harvest the crop and he made an estimate that there will be so many sacks from this particular lot of land, and it falls short of his estimation, would you expect to receive any more than he actually produced from the land if you bought that lot? A. It is according to how your contract reads. If you buy the crop produced from the land located so and so, and give a description of the land, if it had a crop failure and there is nothing produced you wouldn't get anything.

"Q. Then, if I understand you correctly, if you buy John Jones' crop of grain and it hasn't been harvested and it falls short of what his estimate was, you could only expect to get that which he actually received? A. *If you was specifically out buying that particular crop; but if he came in with a sample and he sold you a thousand sacks of a certain sample, that would be a different proposition.*

"Q. I think we are getting to understand each other. If you bought a specific lot of grain from a specific ranch you would only feel yourself entitled to receive the grain that was produced on that ranch, is that correct? A. You would buy it subject to crop production in that case and you would only get what was produced on that land.

"Q. *In the other case, if you sold by sample you would be entitled to receive the amount of barley that they had agreed to sell you on the contract.* A. Yes.

"Q. Of like quality. A. Yes.

"Q. I think I understand you. A. If a farmer could sell you a thousand ton of barley, or I could sell you a thousand ton of barley, and if I didn't raise it I could go down the road and buy it from somebody and give it to you. I am selling it to you on a sample.

"Q. Then there is a distinction between buying on a sample and buying a specific lot? A. Buying subject to crop production.

"The Court: Is that the trade term that is used when you are purchasing only the product of a specific ranch?

"The Witness: If you're buying from a ranch, why, you would buy subject to crop production. If he produces it, O. K. If he doesn't produce it, why that is also O. K.

"The Court: Is that the term that is customarily used when that is the proposal?

"The Witness: Subject to crop production, yes. * * *

"Q. What I was trying to find out, Mr. Devendorf, is this. Those words, 'Subject to crop production' are not words that would have to go into that contract that you bought a specific crop from some one? A. To protect yourself you would put it in there.

"Q. Or language to indicate that? A. Something to that effect, yes."

Hill, an officer of defendant, testified on cross-examination:

"Q. Isn't it a fact that the barley that was contained in this sample H-10 could be duplicated all over the world? A. I don't think it is fact, no, sir.

"Q. Isn't it a fact that *barley sells largely according to its weight and grade and not according to its source?* A. *That is right.*

"Q. And that when a dealer in grain buys *barley he buys it according to those facts and not according to what source it comes from?* A. Well, owing to what class of barley it is. *In this particular case, why, you are perhaps correct,* but in other instances you wouldn't be correct. * * *

"Q. And any experienced grain dealer could, by looking at your grain, determine that that was 38-pound grain and that a certain ten-cent differential would have to be allowed, couldn't he? A. He couldn't tell exactly what it would weigh until he had weighed it, but he could estimate.

"Q. And having determined that weight he could then determine the price in relation to the standard price that you have mentioned? A. That is right.

"Q. And 38-pound barley was obtainable all over the world at that particular time, isn't that right? A. I think you are stretching it out, 'all over the world,' a little bit.

"Q. I will admit that, because there was a war going on. A. You are covering a lot of territory.

"Q. But at any rate that you could obtain it in various parts of the United States? A. I presume you could."

[3-6] Opposed to the foregoing is the testimony of a Mr. Peters, a grain broker, to the effect that he and plaintiff agreed to purchase the barley from defendant as a joint venture or partnership; that he had conversations with Hill (an officer of defendant) indicating the "H-10" referred to a particular lot of barley, namely that grown by Erro on his ranch and that the quantity being sold was governed by the amount harvested from that ranch; that he advised plaintiff of the contingent nature of the amount. Peters' testimony with reference to the joint venture could have been disbelieved by the trier of fact. He stated that the venture was later abandoned. The reason therefore does not appear. Whether "later" meant before or after his conversation with Hill does not appear. He supplied no money in the transaction, thus indicating that there may have been no such arrangement. He told defendant, plaintiff was buying the grain and the contract ran to plaintiff. Plaintiff testified that he purchased the grain from defendant through Peters. There is evidence which indicates Peters was endeavoring to find a purchaser for defendant and he broached the subject to plaintiff. This evidence points to Peters as Hill's agent, refuting the contention of a joint venture between plaintiff and Peters. Certainly the trial court was not bound by the testimony of Peters and Hill as against the inferences which were deducible from the other facts in the case contrary thereto. Thus we have nothing more than a conflict in the evidence and the court could have concluded that Peters was not plaintiff's agent, partner, or co-adventurer. Plaintiff testified (contrary to Peters' testimony) that Peters did not inform him that defendant was selling only a particular lot of grain. Thus the conversation between Hill and Peters could have no bearing upon the construction of the contract.

[7] There is other evidence by Hill and others, but overall we find nothing more than a conflict in the evidence. Under such circumstances the conclusion of the trial court will not be disturbed. See, Estate of Wunderle, 30 Cal.2d 274, 181 P.2d 874; Estate of Rule, 25 Cal.2d 1, 152 P.2d 1003, 155 A.L.R. 1319.

For the foregoing reasons the judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, and SCHAUER, JJ., concur.

31 Cal.2d 390

## WESTON INV. CO. v. STATE et al.

L. A. 19784.

Supreme Court of California.

Feb. 3, 1948.

**1. Eminent domain ⇐152(1)**

Under the statute authorizing court in condemnation proceedings on behalf of the federal government to make such orders in respect of incumbrances, taxes, etc., if any as shall be just and equitable, taxes, which are a lien on property when a declaration of taking is filed, may be ordered paid out of the estimated compensation fund. 40 U.S.C.A. § 258a.

**2. Eminent domain ⇐167(1)**

The nature and extent of the tax liability in a condemnation proceeding involving land condemned by the federal government is to be determined by applicable state law. 40 U.S.C.A. § 258a.

**3. Taxation ⇐501, 511**

Delinquent penalties are a part of the "tax" upon real property and, together with the tax, they become a lien on the property, and both attach to a condemnation fund deposited by the federal government after a taking of the property. Revenue and Taxation Code, §§ 2617, 2618, 2704, 2705, 3001, 3003; 40 U.S.C.A. § 258a.

See Words and Phrases, Permanent Edition, for all other definitions of "Tax".

**4. Taxation ⇐840**

When a property owner is in default in payment of his tax obligations, the statute imposes delinquent penalties in order to encourage voluntary payment of the tax. Revenue and Taxation Code, §§ 2617, 2618, 2704, 2705, 3001, 3003.

**5. Taxation ⇐679(3), 699**

Under the statute permitting sale of property to the state as a preliminary step in actual enforcement of a tax lien against land, the sale, which occurs by operation of law and the declaration of the tax collector, starts the running of the five-year period at the expiration of which the state may acquire legal title. Revenue and Taxation Code, §§ 3436, 3476.

**6. Taxation ⇐695, 709(2)**

Under statutes permitting a taxpayer whose land has been sold to state as a means of enforcing a tax lien to redeem, redemption penalties are imposed as a condition of being relieved from consequences of sale, though taxpayer is not required to redeem. Revenue and Taxation Code, §§ 3436, 3476.

**7. Taxation ⇐501, 511, 709(2)**

Under statutes imposing delinquent tax penalties, the statutory scheme as a whole contemplates redemption penalties as mere charges for exercise of privilege of redemption, not as a part of taxes which are a lien on the property, and a delinquent landowner whose property was condemned by the United States prior to tax sale by the state was under no liability to pay redemption penalties nor was the condemnation fund deposited chargeable therewith. Revenue and Taxation Code, §§ 2617, 2618, 2704, 2705, 3001, 3003, 3351, 3352, 3355(f), 3436, 3476, 3477, 4101–4408; 40 U.S.C.A. § 258a.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by the Weston Investment Company, a corporation, against State of California, County of Los Angeles, and City of Torrance, to recover redemption penalties charged against plaintiff by the county. From the judgments, second and third named defendants appeal.

Affirmed.

Prior opinion 180 P.2d 962.

Harold W. Kennedy, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, and John E. McCall, City Atty., of Torrance, for appellants.

Hill, Morgan & Farrer, A. J. Hill, and Charles P. McCarthy, all of Los Angeles, for respondent.

GIBSON, Chief Justice.

After payment of the sum claimed due for delinquent taxes, plaintiff sued to recover the amount charged as redemption penalties, which was paid under protest. De-

fendants' demurrer to the complaint was overruled, and no answer having been filed, judgment was entered for plaintiff. Defendants county and city have appealed.

[1] Plaintiff was the owner of real property on March 2, 1942, when the taxes for the fiscal year became a lien. On October 26, 1942, the United States instituted condemnation proceedings against the property, and thereafter on March 19, 1943, filed a "declaration of taking" and deposited $252,800 with the court as estimated compensation, which had the effect of vesting title in the government. Under the provisions of section 258a of Title 40 of the United States Code [40 U.S.C.A. § 258a] taxes which are a lien on property when a declaration of taking is filed may be ordered paid out of the estimated compensation fund. Unied States v. Certain Parcels of Land in Philadelphia, 3 Cir., 130 F.2d 782, 783; Weber v. Wells, 9 Cir., 154 F.2d 1004, 1005; Collector of Revenue, etc., v. Ford Motor Co., 8 Cir., 158 F.2d 354, 357. No effort was made, however, to take advantage of section 258a until June 10, 1943, when defendants filed a claim in the condemnation proceedings for installments which were a lien on March 2, 1942, and which became in default on December 5, 1942, and on April 10, 1943. The record does not disclose why an order was not obtained forthwith for the payment of this claim, thus preventing the accrual of additional penalties. See United States v. Eddings, D.C., 50 F.Supp. 926; United States v. Certain Parcels of Land in Mifflin Township, Allegheny Co., Pa., D.C., 47 F. Supp. 333, 334. Instead, the property was sold to the state on June 30, 1943, under the provisions of section 3436 of the Revenue and Taxation Code for nonpayment of taxes. Thereafter, defendants filed a second claim which included redemption penalties. This claim was paid in full in July, 1945, from the fund on deposit, the amount charged as redemption penalties being paid under protest.

The sole question to be determined is whether the condemnation fund was chargeable with the amount claimed as redemption penalties.

[2] The federal courts have uniformly held that the nature and extent of the tax liability in a condemnation proceeding such as is involved here is to be determined by the applicable state law. Collector of Revenue, etc., v. Ford Motor Co., 8 Cir., 158 F.2d 354, 357; Weber v. Wells, 9 Cir., 154 F.2d 1004, 1005; United States v. Certain Parcels of Land in Philiadelphia, 3 Cir., 130 F.2d 782, 783; United States v. Five Acres, D.C., 56 F.Supp. 628 (affirmed in Richard T. Green Co. v. City of Chelsea, 1 Cir., 149 F.2d 927); United States v. Certain Lands, D.C., 49 F.Supp. 225; United States v. Certain Parcels of Land in Mifflin Township, D.C., 47 F.Supp. 333; United States v. 53¼ Acres, D.C., 46 F. Supp. 875; United States v. Certain Land in City of St. Louis, D.C., 29 F.Supp. 92.

Defendants contend that a taxpayer is personally liable for real property taxes, that delinquent and redemption penalties are a part of the tax, and that all are a lien on the property. They argue, therefore, that plaintiff is personally liable for the redemption penalties, and that, inasmuch as the condemnation fund deposited by the government takes the place of the real property, it is subject to the lien of the tax, including all penalties.

The statutes do not expressly make the payment of real property taxes the personal liability of the taxpayer except where the lien is insufficient to secure the payment of delinquent taxes. Revenue & Taxation Code, § 3003. On the other hand, until repealed in 1943, there was an express statutory provision which prohibited suits against assessees for taxes on real property other than possessory interests Revenue & Taxation Code, § 3001. There is no necessity, however, for us to determine this question here, because even if we should assume that a taxpayer is ordinarily personally liable for property taxes, we are of the opinion, for the reasons hereafter stated, that plaintiff was not liable for the sum charged as redemption penalties.

[3] There can be no question that delinquent penalties are a part of the tax and that together with the tax they become a lien on the real property, and plaintiff does

not dispute that the lien for taxes and delinquent penalties attached to the fund. Revenue & Taxation Code, §§ 2617, 2618; 2704, 2705; Collector of Revenue, etc., v. Ford Motor Co., 8 Cir., 158 F.2d 354, 355; Weber v. Wells, 9 Cir., 154 F.2d 1004, 1005; United States v. 25.936 Acres of Land, etc., 3 Cir., 153 F.2d 277, 279; cf. Carpenter v. Peoples Mutual Life Ins. Co., 10 Cal.2d 299, 74 P.2d 508; In re Knox-Powell-Stockton Co., 9 Cir., 100 F.2d 979, 983. Plaintiff contends, however, that redemption penalties are not a part of the tax obligation but are charges imposed for the exercise of the right to redeem property which has been sold to the state for taxes and that where the title of the United States intervenes no redemption right ever accrues and that, therefore, there is no basis for the imposition of redemption penalties.

[4-6] When a property owner is in default in payment of his tax obligations, the statute imposes delinquent penalties in order to encourage voluntary payment of the tax. Long Beach City School Dist. v. Payne, 219 Cal. 598, 603, 28 P.2d 663; Honeycutt v. Colgan, 3 Cal.App. 348, 354, 85 P. 165. If the delinquency persists, the property is "sold" to the state as a preliminary step in the actual enforcement of the tax lien against the land. The "sale," which occurs " by operation of law and the declaration of the tax collector," starts the running of the five-year period at the expiration of which the state may acquire legal title. Revenue & Taxation Code, §§ 3436, 3476; Santa Barbara v. Savings etc. Soc., 137 Cal. 463, 465, 70 P. 457; Crocker v. Scott, 149 Cal. 575, 596, 87 P. 102. Redemption penalties are imposed as a condition of being relieved from the consequences of the sale. The taxpayer is not required to redeem and it is entirely "optional with him whether to take advantage of the privilege given him by law to redeem the land or let the state keep it." Honeycutt v. Colgan, 3 Cal.App. 348, 354, 85 P. 165, 168.

The provisions of the Revenue and Taxation Code which deal with the subject of redemption do not make the redemption penalties a part of the tax obligation to be secured by the lien. Revenue & Taxation Code, §§ 4101–4408. Athough the statutes provide that the delinquent penalty "attaches to" the taxes (Revenue & Taxation Code, §§ 2617, 2618), there is no similar provision with respect to the redemption penalty. When, after the lapse of the five-year period, the property is sold at public auction, redemption penalties are not included in the amount of the minimum bid that a purchaser from the state is required to offer. Revenue & Taxation Code, §§ 3476, 3355(f) and 3477. This fact indicates that redemption penalties were not intended to be regarded as part of the taxes. If property is deeded to the state at the expiration of five years, the statute provides that the deed shall recite that "the property was sold to the State for nonpayment of delinquent taxes which were a lien on the real property" and "the amount for which the property was sold." § 3513, Revenue & Taxation Code. Redemption penalties are not included in this amount which covers only taxes, delinquent penalties, and costs of sale. §§ 3352, 2617, 2618, 3351. This is a further indication that redemption penalties are not a part of the tax obligation to be secured by the lien. Since they are not a part of the taxes and do not become a lien on the real property, they were not a lien on the fund deposited in the condemnation proceeding.

[7] The statutory scheme, when considered as a whole, clearly indicates that redemption penalties are merely what the name implies—charges for the exercise of the privilege of redeeming sold property. The property in question having been acquired by the United States prior to the tax sale, no right to redeem ever came into existence, and plaintiff was under no liability to pay penalties imposed solely as a condition to the exercise of a privilege which he never had.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

## LILLEFLOREN v. SUPERIOR COURT, IN AND FOR LOS ANGELES COUNTY
**and four other cases.**

**L. A. 19904, 19909, 19921, 19922, 19923.**

Supreme Court of California, in Bank.
Feb. 5, 1948.

Rehearing Denied March 4, 1948.

**Appeal and error ⊂=1169(8)**
**Injunction ⊂=231**

In action by employer to enjoin employees, who did not represent the majority, from compelling employer engaged in interstate commerce to sign closed shop contract, an activity allegedly unlawful under the National Labor Relations Act, a temporary restraining order following closely the language of the invalid Hot Cargo Act, and failing to forbid the demands and activity alleged by employer to be unlawful was annulled, and employees found guilty of violations thereof, discharged. Labor Code, §§ 1131–1136; National Labor Relations Act, § 1 et seq. 29 U.S.C.A. § 151 et seq.

SHENK, J., dissenting.

---

Proceedings by Gay Lillefloren, Russell Marks, L. L. Sylvane, Homer Ford, and Irv Magisen to review judgments and orders of commitment of the Superior Court of the State of California in and for the County of Los Angeles issued in an action for injunctive relief by an employer.

Judgments and orders annulled and petitioners discharged.

David Sokol, V. P. Lucas and A. Brigham Rose, all of Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel, and William E. Lamoreaux, Deputy County Counsel, both of Los Angeles, for respondent.

Rupert B. Turnbull and Russell E. Parsons, both of Los Angeles, for Farmer Bros. Co.

CARTER, Justice.

In each case petitioners were found guilty of contempt for violating a temporary restraining order of the superior court issued in an action for injunctive relief by employer-plaintiff against defendants unions and members thereof in connection with the latters' labor activities. Petitioners seek a review of the judgments and orders of commitment.

The temporary restraining order follows closely the language of the Hot Cargo Act (Labor Code, secs. 1131–1136) which was considered and found invalid in Re Blaney, 30 Cal.2d 643, 184 P.2d 892.

The additional contention is made that the defendants and petitioners were engaging in their labor activity for an unlawful purpose, namely, to compel the employer-plaintiff to sign a closed shop contract when it was engaged in interstate commerce, and defendants do not represent a majority of plaintiff's employees; that they are making a demand for a closed shop which would be unlawful under the National Labor Relations Act, 29 U.S.C.A. § 151 et seq. See Park & Tilford Import Corporation v. International, etc., of Teamsters, 27 Cal.2d 599, 165 P.2d 891, 162 A.L.R. 1426. But here the restraining order did not forbid the making of such demand or engaging in the labor activity for such purpose. This court pointed out in Park & Tilford Import Corporation v. International, etc., of Teamsters, supra, that the injunction should be limited to a restraint on the unlawful demand.

For the foregoing reasons the judgments and orders of commitment in each of the above-entitled cases are annulled and the petitioners are discharged.

GIBSON, C. J., and TRAYNOR and SCHAUER, JJ., concur.

EDMONDS and SPENCE, JJ., concur in the judgment.

SHENK, Justice.

I dissent for the reasons stated in the concurring and dissenting opinion of Mr.

Justice Edmonds in Park & Tilford Import Corporation v. International, etc., of Teamsters, 27 Cal.2d 599, at page 615, 165 P.2d 891, 162 A.L.R. 1426, and for the additional reasons stated in my dissenting opinion in Re Blaney, 30 Cal.2d 643, 661, 184 P. 2d 892.

Rehearing denied; SHENK, J., dissenting.




31 Cal.2d 458

## WILSON v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

S. F. 17593.

Supreme Court of California, in Bank.

Feb. 6, 1948.

1. Contempt ⇐67

A final judgment of contempt is properly reviewable on certiorari.

2. Contempt ⇐67

Payment of alimony judgment in avoidance of impending commitment under contempt adjudication did not preclude consideration, on certiorari, of question whether court had exceeded its jurisdiction in making the contempt order.

3. Divorce ⇐243

The fact that final divorce decree made no reference to subject of alimony did not relieve husband from obligation to pay permanent alimony fixed by interlocutory decree. Civ.Code, §§ 131, 132.

4. Divorce ⇐209, 231

"Alimony" is an allowance for support and maintenance pending or subsequent to divorce.

See Words and Phrases, Permanent Edition, for all other definitions of "Alimony".

5. Divorce ⇐209
Husband and wife ⇐295

"Temporary alimony" or "alimony pendente lite" is an award during pendency of action for divorce or separate maintenance.

See Words and Phrases, Permanent Edition, for all other definitions of "Alimony Pendente Lite" and "Temporary Alimony".

6. Divorce ⇐231

"Permanent alimony" is an award made in conjunction with determination of merits of action.

See Words and Phrases, Permanent Edition, for all other definitions of "Permanent Alimony".

7. Divorce ⇐228

An award of temporary alimony is terminated by interlocutory decree, so that unless provision for permanent alimony is made at that time or question is reserved for later consideration by court, all liability for payment in that regard ceases.

8. Divorce ⇐245(1)

In case of award of permanent alimony, the court retains continuing power to modify its order to meet changed conditions. Civ.Code, § 139.

9. Divorce ⇐243

Until judicially modified or vacated in accordance with methods applicable to judgments generally, an award of permanent alimony contained in interlocutory divorce decree is entitled to the same respect of finality as any other substantive right litigated and determined by such decree.

10. Divorce ⇐255

In absence of provision in final decree of divorce modifying or superseding award of permanent alimony contained in interlocutory decree, the interlocutory decree stands as res judicata on alimony issue as determined in response to factual situation presented at time cause of action for divorce was established.

11. Divorce ⇐243

The better practice would recommend at least a reference in final divorce decree to outstanding and continuing provision of interlocutory decree as to permanent alimony award in settlement of financial rights between parties, but fact that such provision was not carried into final decree would not preclude its enforcement thereafter.

12. Divorce ⇐182, 269(1)

Where during pendency of husband's appeal from interlocutory divorce decree awarding wife $500 per month permanent alimony, court made order for $600 per

month alimony and provided that such payments of alimony pending appeal should be deemed credits against and should be applied against payments of alimony ordered by the interlocutory decree, the excess payments were intended as an offset on husband's alimony obligation, and, therefore, court exceeded its jurisdiction in adjudging husband guilty of contempt for failure to pay alimony at time when there remained a balance of $700 in his favor.

---

Certiorari proceeding by Francis A. Wilson against the Superior Court in and for the City and County of San Francisco to review an order adjudging petitioner guilty of contempt and committing him to imprisonment in county jail for failure to make certain alimony payments.

Order adjudging petitioner guilty of contempt annulled.

A. B. Dunne and Dunne & Dunne, all of San Francisco, for petitioner.

Vincent W. Hallinan and James Martin MacInnis, both of San Francisco, for respondent.

SPENCE, Justice.

[1, 2] This is a proceeding in certiorari to review an order of the respondent court adjudging petitioner guilty of contempt and committing him to imprisonment in the county jail for failure to make certain alimony payments alleged to be due under the terms of an interlocutory decree of divorce. In avoidance of such impending commitment, petitioner paid the disputed sums. It is conceded that a final judgment of contempt is properly reviewable on certiorari (5 Cal.Jur., sec. 50, p. 955; Tripp v. Tripp, 190 Cal. 201, 202, 211 P. 225; Brunton v. Superior Court, 20 Cal.2d 202, 204, 124 P.2d 831; Taylor v. Superior Court, 20 Cal.2d 244, 246, 125 P.2d 1; Rose v. Superior Court, 44 Cal.App.2d 599, 600, 112 P.2d 713), but it is argued that "the point * * * has become moot inasmuch as" petitioner, "when ordered into * * * custody * * *, paid the alimony judgment now under contest." However, the law is otherwise and such payment, under legal compulsion, does not preclude a consideration of the question whether the respondent court has exceeded its jurisdiction in making the order presented for review. Hume v. Superior Court, 17 Cal.2d 506, 512, 110 P.2d 669; Null v. Superior Court, 4 Cal.App. 207, 211, 87 P. 392; Dreher v. Superior Court, 124 Cal.App. 469, 477, 12 P.2d 671. That the respondent court has so acted appears from the record of the matters which constituted the basis of the contempt adjudication.

The circumstances giving rise to the contempt proceedings may be briefly stated. On April 4, 1945, Barabara Wilson was awarded an interlocutory decree of divorce from petitioner, Francis A. Wilson. That decree contained certain provisions for the disposition of the community property of the parties and provided that petitioner make an alimony payment of $500 per month. Petitioner appealed therefrom. During the pendency of the appeal and on August 1, 1945, the respondent court made its "order [for alimony] pending appeal" in "the sum of $600.00 per month, payable * * * until the appeal of this cause is determined." It was further provided that such "payments of alimony pending appeal * * * shall be deemed credits against and shall be applied against payments of alimony ordered to be made in the interlocutory decree heretofore entered, in the event said decree, or that portion of it which provides for said alimony payments, is affirmed or otherwise so becomes final." On September 18, 1946, the interlocutory decree was affirmed with the modification that distribution of the community property take place upon entry of the final decree. Wilson v. Wilson, 76 Cal.App.2d 119, 133, 172 P.2d 568. Petitioner on that appeal made "no attack on those portions [of the decree] granting his wife the right to a divorce or granting her alimony * * *." Id., page 122 of 76 Cal.App.2d, page 570 of 172 P.2d. Some sixteen days following the filing of the remittitur and on December 5, 1946, the final decree of divorce was entered in pursuance of the affidavit made therefor by the wife, Barbara Wilson. It simply ordered that "a divorce be, and it hereby is, granted * * * that the marriage * * * be

* * * dissolved and the * * * parties * * * restored to the status of single persons." It contained no other provisions—as to alimony, support and maintenance, property distribution, or otherwise.

Taking the position that the silence of the final decree of divorce as to alimony payments relieved him of such obligation, petitioner on January 6, 1947, filed a formal statement to that effect with the respondent court; and pending the hearing of his objections in the matter, petitioner thereupon made the $500 monthly payment required under the terms of the interlocutory decree as above mentioned. Petitioner followed the same procedure for the succeeding four months, in each instance paying the $500 alimony "in open court * * * contemporaneously with the filing" of his objections as to his obligation therefor. But in June and July, 1947, petitioner failed to make the $500 payments as specified. Petitioner's former wife thereupon filed affidavits reciting the previous adjudication as to alimony payments, and in response thereto, the respondent court ordered petitioner to show cause why he should not be adjudged in contempt for failure to meet his alleged obligations. Hearings in the matter were had on July 17 and 21, 1947, at which time petitioner urged these points: (1) That since the final decree of divorce "contains no provision * * * for alimony * * * [he] is not obligated to pay * * * any [such] sum or at all"; and (2) that his payment of $600 instead of $500 per month alimony beginning August 1, 1945—under the terms of the "order of court pending appeal" that day made—and including December 1, 1946, constituted "excess payments of $100.00 per month," and that for having so "overpair" for the stated seventeen months, he was entitled to a credit of $1,700. The respondent court ruled adversely to petitioner on both points and on July 22, 1947, made its order adjudging petitioner guilty of contempt for refusal to make the June and July, 1947, alimony payments and committing him to jail until he discharged his said obligations. Execution of the order of commitment was stayed seven days to permit petitioner "to purge himself of said contempt." As required, petitioner made the contested payment of $500 for each of the two aforesaid months, or $1,000, and he is now before this court in challenge of the propriety of the contempt adjudication.

[3] There is clearly no merit in petitioner's primary claim that "since the final decree made no reference to the subject of alimony, he is entitled to relief from the payment required by the interlocutory judgment." This precise point was argued in Mathews v. Mathews, 49 Cal.App. 497, 498, 499, 193 P. 586, where, as here, the "interlocutory judgment * * * granted" the wife "permanent alimony" and "the final decree of divorce * * * was silent on the subject of maintenance or alimony." Some "six months" after "the entry of such final decree," the husband "moved to modify the interlocutory judgment by vacating the portion thereof which provide[d] for the payment of alimony." He prevailed in the trial court, but on appeal the order was reversed. In so ruling, the appellate court said at page 500 of 49 Cal.App., at page 587 of 193 P.: "In the instant case the right to alimony was presented and litigated in the action and established by the interlocutory judgment. The trial court would have the right to modify the order in that respect in and by the final decree, as well as before or after entering the same, but it did not do so, nor can it be said that the judgment was modified by the final decree in respect to alimony simply because such decree is silent on that subject. On the contrary, silence at such time must be construed to be acquiescence in the correctness of the previous judgment on that subject."

Such reasoning accords with the recognized scope of the dual-divorce decree procedure created by the legislation of 1903. Civ.Code, §§ 131, 132. Thus, it was said in Newell v. Superior Court, 27 Cal.App. 343, at pages 344, 345, 149 P. 998, at page 999: "It has been determined that in a divorce action under the provisions of our Code the function of an interlocutory decree includes not only the establishment of the right of a party to a divorce, but includes also the hearing and final determination of the rights of the parties as to property.

Any disposition of property rights made in connection with the hearing of the principal cause of action is regularly included in and becomes a part of the interlocutory decree. If no appeal be taken, such decree becomes final with respect to those property rights, as well as with respect to the adjudged right to a divorce. Huneke v. Huneke, 12 Cal.App. 199, 203, 107 P. 131; Pereira v. Pereira, 156 Cal. 1, 103 P. 488, 23 L.R.A.,N.S., 880, 134 Am.St.Rep. 107. Necessarily the same consequence follows where the court takes into consideration and includes in its interlocutory decree the matter of provision for the support of the wife." To like effect was the observation in Parnham v. Parnham, 32 Cal.App.2d 93, at page 96, 89 P.2d 189, at page 190: "The interlocutory decree in a divorce action becomes final and is res judicata on all questions determined therein, including ordinarily the property rights of the parties, except the final dissolution of the marriage which is generally the only question held in abeyance until the entry of the final decree. Overell v. Superior Court [29 Cal.App.2d 418], 84 P.2d 789; Borg v. Borg, 25 Cal.App.2d 25, 76 P.2d 218."

[4-7] "Alimony is an allowance for support and maintenance pending or subsequent to divorce." In re Lazar, 37 Cal. App.2d 327, 332, 99 P.2d 342, 344; see 1 Cal.Jur., sec. 2, p. 944. With reference to the time for which such allowance is intended, alimony is divided into two classes: *temporary* or "alimony pendente lite," signifying an award during the pendency of an action for divorce or separate maintenance, as distinguished from *permanent,* signifying an award made in conjunction with the determination of the merits of the action. See 1 Cal.Jur., sec. 3, p. 946. An award of temporary alimony is terminated by the interlocutory decree, so that unless provision for permanent alimony is made at that time or the question is reserved for later consideration by the court, all liability for payment in that regard ceases. So it was decided in McCaleb v. McCaleb, 177 Cal. 147, 169 P. 1023, where after making an order for temporary alimony in favor of the wife, the court proceeded with the trial on the merits and rendered an interlocutory decree of divorce which neither mentioned the subject of maintenance or alimony nor reserved the matter for further disposition. In those circumstances it was held that the order for temporary alimony was merged in the final judgment on the merits—that is, the interlocutory decree—and the husband's obligation in that respect came to an end. The right to alimony, like other financial and property rights of the parties, is properly at issue at the time the cause of action for divorce is tried and determined, and the ensuing interlocutory decree is intended to bring an end to all matters so litigated and in controversy. Id., pages 149, 150 of 177 Cal., page 1024 of 169 P. But such decision lends no support to petitioner's argument that upon entry of a final decree of divorce, the interlocutory decree is merged therein so that a provision for permanent alimony, as settled thereby between the parties, is no longer effective unless carried into the final decree. Rather the rationale of the McCaleb case rests wholly on the well-defined distinction between temporary alimony awarded the wife "until the decision of the cause on the merits" and permanent alimony awarded at the conclusion of the trial after the court has received "full knowledge of the condition, abilities, and circumstances of the respective parties, and may then advisedly adjudge what is lawful and just to each of them with respect to the right to the divorce and the right of the wife to alimony, if a divorce is granted, or to maintenance if a divorce is denied." 177 Cal. 149, 169 P. 1023. So a provisional order for alimony pendente lite would merge into the interlocutory decree as a "final judgment on the merits" terminating any rights resting on a preliminary proceeding "unless expressly reserved by some provision in the judgment itself." 177 Cal. 152, 169 P. 1025. In thus viewing the right to alimony as any financial or property right of the parties, distinct from the status of the parties and the severance of the marital relation upon entry of the final decree of divorce (cf. Klebora v. Klebora, 118 Cal. App. 613, 618, 5 P.2d 965), the McCaleb case conforms with the general theory of the law that "the interlocutory decree becomes a conclusive adjudication and is res

judicata with respect to all issues determined." Leupe v. Leupe, 21 Cal.2d 145, 148, 130 P.2d 697, 699, and numerous authorities there cited.

[8-10] It is true that in the case of an award of permanent alimony, the court, by virtue of section 139 of the Civil Code, retains continuing power to modify its order "in respect of the support of the wife to meet changed conditions." McClure v. McClure, 4 Cal.2d 356, 360, 49 P.2d 584, 587, 100 A.L.R. 1257. However, until so judicially modified or vacated "in accordance with the methods applicable to judgments generally" (Leupe v. Leupe, supra, 21 Cal.2d 145, 148, 130 P.2d 697, 699), an award of permanent alimony contained in an interlocutory decree would appear entitled to the same respect or finality as any other substantive right litigated and determined by such decree. Dupont v. Dupont, 4 Cal.2d 227, 228, 48 P.2d 677. Upon a proper showing of the financial "circumstances of the parties" (Leupe v. Leupe, supra, 21 Cal.2d 145, 150, 130 P.2d 697, 700), such award might be modified or superseded by appropriate provision in the final decree of divorce, but in the absence of such affirmative procedure upon entry of the final decree in absolute dissolution of the marriage, the interlocutory decree would remain standing as res judicata on the alimony issue as determined in response to the factual situation presented at the time the cause of action for divorce was established. So here, the failure of the final decree to include the alimony provision of the interlocutory decree does not relieve petitioner of his previously adjudicated obligation. Mathews v. Mathews, supra, 49 Cal.App. 497, 501, 193 P. 586.

Petitioner cites certain cases holding that the husband may be absolutely relieved of the obligation of paying alimony. Thus where the court fails to provide alimony for the wife in the original decree of divorce, and it does not reserve the power, there is no jurisdiction to make an award later. The "final decree" in Howell v. Howell, 1894, 104 Cal. 45, 48, 37 P. 770, 43 Am.St.Rep. 70, and O'Brien v. O'Brien, 1900, 130 Cal. 409, 410, 62 P. 598; but since the legislation of 1903 creating the present dual-divorce decree procedure, the "interlocutory decree," Bacigalupi v. Bacigalupi, 1925, 72 Cal.App. 654, 658, 238 P. 93. Also the court, by its order "modifying" a previous alimony allowance, may terminate finally the husband's obligation to make such payments. McClure v. McClure, supra, 4 Cal.2d 356, 360, 49 P.2d 584, 100 A.L.R. 1257. Similarly where the court appropriately provides for alimony payments for a definite term without reserving the right to change or modify the term, it has no power to make a further allowance for support after such term has elapsed and the money has been paid. Tolle v. Superior Court, 10 Cal.2d 95, 98, 73 P.2d 607; Long v. Long, 17 Cal.2d 409, 410, 110 P.2d 383. But there are no parallel considerations here in view of the respondent court's express award, without limitation, in the interlocutory decree and the absence of any subsequent order affirmatively manifesting an intent to modify petitioner's alimony obligation as so adjudicated upon the determination of the cause of action for divorce. Nor does the case of Amell v. Amell, 10 Cal.2d 153, page 155, 73 P.2d 888, page 889, which petitioner cites for the settled proposition that there "can be only one final judgment in an action," strengthen his position. There the interlocutory decree of divorce was vacated (Code Civ.Proc. sec. 663), and "another and different judgment [was] entered in lieu thereof," which then became "the only judgment in the case," furnishing "the sole guide as to the respective rights and obligations of the parties to the action" and subject to attack by appeal or new trial proceedings. Page 155 of 10 Cal. 2d, page 889 of 73 P.2d. Manifestly, such observations with regard to that distinct factual situation have no relevancy to the "conclusive adjudication" of the interlocutory decree as it stands under the record in this case.

[11] Likewise without force is petitioner's reference to the decisions in Cardinale v. Cardinale, 8 Cal.2d 762, 68 P.2d 351, and Calhoun v. Calhoun, 81 Cal.App.2d —, 183 P.2d 922, as exemplifying the rule that the marital status must be in existence at the time the alimony award is made. Both

cases involved the power of the California court to grant an allowance for support to the wife as the question was raised *after* the husband had obtained in another jurisdiction a divorce decree dissolving the marriage and making no provision for such contribution by him. But here the alimony obligation was imposed on petitioner while the marital status was in existence and upon rendition of the interlocutory decree. The question of alimony was then at issue and adjudicated. Cf. Bernard v. Bernard, 79 Cal.App.2d 353, 356, 179 P.2d 625. While better practice would recommend at least a reference in the final decree to such outstanding and continuing provision as the alimony award here made in the interlocutory decree in settlement of a financial right between the parties, the fact that such provision was not carried into the final decree does not preclude its enforcement thereafter. Mathews v. Mathews, supra, 49 Cal. App. 497, 501, 193 P. 586.

[12] There still remains, however, the question of whether the respondent court could justifiably hold petitioner guilty of contempt upon the record before it. As above recited, petitioner, in pursuance of the "order of court pending appeal," paid for a period of seventeen months the sum of $600 instead of $500 per month alimony as awarded in the interlocutory decree. It is contended on behalf of petitioner's former wife, and the respondent court so ruled, that the increased monthly amount represented an added responsibility imposed on petitioner for the period involved, and that upon affirmance of the interlocutory decree (Wilson v. Wilson, supra, 76 Cal. App.2d 119, 172 P.2d 568), petitioner's original obligation became again effective, disassociated from the intervening payments. But the express language of the order in question does not permit such construction. It specifically provided that "payments of alimony pending appeal * * * shall be deemed *credits against and shall be applied against* payments of alimony ordered to be made in the interlocutory decree heretofore entered. * * *" The italicized wording is free of ambiguity and can only mean that the "excess payments" were intended as an "offset" on petitioner's alimony obligation account (see 21 C.J.S., Credit, page 1043) "in the event said [interlocutory] decree * * * [was] affirmed. * * *" It therefore appears that petitioner built up a credit of $1,700 to "be applied against" the alimony award under the interlocutory decree, and that there still remained a balance of $700 in his favor at the time he was adjudged guilty of contempt for refusing to make the June and July, 1947, alimony payments of $500 each, or $1,000. In such circumstances the respondent court exceeded its jurisdiction and petitioner is entitled to relief accordingly.

The order adjudging petitioner guilty of contempt is annulled.

SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., and NOURSE, Justice pro tem., concur.




31 Cal.2d 429

## KAUFFMAN et al. v. DE MUTIIS.

Sac. 5891.

Supreme Court of California, in Bank.

Feb. 4, 1948.

**1. New trial ⊂=82**

The words "accident" and "surprise", though not strictly synonymous, have substantially the same meaning as used in statute providing grounds for new trial, since each is used to denote some condition or situation in which a party is unexpectedly placed to his injury, without negligence of his own, which ordinary prudence could not have guarded against. Code Civ.Proc. § 657.

See Words and Phrases, Permanent Edition, for all other definitions of "Accident" and "Surprise".

**2. New trial ⊂=97**

When a situation arises which might constitute legal surprise as ground for new trial, counsel cannot speculate on a favorable verdict, but must act at the earliest possible moment, since the right to new trial on ground of surprise is waived, if

when the surprise is discovered, it is not made known to court, and no motion is made for a mistrial or continuance. Code Civ.Proc. § 657.

**3. Appeal and error ⇐977(1)**
**New trial ⇐140(1)**

While granting or denial of new trial is discretionary with trial court and its determination will not be disturbed, though Supreme Court might be inclined to rule differently in passing on the motion de novo, such rule has no application where affidavit or other evidence upon which order is made furnishes no basis for exercise of such discretion. Code Civ.Proc. § 657.

**4. New trial ⇐97**

Granting plaintiffs a new trial in action arising out of automobile collision on ground of surprise caused by non-appearance of a witness, subpoenaed and relied upon by plaintiffs as rebuttal witness, was abuse of discretion, where plaintiffs upon learning that witness would not appear made no request for continuance but chose to speculate on a favorable verdict. Code Civ.Proc. § 657.

CARTER and SHENK, JJ., dissenting.

Appeal from Superior Court, Placer County; Lowell L. Sparks, Judge.

Action by Mabel B. Kauffman and another against Joseph E. DeMutiis for injuries sustained in automobile collision. From order granting plaintiffs a new trial, defendant appeals.

Order reversed.

Prior opinion, 183 P.2d 331.

Yale S. Kroloff, of Stockton, Charles E. Koller, of Oakland, and Jack Miller, of Stockton, for appellant.

Russell A. Harris, of Sacramento, for respondents.

EDMONDS, Justice.

The propriety of an order granting a new trial upon the ground that a witness subpoenaed by the plaintiff did not appear for examination is challenged by the defendant, who obtained a verdict in his favor. The question for decision concerns the construction and application of section 657 of the Code of Civil Procedure in so far as it authorizes a new trial because of "accident or surprise".

The action is for damages because of personal injuries received in an automobile collision. Rudolph Erends, a locomotive engineer, witnessed the accident. Eight days before the trial, Rudolph Erends was interviewed by Charles E. Koller, one of defendant's counsel. When Erends stated that he had not been subpoenaed by the plaintiffs, Koller served him with a subpoena. But Koller told him that, after further consideration of the evidence, he would notify him as to whether or not he need appear at the trial. Five days later, Erends was subpoenaed by the plaintiffs.

Erends was not present at the trial. According to the affidavits presented on behalf of the plaintiffs, their counsel had planned to use him as a rebuttal witness. After the defendant had rested, counsel found that he was not present, and they reached him by telephone at the railroad roundhouse in another city. At that time, Erends stated "that he had planned to attend the trial * * * in response to subpoenas served upon him, but that he had been notified by telephone that it would not be necessary for him to appear in court; that * * * he was scheduled to leave immediately on a railroad run as locomotive engineer and that it would * * * be impossible for him to * * * appear at the trial * * *." Erends' statement in regard to his failure to appear is that he "received a telephone call from a person unknown to him and was advised by said person that it would not be necessary for him to appear in court in response to said subpoenas; * * *."

In affidavits submitted by counsel for the defendants, it is said that on the day before the trial commenced, Koller, an attorney associated with Kroloff, endeavored to reach Erends by telephone at the railroad roundhouse. Erends was not there, Koller was informed, but a message could be left for him. Koller then identified himself as the attorney who had subpoenaed Erends

to appear "on behalf of the defendant Joseph E. DeMutiis at a trial that was commencing in Auburn [on the following day] * * *, and that it had been decided that * * * Erends would not be needed as a witness for the defendant and that he need not answer to the subpoena given to him by Mr. Koller in behalf of the defendant."

There is no suggestion that Erends' failure to appear in response to the subpoena served upon him by the plaintiffs was due to anything other than a misunderstanding of the message left by Koller. As stated by Koller in his affidavit, at no time, either directly or indirectly, did he say that Erends should ignore any subpoena other than the one served on behalf of the defendant.

Kroloff declared in his affidavit that after the plaintiffs' attorneys learned that Erends was not present, there was a discussion between counsel. Kroloff then suggested to Harris, it is said, "that if he was desirous of having the witness testify, that he should request a continuance of the case for that purpose; Mr. Harris immediately retorted that he did not intend to have the case continued for that purpose, but that if anything went wrong he would file affidavits with this court in support of a motion for a new trial * * *."

When the court reconvened, Harris did not request either a continuance or the issuance of a bench warrant, nor did he advise the court as to what had occurred. He had the bailiff call the witness and, when there was no response, proceeded to present his rebuttal evidence. The next day the case was argued and submitted to the jury, which returned a verdict in favor of DeMutiis. Thereafter, the plaintiffs made a motion for a new trial based upon all of the statutory grounds and supported by affidavits. The motion was granted upon the sole ground of "accident or surprise which ordinary prudence could not have guarded against and by which plaintiffs were prevented from having a fair trial." (Sec. 657, Code Civ.Proc.)

Upon his appeal from that order, DeMutiis contends that the trial court abused its discretion in granting the motion for a new trial. Under the undisputed facts, he argues, there was no accident or surprise within the meaning of the quoted code section. And to allow a plaintiff a new trial when no continuance or other relief was asked at the time when he knew that a witness was not present gives counsel opportunity to speculate on a favorable verdict. The plaintiffs' reply that abuse of discretion is not shown because they had no opportunity calmly and deliberately to determine the effect of the failure to call Erends as a witness.

[1, 2] "The terms 'accident' and 'surprise,' although not strictly synonymous, have, as used in legal practice, substantially the same meaning, as each is used to denote some condition or situation in which a party to a cause is unexpectedly placed to his injury, without any default or negligence of his own (see Bouv.L.Dict.; And L. Dict.) which ordinary prudence could not have guarded against. (Code Civ.Proc. § 657, subd. 3.)" (McGuire v. Drew, 83 Cal. 225, 229, 23 P. 312, 313; Jennings v. American President Lines, 61 Cal.App.2d 417, 429, 143 P.2d 349, 144 P. 2d 54; Porter v. Anderson, 14 Cal.App. 716, 726, 113 P. 345.) However, where a situation arises which might constitute legal surprise, counsel cannot speculate on a favorable verdict. He must act at the earliest possible moment for the "right to a new trial on the ground of surprise is waived if, when the surprise is discovered, it is not made known to the court, and no motion is made for a mistrial or continuance of the cause." (Baker v. Berreman, 61 Cal.App.2d 235, 142 P.2d 448, 451; Bailey v. Richardson, 66 Cal. 416, 5 P. 910; Heath v. Scott, 65 Cal. 548, 4 P. 557; Dewey v. Frank Bros. & Co., 62 Cal. 343; Ferrer v. Home Mut. Ins. Co., 47 Cal. 416; Delmas v. Martin, 39 Cal. 555; Doyle v. Sturla, 38 Cal. 456; Schellhous v. Ball, 29 Cal. 605; Turner v. Morrison, 11 Cal. 21; Bradbury Estate Co. v. Carroll, 98 Cal.App. 145, 276 P. 394; Denvir v. Judson Frt. Forwarding Co., 86 Cal.App. 369, 260 P. 846; 1 Haynes, New Trial, sec. 76 et seq.; 20 Cal. Jur. 69, 74; 39 Am.Jur. 158.)

Plaintiffs concede that a litigant must take prompt action when he is confronted

by the absence of a material witness, but they argue that they were excused from asking for a continuance because they did not have time for discreet deliberation as to the effect of not calling Erends. As authority for their position they rely upon Delmas v. Martin, supra. However, in Ferrer v. Home Mutual Ins. Co., supra, the Delmas case was expressly limited to its facts, and it has no application here. Delmas sued to quiet title, and a deed by one Davidson conveying to him the land in dispute was the last evidence introduced. The defendant claimed surprise because that deed was made some years after a prior conveyance of the same property to him by Davidson. The subsequent deed had not been recorded; Martin had no knowledge of it and was not prepared to meet it. The court held that a new trial should have been granted, stating: "It may well be, that in the last stage of a jury trial, at the conclusion of the evidence, sufficient opportunity may not have occurred to enable the defendants and their counsel to decide, deliberately and discreetly, what course it was proper to pursue in respect to the last item of proof which was offered in the cause. We perceive nothing in the record to justify the belief that the defendants and their counsel were not acting in good faith in omitting to apply for continuance, and are satisfied that they were guilty of no laches * * *." (Delmas v. Martin, supra, 39 Cal. at page 558.)

An entirely different situation is shown by the record now being reviewed. Here the plaintiffs and their counsel knew before they commenced the presentation of rebuttal evidence that Erends would be unable to attend. The attorney for DeMutiis suggested a continuance so that Erends could testify. Opposing counsel, in the presence of the plaintiffs, stated "that he did not intend to have the case continued for that purpose, but that if anything went wrong would file affidavits * * * in support of a motion for a new trial." This amounts to an express statement that the plaintiffs intended to speculate upon a favorable verdict. As this court said in an early case: "Not till after the decision did they present the view of surprise; and we think it was then disappointment rather than surprise; * * *." Dewey v. Frank Bros. & Co., supra, 62 Cal. at page 347.

[3, 4] Although it is well settled that the granting or denial of a motion for a new trial is discretionary with the trial court and its determination will not be disturbed even though this court might be inclined to rule differently if passing on the motion de novo (Mazzota v. Los Angeles Ry. Corp., 25 Cal.2d 165, 153 P.2d 338; Koyer v. McComber, 12 Cal.2d 175, 82 P.2d 941; Fennessey v. Pacific Gas & Elec. Co., 10 Cal.2d 538, 76 P.2d 104; Whitfield v. Debrincat, 18 Cal.App.2d 730, 64 P.2d 960), the power is not absolute. As stated by Mr. Justice Carter in Slemons v. Paterson, 14 Cal.2d 612, 615, 96 P.2d 125, 127: "This rule has no application where the affidavit or other evidence upon which the order is made furnishes no basis for the exercise of such discretion." To the same effect are Dewey v. Frank Bros. & Co., supra, and Baker v. Berreman, supra.

The order granting a new trial is reversed.

GIBSON, C. J., and TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The position of the majority is akin to that of the Sunday morning quarterback who calls the plays by hindsight, and then comments on the poor judgment of the player who was required to make his decisions on the spur of the moment and under the stress of imminent conflict. The cold record cannot reveal the emotional strain to which counsel was subjected at the time he was forced to decide whether to proceed with the trial or ask for a continuance when he learned that the witness he expected to call was absent through no fault on his part. Those familiar with the trial forum have some appreciation of the delicacy of such a situation and realize the importance of allowing the trial judge a broad discretion in relieving a party from the effect of an unwise decision under the circumstances here presented. Such discretion should not be controlled by some mere rule of thumb, dogmatically applied, like a teacher teaching

a kindergarten class, but the judge should be permitted to exercise his judgment in the light of what he saw and heard, as well as upon those matters which form a part of the record before the court. Such a ruling should be reversed only upon a clear showing that the judge committed an abuse of discretion. Certainly, if there is any doubt that the mental processes of the judge in making his ruling were arbitrary or capricious, it should not be said that he abused his discretion.

That the trial judge did not abuse his discretion in granting plaintiffs' motion for a new trial is manifest from the record before this court, and I agree with the majority of the District Court of Appeal, Third Appellate District, that the order granting such motion should be affirmed. I, therefore, adopt as part of this dissenting opinion the able and learned opinion prepared by Presiding Justice Adams of the District Court of Appeal, Third Appellate District, when this case was before that court. Said opinion was as follows [183 P.2d 331, 332]:

"This is an appeal from an order granting plaintiffs a new trial under the provisions of subdivision 3 of section 657 of the Code of Civil Procedure, to wit, accident or surprise which ordinary prudence could not have guarded against, caused by the nonappearance of a witness subpoenaed and relied upon by plaintiffs as a rebuttal witness. In support of their motion for a new trial plaintiffs filed five affidavits, while defendant filed two. From these affidavits and from the record in the case it appears that the trial was commenced on the 25th day of June, 1946, and a verdict in favor of defendant returned on June 27th.

"Plaintiffs sought damages for severe injuries sustained by Mrs. Kauffman in a collision between an automobile operated by her, and an automobile owned and operated by defendant, which collision occurred on the streets of Auburn on January 4, 1946, and was alleged to have been caused by the negligence of defendant. In preparation for the trial, and prior to June 23rd, defendant subpoenaed as a witness one Rudolph Erends, a resident of Truckee, who was employed by the Southern Pacific Company as a locomotive engineer, and had witnessed the accident. On June 22nd, Erends was also served with a subpoena to appear as a witness for plaintiffs. On June 24th, one of defendant's attorneys telephoned to Truckee for the purpose of informing Erends that he would not have to respond to the subpoena served on him in behalf of defendant, but, failing to reach the witness left word with someone at the Truckee Roundhouse. The message as received by Erends was that he would not have to respond to the subpoenas. He then so advised his employer, with whom he had previously made arrangements to be absent from his work, and was thereupon ordered to leave on a scheduled run.

"At noon on the second day of the trial, at the conclusion of defendant's evidence, plaintiffs' attorney, who had expected to use Erends as a rebuttal witness that afternoon, seeing that the witness was not in court, asked plaintiff Frederick Kauffman to telephone him. Kauffman did so and was advised by Erends that he would not be able to appear as he was leaving immediately on a scheduled run as a locomotive engineer. On receiving this information plaintiffs' counsel did not request a continuance of the trial, but proceeded therewith when Erends failed to answer to the call of the bailiff made during the afternoon.

"After a hearing on the motion for a new trial the trial court stated in a written opinion that the non-appearance of the witness was not due to any negligence or lack of diligence on the part of plaintiffs, that his testimony was material in that it would have contradicted that of defendant on important matters such as the speed at which defendant's car had entered the intersection and was traveling at the time of the impact, and it was not cumulative; and that for said reasons a new trial should be granted.

"Appellant urges that the affidavits show that plaintiffs' counsel knew at noon on June 26th that Erends was not present, and that he would not respond to plaintiffs' subpoena; and that defendant's attorney Kroloff at that time advised plaintiffs' attorney that he should ask for a continuance; but that plaintiffs' attorney refused to do so; and that, because of such failure to

ask for a continuance the motion for a new trial should have been denied.

Erends, in an affidavit in support of plaintiffs' motion, averred that he saw the accident, and that defendant's automobile entered the intersection at a speed of from 35 to 40 miles per hour and was so traveling when it struck plaintiffs' car; and that he would have so testified at the trial. He also deposed that the message received by him from defendant's counsel was that he would not have to appear in response to either of the subpoenas served upon him; and that when plaintiff Kauffman telephoned him at noon on June 26th, he told Kauffman that he had been advised that his presence was not required, and that he could not appear because he had been assigned to immediate duty by his employer.

"Appellant urges here that the trial court abused its discretion in granting a new trial, in view of the allegations of the affidavits, and that this court should reverse its order.

"It is settled that a motion for a new trial is, to a large extent, addressed to the sound legal discretion of the court to which the application is made; and it has often been said that its action will not be disturbed on appeal in the absence of a clear and affirmative showing of a gross, manifest or unmistakable abuse of discretion. See Fennessey v. Pacific Gas & Electric Co., 10 Cal.2d 538, 544, 76 P.2d 104; Mazzotta v. Los Angeles Railway Corp., 25 Cal.2d 165, 169, 153 P. 2d 338; Prescott v. City of Orange, 56 Cal.App.2d 144, 150, 132 P.2d 523; Whitfield v. Debrincat, 18 Cal.App.2d 730, 733, 64 P.2d 960. In the latter case it was said that where there appears to be reasonable or even fairly debatable justification therefor, an order granting a new trial will not be set aside, although a contrary order might not be disapproved or the appellate court might be inclined to take a different view. And this rule is applicable where the ground for the motion is surprise. 20 Cal.Jur. 67.

"Appellant urges, however, that in this case the motion for a new trial should not have been granted because, though plaintiffs' counsel knew that Erends was not present and would not appear, they made no request for a continuance. While this might have justified the refusal of the motion had the trial court been satisfied that plaintiffs had not used reasonable diligence to procure the attendance of the witness, nevertheless it was within the province of that court to determine from the affidavits on file and the record in the case not only the question of diligence but whether the absence of the witness resulted in injury to plaintiffs.

"Appellants rely upon Baker v. Berreman, 61 Cal.App.2d 235, 142 P.2d 448, but there the facts were quite different. The absent witness had never been subpoenaed nor had any attempt been made to secure his deposition; also it was known two days before the trial date that the witness would not be able to attend. In the case before us plaintiffs had duly subpoenaed the witness and did not know until noon of the second day that he would not appear, and by that time the taking of evidence was largely completed, and it was concluded that afternoon, though the case was not submitted to the jury until the 27th. Also, Erends' nonappearance was apparently due to the acts of defendant's counsel because of the manner in which they had advised Erends that they did not desire his testimony. In Baker v. Berreman it is recognized that the general rule requiring the presentation of a motion for a continuance when a party is taken by surprise is not inflexible but is to be given a reasonable application. It was so held in Delmas v. Martin, 39 Cal. 555, 557, 558, where a motion for a new trial had been denied, but the Supreme Court reversed the order, stating:

" 'The general rule undoubtedly is, that a party surprised on a trial must apply for relief at the earliest practicable moment, and in such method as to produce the least vexation, expense and delay. He will not be allowed to speculate on the chances of a favorable decision on other points, and if he fails on these, fall back on his motion for new trial on the ground of surprise. (Schellhous v. Ball, 29 Cal. 605, 609.) But while this is the general rule, cases may and do frequently arise in which it ought not to be enforced. In Rodriguez v. Comstock, 24 Cal. 85, it was considerably relaxed in favor of a party who was deceived by his own witness in respect to the facts

to which he would testify, and who failed to move for a continuance. But, in relaxing the rule, it should be done only where the surprise is clearly established, and the consequences of it can be avoided on another trial; and it must also be apparent that the party has not been guilty of laches, and has acted in good faith in omitting to apply for relief at an earlier stage in the proceedings. In this case, the deed from Black to the plaintiff was the last evidence offered in the cause, and the Court immediately proceeded to charge the jury. It may well be, that in the last stage of a jury trial, at the conclusion of the evidence, sufficient opportunity may not have occurred to enable the defendant and their counsel to decide, deliberately and discreetly, what course it was proper to pursue in respect to the last item of proof which was offered in the cause. We perceive nothing in the record to justify the belief that the defendants and their counsel were not acting in good faith in omitting to apply for a continuance, and are satisfied that they were guilty of no laches; that they were surprised, in the sense of the statute, by the deed from Black to the plaintiff, and that they can probably overcome the effect of that deed, if allowed an opportunity to do so. We think this is a proper case in which to relax somewhat the rule to which we have reverted.'

"Also see Whitfield v. Debrincat, supra.

"In the case before us the wisest course for plaintiffs to pursue may have been to ask for a continuance when it was learned that Erends would not be present. But the trial court's opinion indicates that it believed that plaintiffs were taken by surprise when Erends failed to appear in answer to their subpoena; that sufficient opportunity was not afforded them and their counsel to decide, deliberately and discreetly, what course it was proper to pursue, that they acted in good faith and were not guilty of laches, that the testimony of Erends was important in view of the fact that defendant had testified that his automobile was practically stopped at the time of the impact, and that in view of the whole situation presented and the importance of the testimony of Erends the ends of justice would be best met by granting the new trial as requested. That court was in a better position than we are to decide those questions; and we cannot say that in so doing its conduct constituted such an abuse of discretion as necessitates a reversal."

In my opinion the order should be affirmed.

SHENK, J., concurs.




31 Cal.2d 441

## NORTHWESTERN PAC. R. CO. v. LUMBER & SAWMILL WORKERS' UNION, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, et al.

Sac. 5823.

Supreme Court of California, in Bank.
Feb. 5, 1948.

Rehearing Denied March 4, 1948.

**1. Constitutional law ⇐90, 91**

The publicizing of a labor dispute by picketing is an incident of the rights guaranteed by Constitution of "free speech, press and assembly," though these rights do not free picketing from all restraint.

See Words and Phrases, Permanent Edition, for all other definitions of "Free Speech, Press and Assembly".

**2. Injunction ⇐101(1)**

Injunctive relief against picketing is available where the object sought to be achieved or the means used to acheive it are unlawful.

**3. Injunction ⇐101(1)**

A common carrier under duty imposed by Constitution and statutes to accept freight for transportation from all shippers and to refrain from discrimination in service rendered them on pain of sanctions imposed for violations, interference with performance of such duties by union activities in a labor dispute with a third party may, in a proper case, be enjoined. Civ.Code, §§ 2169, 2170; Gen.Laws, Act 6386, §§ 13 (b), 17, 19, 73, 75, 76, 77, 81; Const. art. 12, § 21.

**4. Injunction ⇐101(4)**

A labor union, engaged in a dispute with employing lumber company, that interfered with operation of railroad serving lumber company, by picketing highway crossings, stopping trains, and threatening train crews many miles from the scene of dispute, was properly restrained as illegally interfering with the statutory duty of the railroad to serve the public on pain of sanctions for nonperformance of such duty, and on ground that picketing was not justified by the public interest in competition and preservation of equality in economic struggle between seller and purchaser of services, notwithstanding there was no actual violence but only a threat of violence. Civ.Code, §§ 2169, 2170; Gen. Laws, Act 6386, §§ 13 (b), 17, 19, 73, 75, 76, 77, 81; Const. art. 12, § 21.

**5. Constitutional law ⇐90**
**Injunction ⇐190**

In action by a railroad engaged in hauling lumber products of a lumber company with whom defendant union was engaged in a labor dispute, an injunctive provision enjoining the union from any act, agreement or concerted activity to persuade or induce the railroad or the railroad's employees to refuse to handle goods of patrons, was invalid as being too broad, and as extending its restraint to freedom of speech and press.

**6. Injunction ⇐98(1)**

Equity will not restrain the commission of a libel or slander since that is prior censorship and violative of the constitutional provisions protecting freedom of speech and the press.

**7. Injunction ⇐98(2), 101(4)**

Equity will intervene where false or fraudulent statements are combined with picketing, and where under local policy, this renders the picketing illegal though publication of false statements alone will not justify equitable relief.

SHENK, J., dissenting in part.

---

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Action by Northwestern Pacific Railroad Company, a corporation, against Lumber & Sawmill Worker's Union, United Brotherhood of Carpenters & Joiners of America, an unincorporated association affiliated with the American Federation of Labor and others, for injunctive relief against and damages for picketing. From an order granting a preliminary injunction, defendants appeal.

Injunction modified and as modified affirmed. Appeal from temporary restraining order dismissed.

Clarence E. Todd, Henry C. Todd and Gordon W. Mallatratt, all of San Francisco, for appellants.

Geary & Tauzer and C. J. Tauzer, of Santa Rosa, and A. Dal Thomson, of San Francisco, for respondent.

CARTER, Justice.

This is an appeal from an order granting a preliminary injunction issued in an action for injunctive relief against and damages for picketing. Plaintiff is a corporation operating a railroad common carrier, and particularly, in the instant case, engaged as a common carrier in hauling logs and lumber products between points in northern California for various lumber companies and mills. Defendants are unions and the representatives and members thereof between whom and the lumber companies a labor dispute exists. There is no labor dispute between plaintiff and defendants.

The complaint charges that by reason of the labor dispute with the lumber companies, defendants have caused the lumber companies and their products to be designated unfair and are endeavoring to cripple the business activities of those companies and prevent the transportation by plaintiff of such products; that to that end defendants have advised plaintiff that if it transports the lumber companies' products, its places of business will be picketed, including its tracks, for the purpose of coercing plaintiff's employees to cease serving plaintiff, thus preventing plaintiff from transporting the companies' products; that defendants have interrupted and interfered with plaintiff's common carrier operations, have threatened plaintiff's train crews with violence and bodily injury if they handle the companies' products; that in this connection defendants have on occasion at-

tempted to stop plaintiff's trains by placing a "large number" of pickets across plaintiff's main line tracks and have stopped one of plaintiff's trains by placing a "solid phalanx" of pickets who were in a place of danger from injury by plaintiff's train and who waved, shouted, stood close to the tracks and threatened to injure the train crew; that plaintiff's employees refused to pass through the picket lines because of defendants' threats and fear of bodily injury, and plaintiff has no means of compelling them to do so.

From the evidence and affidavits considered at the hearing prior to issuing the preliminary injunction, viewed most favorably to plaintiff as it must be inasmuch as the injunction was granted, it appears that between September 23 and 30, 1946, defendants maintained picket lines at points where plaintiff's main line traversed highways at grade in Sonoma County, many miles removed from the location of the lumber companies with whom the labor dispute existed, while plaintiff's trains were operating as common carriers on its line. No weapons were displayed by the pickets, nor were acts of physical violence committed or directly threatened by them. The trains carried various kinds of freight including products of the lumber companies. The pickets carried banners bearing such statements as "unfair to organized labor," followed by the names of the lumber companies. There was evidence that some of the banners advised, in addition, that this operation is unfair to organized labor. The number of pickets ran as high as 90. On several occasions upon the approach of a train to the crossing the pickets would gather in a compact group directly on the tracks upon which the train was traveling and, instead of giving way for the passage of the train when the whistle and bell were sounded, the pickets would draw their ranks closer together. The crews of the trains brought the trains to a stop, and it may be inferred that they did so because of the picketing and the way in which it was conducted as above described. Some members of the train crews stated that they stopped their trains for fear of physical violence to themselves if they went through the picket lines, and others feared injury to the pickets if they continued operation of the trains. After a conversation between the pickets and the train crew the train was permitted to proceed if none of the freight carried by it was a product of any of the lumber companies. The vice president of plaintiff was present at the picket line a portion of the time and testified that the crews of the trains would not take them through the lines although he ordered them to do so.

The preliminary injunction restrained defendants from (1) using against plaintiff or its employees "force or violence" in connection with picketing of plaintiff's trains, premises, or goods transported by it; (2) "Hindering, delaying, interfering with, or in any manner obstructing the operation of trains, or any part thereof, of the plaintiff," by picketing upon or across plaintiff's tracks or right of way or upon grade crossings "during the approach of trains, or any part thereof, to such crossings, or in any manner whatsoever." (3) Picketing the tracks, trains or premises of plaintiff or its employees or goods transported by it "for the purpose of causing, compelling, persuading, inducing, demanding or coercing plaintiff, or its * * * employees * * * to refuse to * * * transport, * * * or handle any goods or freight, or to make or grant any preference or advantage to, or subject to any discrimination, prejudice or disadvantage, any person or corporation, in respect to services or facilities furnished or to be furnished by plaintiff, as a common carrier, or by its agents, employees or representatives." (4) Engaging in any "act, combination, agreement or concerted activity to cause, persuade, induce, compel or coerce the employees, * * * of the plaintiff [or plaintiff] to refuse to handle any goods of any shipper, * * * or patron of plaintiff, or to discriminate for or against any * * * patron of plaintiff in connection with the * * * handling of * * * freight * * * belonging to any * * * patron of plaintiff, * * * and from in any manner interfering with or obstructing the trains, or any part thereof, or the tracks, switches, team tracks, sidings, or other equipment or facilities of plaintiff in order to accomplish, or for the purpose

or with the intent of carrying out or effectuating the agreement, combination or concerted activity enjoined herein."

[1, 2] It is true that the publicizing of a labor dispute by picketing has been identified with the constitutional guaranties of freedom of speech, press and assembly. In re Blaney, 30 Cal.2d 643, 184 P.2d 892; Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430; Cafeteria Union v. Angelos, 320 U.S. 293, 64 S.Ct. 126, 88 L. Ed. 58; Hotel Employees' Local v. Board, 315 U.S. 437, 62 S.Ct. 706, 86 L.Ed. 946; Bakery Drivers Local v. Wohl, 315 U.S. 769, 62 S.Ct. 816, 86 L.Ed. 1178; Carpenters Union v. Ritter's Cafe, 315 U.S. 722, 62 S. Ct. 807, 86 L.Ed. 1143; A. F. of L. v. Swing, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855; Carlson v. California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104; Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; Senn v. Tile Layers Union, 301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229; In re Porterfield, 28 Cal.2d 91, 92, 168 P.2d 706, 167 A.L.R. 675; Park & Tilford Import Corporation v. International etc. of Teamsters, 27 Cal.2d 599, 165 P.2d 891, 162 A.L. R. 1426; James v. Marinship, 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900; Emde v. San Joaquin County etc. Council, 23 Cal. 2d 146, 143 P.2d 20, 150 A.L.R. 916; People v. Dail, 22 Cal.2d 642, 140 P.2d 828; Magill Bros. v. Building Service etc. Union, 20 Cal.2d 506, 127 P.2d 542; In re Bell, 19 Cal.2d 488, 122 P.2d 22; Steiner v. Long Beach Local No. 128, 19 Cal.2d 676, 123 P.2d 20; McKay v. Retail Auto Salesmen's Local Union No. 1067, 16 Cal.2d 311, 106 P.2d 373; In re Lyons, 27 Cal.App.2d 182, (80 P.2d 745.) Such identification, however, does not free picketing from all restraint. Carpenters Union v. Ritter's Cafe, supra; Milk Wagon Drivers Union v. Meadowmoor Co., 312 U.S. 287, 61 S.Ct. 552, 132 A.L.R. 1200, 85 L.Ed. 836; Steiner v. Long Beach Local No. 128, supra; Magill Bros. v. Building Service etc. Union, supra. And it appears to be settled that injunctive relief against picketing is available where the object sought to be achieved or the means used to achieve it are unlawful. See Park & Tilford Import Corporation v. International etc. Teamsters, supra; James v. Marinship, supra; Magill Bros. v. Building Service etc. Union, supra; Dorchy v. State of Kansas, 272 U.S. 306, 47 S.Ct. 86, 71 L.Ed. 248; Milk Wagon Drivers Union v. Meadowmoor, supra; Carpenters Union v. Ritter's Cafe, supra; Allen–Bradley Local v. Board, 315 U.S. 740, 62 S.Ct. 820, 86 L.Ed. 1154; Burlington Transp. Co. v. Hathaway, 234 Iowa 135, 12 N.W.2d 167, 149 A.L.R. 1238; Opera on Tour v. Weber, 285 N.Y. 348, 34 N.E.2d 349, 136 A.L.R. 267; certiorari denied 314 U.S. 716, 62 S. Ct. 477, 86 L.Ed. 570; Rest., Torts, secs. 775, 784 et seq.,; 31 Am.Jur. 934, 935, 948, 949; 41 Mich. L.Rev. 1143–1164; 90 U. of Pa. L. Rev. 227, 229. We must, therefore, give consideration to the problems, first, the validity of the object sought to be achieved, and, second, the lawfulness of the means employed to achieve such object. In one sense it might be said that the object or purpose was to obtain proper labor objectives, namely, the granting of the demands made on the lumber companies for improved working conditions. Then the object would be valid, but the means—seeking to compel the plaintiff to refrain from performing its law imposed duties as a common carrier, would be unlawful. If it is said that the object was to cause plaintiff to refuse to abide by its obligations to the lumber companies as a common carrier, then the object would also be unlawful.

[3] Plaintiff, as a railroad common carrier, is under a duty imposed by the constitution and statutes of this state to accept freight for transportation from all shippers and to refrain from discrimination in the service rendered to them. Cal.Const. Art. XII, sec. 21; Public Utilities Act, Stats.1915, p. 115, as amended, secs. 13(b), 17, 19, Gen.Laws, Act 6386; Civ.Code, secs. 2169, 2170. And sanctions are imposed for violations. Public Utilities Act, secs. 73, 75, 76, 77, 81. It has been held that interference with the performance by a common carrier of its duties, by union activities in a labor dispute with a third party, may be enjoined. Burlington Transp. Co. v. Hathaway, supra, see, 149 A.L.R. 1243. In the instant case it is clear from the evidence, including the complaint, that a case was made out by plaintiff in showing interference in the performance of its duties as a common carrier by the con-

certed activities of defendants in a labor dispute between defendants and third parties, the lumber companies. The object of the activity as well as the means employed to accomplish it would thus be unlawful—preventing or attempting to prevent the carrier from carrying out its statutory obligations—hence injunctive relief would appear to be proper.

The solution of labor problems requires, however, an approach with a broader perspective. Although literally, and in a strict sense, the objective or means employed in the union activity may be unlawful, there still remains the necessity for preserving the general public welfare and the constitutional guaranties of freedom of speech, press and assembly. The asserted illegality may be merely incidental or of only minor importance when weighed against the requirement of competition and some measure of equality in the economic struggle between the seller and purchaser of services. The public interest may tip the scales one way or the other. If preventive relief were available in every instance of labor activity interfering with the performance by a common carrier or other public utility of its duties, or involving some unlawful act, no matter how insignificant on the part of the person upon whom the economic pressure is exerted, conceivably there would be little left in the way of protection for the exercise of the fundamental rights of freedom of speech, press and assembly, and organized labor would be at a serious if not hopeless disadvantage in our competitive economy. For illustration, the employees of the carrier or other public utility should be able to bring direct concerted pressure, such as strikes and picketing against their employer, to better their working conditions, yet their activities could well be an interference with the duties of the carrier or utility to the point that the latter could not serve the public. It must therefore follow that the peaceful picketing of an employer involved in a dispute to achieve an unquestionably proper objective might require that there be some incidental interference with a carrier or a public utility. There might be no other place or way for the employees to publicize their dispute. Typical of such a case would be where the only entrance to the employer's (with whom the dispute existed) premises was also the point of entry for a spur track of a common carrier serving the employer.

[4] In the case at bar the lumber mills involved in the labor dispute with defendants are many miles from the scene of defendants' picketing activities of plaintiff's trains and premises. There is no dispute between plaintiff and defendants. Hence there is not such an economic necessity for defendants to publicize their dispute by picketing plaintiff's premises at the point where its trains cross highways, as will override the vital importance of the proper functioning of plaintiff as a common carrier in carrying out its constitutional and statutory imposed duties. Not only does the public welfare tip the scales in favor of preventive relief, but under these circumstances, plaintiff should not be required to run the risk of the sanctions imposed by law for its failure to perform those obligations. Finally, what has been said answers defendants' contention that if it is lawful for the carrier's employees to strike or picket the carrier in a dispute with it, it is also lawful for the employees of a third party to picket the carrier to persuade its employees to withhold their services from their employer. The economic aspects and necessities of the case are not similar.

It is urged that there was no showing of injury to plaintiff. But it must be conceded it was faced with the risk of incurring the sanctions imposed by law for a failure to perform its duties as a common carrier. That in itself is sufficient. Moreover it is evident from the evidence adduced that its trains were stopped. Such result was clearly injurious to it.

There was no violence or threat thereof, claim defendants, and hence there should be no injunction covering that field. It will be remembered however that the complaint charged defendants with having threatened the train crews with violence and bodily injury and some members of the train crew testified they feared physical injury to themselves if they passed the picket lines.

[5-7] The fourth paragraph of the preliminary injunction is too broad. It en-

joins any act, agreement or concerted activity to persuade or induce plaintiff or plaintiff's employees to refuse to handle goods of patrons. Such conduct by picketing is adequately covered in the other paragraphs of the injunction. Under paragraph four, it would be a violation of the injunction to agree to make or to make editorial comment in a newspaper for the purpose of persuading plaintiff to withhold services. For the reasons above discussed, equitable relief does not extend that far, even if the purpose or means be unlawful. It will not restrain the commission of a libel or slander, for that is prior censorship—a basic evil denounced by the constitutions of the United States and California in protecting freedom of speech and press. It has been held that where the speech is expressed by picketing equity will give relief. See Magill Bros. v. Building Service etc. Union, supra. But where there is no picketing we have the "principle that equity will not grant injunctive relief against the publication of what might be, after publication, a libel or slander. Dailey v. Superior Court, 112 Cal. 94, 44 P. 458, 32 L.R.A. 273, 53 Am.St.Rep. 160; In re Wood, 194 Cal. 49, 60, 227 P. 908; cf. People v. Armentrout, 118 Cal.App. Supp. 761, 769, 1 P.2d 556; Goldberg, Bowen & Co. v. Stablemen's Union, 149 Cal. 429, 434, 86 P. 806, 8 L.R.A.,N.S., 460, 117 Am.St. Rep. 145, 9 Ann.Cas. 1219. * * * If defendants had remained at home and had uttered false statements concerning plaintiff, the rule cited might have been relied upon. * * * the publication of false statements alone will not justify equitable relief, it is the nearly unanimous rule throughout the country that equity will intervene where false or fraudulent statements are combined with picketing and where, under local policy, this renders the picketing illegal." Magill Bros. v. Building Service etc. Union, supra, 20 Cal.2d at page 509, 127 P.2d at page 543. It is said in Near v. Minnesota, 283 U.S. 697, 713, 51 S.Ct. 625, 630, 75 L.Ed. 1357: "If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judgment upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and, unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. *This is of the essence of censorship.* The question is whether a statute authorizing such proceedings in restraint on publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. * * * This court said, in Patterson v. Colorado, 205 U.S. 454, 462, 27 S.Ct. 556, 558, 51 L.Ed. 879, 10 Am.Cas. 689: 'In the first place, the main purpose of such constitutional provisions is "to prevent all such previous restraints upon publications as had been practiced by other governments," and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. Commonwealth v. Blanding, 3 Pick. 304, 313, 314 (15 Am.Dec. 214); Respublica v. Oswald, 1 Dall. 319, 325, 1 L.Ed. 155, 158 [1 Am.Dec. 246]. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all. Commonwealth v. Blanding, supra; 4 Bl.Com. 150.' * * * As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction—that is, for restraint upon publication." Moreover paragraph four of the preliminary injunction is too

broad and cannot stand for the same reasons that the Hot Cargo Act was declared invalid in Re Blaney, supra.

The preliminary injunction is modified by striking therefrom the fourth paragraph, and as so modified, is affirmed. The temporary restraining order having been dissolved and merged in the preliminary injunction, the appeal therefrom is dismissed.

GIBSON, C. J., and TRAYNOR, and SCHAUER, JJ., concur.

EDMONDS and SPENCE, JJ., concur in the judgment.

SHENK, Justice (concurring and dissenting).

I concur in the affirmance of the first, second and third paragraphs of the injunction order, but I discover no necessity or propriety in striking the fourth paragraph from the order. There is nothing in the record which indicates in the slightest degree that the fourth paragraph of the injunction was intended to apply to editorial comment nor anything which could come within the proper exercise of free speech, press and assembly. It was directed against unlawful combinations denounced by the Hot Cargo Act (sections 1131–1134, Labor Code), which act was, in my opinion, unjustifiably declared invalid in Re Blaney, 30 Cal.2d 643, 184 P.2d 892. The judgment of injunction should be affirmed in its entirety.




31 Cal.2d 451

**Ex parte DAVIS.**

**Cr. 4775.**

Supreme Court of California, in Bank.

Feb. 5, 1948.

Rehearing Denied March 4, 1948.

**1. Injunction ⇐158, 225**

Order of Superior Court of Humboldt County denying preliminary injunction on behalf of railroad to restrain picketing by a union involved in a labor dispute with a third party was not a final judgment on the merits where the railroad appealed but dismissed both appeal and the action and a picketer could not rely upon that order denying the injunction as justifying his violation of a later preliminary injunction in an action substantially the same but issued in a court of Sonoma County.

**2. Contempt ⇐44**

For a court to have jurisdiction of a contempt proceeding, where the contempt was committed outside of its immediate view and presence, the affidavit forming the basis of the proceeding must sufficiently charge the alleged acts constituting the contempt, and a lack of essential facts cannot be cured by proof upon the hearing.

**3. Injunction ⇐230(2)**

In contempt proceeding citing defendant for failure to obey injunction prohibiting picketing across railroad tracks, affidavit forming basis for contempt citation sufficiently charged an offense by alleging that at 11:40 a. m. train crew refused to run through picket line, that at 11:50 a. m. a copy of injunction was served upon defendant, and that defendant and others picketed main line after 11:40 a. m. and continued thereafter "to and including the hour of 2:10 p. m. at least," thereby continuing to hinder the operation of trains of the railroad; and a further allegation that the train crews were again ordered to take the train through the line after the injunction was served was unnecessary.

Application by Ray Davis for a writ of habeas corpus, to review his conviction and punishment for contempt arising out of an alleged violation of a labor injunction.

Writ discharged, and petitioner remanded to custody.

Clarence E. Todd, Henry C. Todd and Gordon W. Mallatratt, all of San Francisco, for petitioner.

Geary & Tauzer, C. J. Tauzer and Charles J. McGoldrick, Dist. Atty., all of Santa Rosa, and A. Dal Thomson, of San Francisco, for respondent.

CARTER, Justice.

Petitioner in this case was found guilty of violating the preliminary injunction from which the appeal was taken in Northwestern Pac. R. Co. v. Lumber and Sawmill Workers' Union, 189 P.2d 277, and punishment for contempt was imposed. The alleged violation by petitioner of the injunction occurred in Humboldt County in the northern part of this state. The picketing forming the foundation of the preliminary injunction occurred in Sonoma County.

All questions of the validity of the preliminary injunction have been resolved against petitioner in Northwestern Pacific R. Co. v. Lumber and Sawmill Workers' Union, supra. Petitioner makes additional contentions in this proceeding.

[1] He asserts that his action in violating the preliminary injunction was justified by reason of his alleged right to rely upon an order of the Superior Court of Humboldt County denying an application for a preliminary injunction in an action substantially the same as the Sonoma County action involved in Northwestern Pacific R. Co. v. Lumber and Sawmill Workers' Union, supra. After denial of the application in the Humboldt County action plaintiff appealed, but it dismissed the appeal and the action. Under these circumstances there is plainly no final judgment on the merits. Hence the action of the Humboldt County court is of no avail to petitioner.

[2, 3] Petitioner asserts that the affidavit forming the basis for the contempt citation was insufficient and hence the judgment of contempt is invalid. It is true, as pointed out by petitioner, that for the court to have jurisdiction of a contempt proceeding where the contempt is committed outside its immediate view and presence the affidavit forming the basis for the proceeding must sufficiently charge the alleged acts constituting the contempt, and a lack of essential facts cannot "be cured by proof upon the hearing." Phillips v. Superior Court, 22 Cal.2d 256, 137 P.2d 838, 840. Here the affidavit charged that on November 21, 1946, in Humboldt County, plaintiff's (Northwestern Pacific Railroad Company, plaintiff in the injunction action) train crew was operating a train carrying products of the lumber companies involved in the labor dispute (see Northwestern Pac. R. Co. v. L. & S. Worker's Union, supra) in performance of its duties as a common carrier; that petitioner and others picketed upon and across the main line of plaintiff, the pickets carrying banners; that at about 11:40 a.m. the train crew refused to take the train through the picket line; that at 11:50 a.m. a copy of the preliminary injunction was served upon him. It appears to be petitioner's contention that there are no facts alleged showing a violation of the injunction after it was served on him. We cannot agree. It is alleged that petitioner and others picketed plaintiff's main line after 11:40 a.m. and continuously thereafter "up to and including the hour of 2:10 p.m., at least, thereby continuing to hinder, delay, interfere with and obstruct the operation of said trains of the plaintiff, and the forwarding, shipping, delivering and handling of freight by said plaintiff." While it does not appear whether the train crews were again ordered to take the train through the picket line after the injunction was served, the last above-quoted portion of the affidavit shows that the movements of the trains were delayed and hindered. That statement is not a conclusion. It is one of fact. Hence the affidavit is sufficient.

The writ heretofore issued is discharged and petitioner is remanded to custody.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

83 Cal.App.2d 516

**PEOPLE v. GRAYSON.**

**Cr. 4168.**

District Court of Appeal, Second District, Division 3, California.
Feb. 6, 1948.

**1. Criminal law ⇐507(8)**

Since the act of placing a bet on a horse race is punishable as an offense separate from offense of receiving, holding, or forwarding the bet under subdivision 6 and not specifically punishable as a separate offense under subdivision 3, making the receiving, holding, or forwarding the bet an offense, the placing of the bet is not punishable under section 31, defining principals, and hence one who placed a bet with defendant charged with receiving and holding a bet on a horse race was not an "accomplice" whose testimony required corroboration. Pen. Code, §§ 31, 337a, subds. 3, 6, § 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

**2. Gaming ⇐98(2)**

Evidence sustained conviction for receiving and holding a bet on a horse race. Pen.Code, § 337a, subd. 3.

**3. Gaming ⇐97(2)**

In prosecution for recording and registering a bet on a horse race, markers given prosecuting witness by defendant indicating amounts of bet and name and identifying number of horses on which witness had placed wagers with defendant were admissible even though written by someone other than defendant, since by handing them to witness defendant adopted them as his own. Pen.Code, § 337a, subd. 4.

**4. Criminal law ⇐372(3)**

In prosecution for recording and registering a bet on a horse race, markers given prosecuting witness by defendant indicating the amounts of bet and name and identifying numbers of horses on which witness had placed bets with defendant tended to prove a system followed by defendant in the recording of bets and were admissible as against contention that the markers tended to prove a crime other than the one charged. Pen.Code, § 337a, subd. 4.

**5. Gaming ⇐98(3)**

Evidence sustained conviction for recording and registering a bet on a horse race. Pen.Code, § 337a, subd. 4.

**6. Criminal law ⇐369(2)**

In prosecution for recording and registering a bet on a horse race, testimony of arresting officer that he had found many betting markers in defendant's home other than those given to prosecuting witness by defendant and testimony of prosecuting witness that witness had received from defendant many other betting markers was relevant and not rendered inadmissible merely because it tended to prove the commission of other offenses. Pen.Code, § 337a, subd. 4.

**7. Criminal law ⇐1169(7)**

In prosecution for recording and registering a bet on a horse race, repetition and emphasis in instructions that testimony of an accomplice was not to be disregarded was not prejudicial, where evidence was sufficient to establish commission of the offense by defendant regardless of the testimony of accomplice. Pen.Code, § 337a, subd. 4.

**8. Criminal law ⇐1171(1)**

References to defendant as a "big time bookmaker" in the argument of prosecutor, or the refusal of trial court of defendant's request that jury be instructed to disregard the references, did not require reversal of conviction for recording and registering a bet on a horse race. Pen. Code, § 337a, subd. 4.

---

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Merlin F. Grayson was convicted of receiving and holding a wager on a horse race and of separate offense of recording and registering a wager on a horse race, and he appeals.

Judgments affirmed.

Franklin B. MacCarthy, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Ruth Bernfeld, Deputy Atty. Gen., for respondent.

SHINN, Acting Presiding Justice.

Appellant was convicted in a jury trial of receiving and holding a wager on a horse race, and of a separate offense of recording and registering a wager on a horse race, in violation of subdivisions 3 and 4 of section 337a, Penal Code. He appeals from the judgments, specifying insufficiency of the evidence, erroneous rulings in the admission of evidence, errors in the instructions and alleged misconduct of the prosecutor.

The attack upon the sufficiency of the evidence assumes, as the trial court held, that the prosecuting witness, one Pease, was an accomplice of appellant in each of the offenses charged. This is also the basis of the criticism of the instructions and several of the questioned rulings. The question whether Pease was an accomplice will be considered separately, as to the two counts.

Pease testified that on November 13, 1946, he telephoned appellant and placed a bet of $100 to "win, place and show," $300 in all, on the horse Barging Rose, which ran that day at Bay Meadows, and that on November 21, 1946, he placed another $30 bet with appellant on the horse See-Tee-See, also running at Bay Meadows; that Barging Rose won; that he met appellant by appointment in the evening of November 13, that appellant handed him $100 and a few days later gave him a check for $725, dated November 28, 1946, and another check for $500 dated November 29, 1946, as his winnings on the race. He also testified that the checks were postdated. They were dishonored when presented for payment. There was nothing on the checks to connect them with a wager or any other previous transaction between appellant and Pease. They were identified with the betting transaction only by the testimony of Pease.

[1, 2] The first question is whether one who places a bet on a horse race is an accomplice of one who receives, holds or forwards the bet, which is made an offense by subdivision 3 of section 337a. By section 1111, Penal Code, an accomplice is defined as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." If subdivision 3 of section 337a alone were to be considered, Pease would have been liable to prosecution as a principal under sections 31 and 971, Penal Code, for aiding and abetting appellant in the offense of receiving a bet. However, subdivision 6 of the section makes the placing of a bet a separate offense and the acts of Pease, according to the evidence, were only those which constituted a violation of this subdivision. It was held in People v. Miropol, 33 Cal.App.2d 297, 91 P.2d 230, that one who places a bet is not an accomplice of one who receives it. This conclusion has support in the later, as well as the earlier, cases. In People v. Davis, 210 Cal. 540, 293 P. 32, it was held that the giver and the receiver of a bribe are not accomplices, one to the other, since each is guilty of a separate offense. It was said in People v. Clapp, 24 Cal.2d 835, 838, 151 P.2d 237, 239: "If a statutory provision so defines a crime that the participation of two or more persons is necessary for its commission, but prescribes punishment for the acts of certain participants only, and another statutory provision prescribes punishment for the acts of participants not subject to the first provision, it is clear that the latter are criminally liable only under the specific provision relating to their participation in the criminal transaction. The specific provision making the acts of participation in the transaction a separate offense supersedes the general provision in section 31 of the Penal Code that such acts subject the participant in the crime of the accused to prosecution for its commission." This holding was followed in People v. Wilson, 25 Cal.2d 341, 153 P.2d 720, the conclusion in each case being that a woman who was subject to prosecution under section 275, Penal Code, for submitting to an abortion, was not an accomplice of one who was prosecuted under section 274 for commit-

ting the abortion. So, here, since the act of placing a bet, without which, of course, the bet could not be received by another, was punishable as a separate offense under subdivision 6, and not specifically under subdivision 3, it was not punishable under section 31, and Pease was not an accomplice of appellant who received the bet. The testimony of Pease was sufficient, without corroboration, to prove the offense charged in count one.

The court declined to give appellant's requested instruction under which the jury could have determined that the two checks given Pease by appellant would not furnish sufficient corroboration of the testimony of Pease that he placed a bet, in the event that it should be found by the jury that the checks were connected with a betting transaction only by the testimony of Pease. The question involved is immaterial in view of our holding that Pease was not an accomplice in the offense charged in count one.

[3–5] As to the charge in the second count of recording and registering a bet, we find it unnecessary to determine whether Pease was an accomplice. The evidence was sufficient to prove commission of the offense if Pease should be deemed an accomplice. Pease testified that after he placed the bet on See-Tee-See appellant brought to his home four certain writings which he identified as betting markers and that he had received many similar markers from appellant. The four papers were identified by a police officer, testifying as an expert, as markers commonly used by bookmakers in recording bets. Mrs. Pease, wife of the prosecuting witness, testified that appellant brought the markers to Pease and that appellant then placed figures on the back of one of them indicating the amount that Pease had won. Pease testified that the markers indicated the names and gave the identifying numbers of four horses on which he had placed bets with appellant. Each marker had in pencil a number and an abbreviation of a horse's name "Se," "Jo," "Ty," or "Bi," and each had figures placed in one or more of three printed rectangles which, according to the testimony, indicated the amounts of bets that the horse would run first, second or third. The name Pease was written on each marker and on the marker "Se" (identified by Pease as See-Tee-See) were figures purporting to show the odds on the horse of 3.90 and the figures 58.50, the return on the $30 bet indicated on the marker. The several markers were received in evidence over the objection of appellant that they were not shown to be in his handwriting and as to those, other than the one marked "Se," that they tended to prove the commission of offenses other than the one charged. The objections were properly overruled. The markers tended to prove a system followed by appellant in the recording of bets, and the testimony with relation to them tended to explain the cryptic use of abbreviations and figures on the marker which was claimed to be a record of the bet on See-Tee-See. People v. Derrick, 85 Cal.App. 406, 259 P. 481. If they were written by someone other than appellant, he adopted them as his own when he handed them to Pease. The only reasonable inference was that the writing was done by appellant or under his direction. The figures 58.50 indicating the winnings on the "Se" bet appear on the back of another marker on which, as Mrs. Pease testified, appellant figured the winnings of Pease. Disregarding certain writing on the marker "Se" which would appear to have been placed there after the race was run, there was sufficient evidence to prove the offense charged in count two. When the testimony of the other witnesses is considered it will appear that the prosecution rested but lightly upon the testimony of Pease.

[6] The arresting officer testified, over appellant's objection, that he found many other betting markers in appellant's home. This testimony and that of Pease that he had received from appellant many other markers was properly admitted. Evidence tending to prove that appellant was operating as a bookmaker was relevant to the main issues. People v. Schwartz, 14 Cal. App. 9, 110 P. 969. It was not rendered inadmissable merely because it tended to prove the commission of other offenses. People v. James, 65 Cal.App.2d 709, 151 P.2d 572.

[7] The instructions correctly stated the law with respect to the quantum of proof required to corroborate the testimony of an accomplice. There was, as appellant contends, repetition and emphasis of the statement that the testimony of an accomplice was not to be disregarded, but the repetition was occasioned by statements of both counsel in the arguments. If we deemed the emphasis to have been unnecessary and subject to criticism we could not hold it prejudicial, in view of the evidence furnished by the markers and the testimony of Mrs. Pease and the officer.

[8] The references to appellant as a "big time bookmaker" in the argument of the prosecutor, or the refusal of the court of appellant's request that the jury be instructed to disregard them, does not furnish cause for reversal of the judgments. The appellation given appellant, while ill-advised, probably added little to the impact of the evidence on the minds of the jurors.

There are no other claimed errors which require particular mention.

The judgments are affirmed.

WOOD, J., and VALLEE, Justice pro tem., concur.




83 Cal.App.2d 461

## CURTIN v. SUPERIOR COURT IN AND FOR SAN MATEO COUNTY et al.

No. 13719.

District Court of Appeal, First District, Division 1, California.

Feb. 4, 1948.

**1. Criminal law ⇐240**

"Sufficient cause" in statute requiring magistrate to hold defendant to answer if there is "sufficient cause" to believe defendant guilty of public offense means "reasonable and probable cause", which means such state of facts as to lead man of ordinary prudence conscientiously to entertain strong suspicion of guilt. Pen. Code, § 872.

See Words and Phrases, Permanent Edition, for all other definitions of "Reasonable and Probable Cause" and "Sufficient Cause".

**2. Indictment and Information ⇐10**

If there is some evidence to support an indictment, court will not inquire into its sufficiency.

**3. Criminal law ⇐238**

Evidence strong enough to support verdict of guilty is not required at preliminary examination.

**4. Criminal law ⇐238**

Evidence at preliminary examination not strong enough to support verdict of guilty of robbery, but strong enough to constitute some evidence to support charge of guilty, was sufficient to show probable cause of guilt of accused so as to justify holding accused to answer the charge. Pen.Code, § 211.

PETERS, P. J., dissenting.

Proceeding by Jadwiga Curtin against the Superior Court of the State of California in and for the County of San Mateo, Honorable A. R. Cotton, for writ of prohibition to restrain the respondent court from proceeding with the trial of a criminal case.

Writ denied.

Wayne R. Millington, of Redwood City, for petitioner.

Fred N. Howser, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Petitioner was charged jointly with one Howard Durham with the crime of robbery (violation of section 211, Penal Code). At the preliminary examination both defendants were held to answer. The sole question presented here is whether the evidence showed probable cause of the guilt of the petitioner.

The sole witness was one George Caulfield. He testified that on Sunday night,

October 12, 1947, he was in a certain bar in San Mateo County, and occupied a bar seat next to petitioner. She started a conversation with him by asking where he lived. After some conversation on other matters she mentioned that she had lived on a farm and was interested in horses. She suggested that he drive her to a place to which she had that day seen a car drive, with horses in back of it. She stated that she wanted to talk to the rancher and look over the place in general. While in the bar, he noticed the defendant Durham sitting about ten feet to his left where the bar made a right angle turn, so that Durham was facing him. Durham was staring at him, or at the person alongside of him. Petitioner mentioned the fact that she knew one individual in the bar room, but did not indicate who he was, nor did she indicate Durham. Caulfield and petitioner entered the former's car, and he drove up the highway and then up a dirt road for about fifty yards. It was very dark. Petitioner suggested that they walk from there over to a hill. Both got out of the car. Petitioner suggested leaving her purse and coat in the car, which she did. They walked about two hundred yards from the car to the top of a knoll and stood there five to seven minutes looking at the lights in the distance. The road upon which they stopped the car continued on, and two or three blocks up there was a ranch house. There were no lights in it, but lights from the distant airport reflected in its windows. They saw no horses. They turned back towards the car, and when about fifty yards from it, Caulfield saw someone approaching in the dark. It was too dark for him to identify who was approaching. The man flashed a light in Caulfield's eyes, and he then saw a gun next to the flashlight. The man said, "Stand where you are." Both petitioner and Caulfield raised their hands. The man ordered petitioner to take Caulfield's wallet. Caulfield said that it was in his left rear pocket. Petitioner took the wallet out of his pocket. He asked the man to leave the wallet and take the money, and the man ordered petitioner to take the money out of the wallet. This she did, throwing the money on the ground and returning the wallet to Caulfield. (Later he found that there was still $20 remaining in the wallet.) Apparently the amount taken was $30. The man told him to lower his hands a bit and told petitioner to take the watch off his left hand. The sleeve of his jacket covered the watch, and petitioner stated, "He has no watch." Then petitioner found the watch, and either threw it on the ground or gave it to the man. He could not say whether or not the man ordered petitioner to make a further search for the watch before she found it. The man then asked petitioner where her purse was. When she told him, the man ordered her to go back to the car and get it. She walked back to the car, the man and Caulfield remaining where they were. After the first few steps, because of the darkness he could not see petitioner until he saw her leave the car with her purse and coat in her hand. This he saw because the car was silhouetted against the distant lights. On leaving the car she ran for about two or three steps and disappeared in the darkness. The man then ordered him to walk back to the car, the man following him. The man ordered him to get into the car and wait five minutes, and then started walking towards the highway. After waiting a minute and a half or so, he turned the car around, drove to the highway and then to the San Bruno police station. Three or four mornings later he identified defendant Durham as the man he saw in the bar, and, by his voice, as the man who held him up.

Section 872 of the Penal Code provides: "If, however, it appears from the examination that a public offense has been committed, and there is *sufficient cause* to believe the defendant guilty thereof" the magistrate must hold the defendant to answer. (Emphasis added.)

"'Probable cause' is a state of facts which inclines a man of ordinary prudence conscientiously to entertain a strong suspicion that a prisoner is guilty. People v. Novell, 54 Cal.App.2d 621, 129 P.2d 453; In re McCarty, 140 Cal.App. 473, 35 P.2d 568." People v. Wisecarver, 67 Cal. App.2d 203, 153 P.2d 778, 781.

"It is said in Greenberg v. Superior Court, 19 Cal.2d 319, 322, 121 P.2d 713, 715:

"'It has long been settled in most jurisdictions that an indictment is invalid if it is unsupported by any evidence before the grand jury. See cases collected in (Brady v. United States, 8 Cir., 24 F.2d 405), 59 A.L.R. 567. If there is some evidence to support the indictment the courts will not inquire into its sufficiency (see cases collected in 59 A.L.R. 573) * * *'

"It has long been settled that in the analogous case of an information the evidence before the committing magistrate is not subject to the same test as that before a trial jury in a criminal case and probable cause may be found for the holding to answer although the evidence does not establish the defendant's guilt beyond a reasonable doubt. All that is required is a reasonable probability of the defendant's guilt. People v. Mitchell, 27 Cal.2d 678, 681, 166 P.2d 10; People v. Wisecarver, 67 Cal.App.2d 203, 209, 153 P.2d 778; 7 Cal.Jur. 982.

"The supreme court in Greenberg v. Superior Court, supra, did not explain whether it thought that the same rule should apply in the case of an indictment as in the case of an information. It at least indicated that no severer rule should be applied when it used the language above quoted.

"We are satisfied that the evidence against petitioner Stock if given before a committing magistrate would support an information. We must hold (quoting the language of the Greenberg case) that 'there is some evidence to support the indictment.'" (Davis v. Superior Court, 78 Cal. App.2d. 25, 177 P.2d 314, 315.)

[1] 7 Cal.Jur., p. 982, sec. 120, states: "The term 'sufficient cause' used in section 872 of the Penal Code, means about the same as the term 'reasonable and probable cause' in the habeas corpus act. The term 'probable' has been defined to mean 'having more evidence for than against; supported by evidence which inclines the mind to believe, yet leaves room for doubt.' And the term 'reasonable or probable cause' has been defined to mean such a state of facts as would lead a man of ordinary caution and prudence to believe and conscientiously entertain a strong suspicion that the person accused is guilty."

Does the evidence in this case meet the test of inclining "a man of ordinary prudence conscientiously to entertain a strong suspicion" (People v. Wisecarver, supra, 67 Cal.App.2d at page 209, 153 P.2d at page 781) that petitioner is guilty? I think it does.

The suggestion of going to the place where the holdup took place came from petitioner. Ostensibly she was going there to talk to the rancher about horses, and to look over the place; and it is a reasonable inference from the evidence that she directed the victim as to the location of the ranch to which she wanted to go. Instead of driving up the road to the ranch house, when the car stopped petitioner suggested that they walk from where they were. When they reached the top of the knoll she no longer evinced any interest in horses, the rancher or the ranch. It is true that the ranch house appeared dark from the distance, but, if her interest, as expressed, was not a mere ruse to get the victim to that particular place, she would have at least suggested that they approach a bit nearer than two or three blocks to see if there might not be a light in the rear of the house. It was then only shortly after 9 o'clock in the evening. When they left the car, they were presumably (in view of her statements at the bar) going to walk to the ranch house where she could talk to the rancher and look the place over; yet she left her purse in the car. In a few moments the holdup man appeared. After obtaining petitioner's assistance in robbing Caulfield, the robber permitted her to leave their immediate presence and go to the car to get her purse. The car was fifty yards away. It was so dark that she could not be seen during the time she traversed that distance. A holdup man who was particularly concerned about her and her purse would have accompanied her back to the car and taken Caulfield with him. As a matter of fact, as soon as petitioner made her get-away the man did return to the car with the victim. When petitioner disappeared, the robber said

nothing, and apparently showed no concern whatever over that fact. Any one of these circumstances, taken alone, might not be sufficient to justify a belief that petitioner was acting as the robber's confederate, but, taken together, they raise a very strong suspicion in that respect. Taking all of petitioner's actions with the fact that the holdup was accomplished by the man who sat opposite her and the victim in the bar, and at a place selected by her for reasons which she entirely disregarded on arrival there—they are not the actions of a woman innocent of knowledge that a holdup is to be accomplished. While it is possible that in spite of the whole situation she might be innocent, nevertheless the circumstances justify a reasonable person in drawing a strong suspicion of her guilt. Nor is a reasonable person's suspicion of petitioner's actions lessened by the fact that in examining the victim's wallet, she overlooked a $20 bill (whether purposely or accidentally does not appear), nor by the fact that, at first, she reported that the victim did not have a watch. As pointed out by Caulfield, the elastic band of his jacket sleeve concealed it, and, in his opinion, made it hard to find.

[2, 3] Petitioner relies upon the decision in Greenberg v. Superior Court, 19 Cal.2d 319, 121 P.2d 713. However, in that case there was no evidence concerning the defendant Greenberg introduced at the grand jury hearing. "The transcript of the testimony upon which the indictment was based contains no evidence *even remotely* supporting the charges made against petitioner." 19 Cal.2d at page 321, 121 P.2d at page 715. (Emphasis added.) But the rule of law established by that case applies here. "If there is *some evidence* to support the indictment the courts will not inquire into its sufficiency * * *." 19 Cal.2d at page 322, 121 P.2d at page 715. (Emphasis added.) Likewise in the case of Dong Haw v. Superior Court, 81 Cal.App.2d 153, 183 P.2d 724, where the court held that the "transcript fails to disclose any legal evidence to support the indictment" (81 Cal.App.2d at page 155, 183 P.2d at page 725) the court endorsed the rule of the Greenberg case and said, "* * * the courts will not inquire into its sufficiency *if there is some evidence to support the indictment* * * *." 81 Cal. App.2d at page 156, 183 P.2d at page 727. (Emphasis added.) While the evidence in our case would not be strong enough to support a verdict of guilty (such evidence is not required at a preliminary examination (Davis v. Superior Court, supra [78 Cal.App.2d 25, 177 P.2d 314]; People v. McRae, 31 Cal.2d 184, 187 P.2d 741) it is strong enough to constitute "some evidence" to support the charge, and hence its sufficiency will not be inquired into.

[4] It cannot be said as matter of law that it would be unreasonable for a man of ordinary caution to believe that the combination of suspicious circumstances here would not occur unless the petitioner were in on the crime. At least, such a combination is so unlikely to occur, if petitioner were innocent, that even if it might be consistent with innocence, it nevertheless would cause a reasonable person to entertain a strong suspicion that this was not the exceptional situation of innocence, but the more usual and likely one of guilt.

The alternative writ is discharged and the petition for a writ of prohibition is denied.

WARD, J., concurs.

PETERS, Presiding Justice (dissenting).

I dissent.

The record of the preliminary examination, so far as this petitioner is concerned, demonstrates that there was no evidence, as distinguished from mere guess, surmise or conjecture, to connect this petitioner with the offense with which she is charged.

I have no quarrel with the law stated in the majority opinion—it is with the application of that law to the facts that I disagree. We start with the basic premise that in order to hold an accused to answer under § 872 of the Penal Code there must be "sufficient cause to believe the defendant guilty." Admittedly that means "reasonable and probable cause" (see many cases collected 7 Cal.Jur. p. 982, § 120) and concededly that phrase means evidence of such character as to lead a man "of ordinary prudence conscientiously to en-

tertain a strong suspicion that a prisoner is guilty." People v. Wisecarver, 67 Cal. App.2d 203, 209, 153 P.2d 778; see, also, People v. Novell, 54 Cal.App.2d 621, 129 P.2d 453; In re McCarty, 140 Cal.App. 473, 35 P.2d 568; cases collected 7 Cal. Jur. p. 982, § 120. Such cases as Greenberg v. Superior Court, 19 Cal.2d 319, 121 P.2d 713, and Dong Haw v. Superior Court, 81 Cal.App.2d 153, 183 P.2d 724, have established beyond question that where there is no evidence, or no reasonable probability of petitioner's guilt based upon evidence, the superior court has no jurisdiction to try the accused, and that the trial, in such event, should be stopped by a writ of prohibition. It certainly needs no citation of authority to establish the principle that a mere surmise, guess or conjecture does not constitute "evidence" in a legal sense. As was aptly stated in the Dong Haw case where the suspicious circumstances were much stronger than those here, but where, nevertheless, a writ of prohibition issued 81 Cal.App.2d at page 158, 183 P.2d at (page 727): "Conspiracies cannot be established by suspicions. There must be some evidence. Mere association does not make a conspiracy." See, also, People v. Long, 7 Cal.App. 27, 93 P. 387; People v. Zoffel, 35 Cal.App.2d 215, 95 P.2d 160.

The reasons behind the rule that entitle one accused either by indictment or information to a writ of prohibition where no "evidence" is produced before the grand jury or committing magistrate are obvious and are based on sound public policy. No person should be forced to trial unless the district attorney produces before the grand jury or committing magistrate some evidence sufficient to raise at least a reasonable suspicion that the accused is guilty. That does not mean as some district attorneys and the attorney general have, on occasion, contended, that the district attorney must disclose his entire case before the grand jury or committing magistrate, which obviously would be unfair to the prosecution, but it does mean that he must produce some evidence that tends to connect the accused with the crime charged. Otherwise the criminal processes can and will be abused.

Now how do these admitted rules of law apply to this case? Caulfield met the petitioner at a bar. She opened the conversation and requested that he drive her to a designated spot to look over a horse ranch. There is not one word in the record (and we are limited to the record) that petitioner knew Durham, or that Durham saw, or that petitioner saw, that Caulfield had $50 in his wallet. So far there is nothing remotely resembling any evidence that this "pick-up" in the bar was any different from any other "pick-up," or was for the purpose of robbery. The two then drove to the side road designated by petitioner and proceeded along this road for about fifty yards. The majority opinion states that "Instead of driving up the road to the ranch house, when the car stopped petitioner suggested that they walk from where they were," and from this statement the opinion implies that petitioner picked the spot for the subsequent holdup. This inference is not warranted by the record. It was Caulfield who stopped the car. The only testimony on this point was by Caulfield, and is as follows: "we drove, perhaps, 50 yards from the highway. At that time, I parked the car." (P. 6.) And again at p. 17 he was asked "And you stopped at this point?" To which he answered "Yes." There is no evidence upon which a reasonable suspicion can be predicated, or in fact even a guess made, that it was petitioner who suggested that they stop at that spot. The evidence is to the contrary.

It is also stated in the majority opinion that after petitioner suggested they walk up the hill "they were presumably (in view of her statements at the bar) going to walk to the ranch house where she could talk to the rancher," and then the opinion infers that this is a most suspicious circumstance in that an innocent person would not have left her purse in the automobile if she had intended to walk to the ranch house. There is no evidence at all upon which the inference that they intended to walk to the ranch house can be based. The only evidence on this point as to why they walked up the hill was the following, appearing on p. 17: "Q. And you and she left the car? A. Yes. Q. For what purpose? A. To look

over the place, just to walk around. Q. What were you going to look at? A. We just looked at the place to find out where the ranch house was, what the place looked like." Whatever purpose the parties may have had in walking up the hill on a dark night (and there might be several reasonable guesses on that question), certainly the inference indulged in by the majority that they were going to walk to the ranch house finds no support in the record, and is contrary thereto. In this respect, as well as in the respect already discussed, the majority have simply filled in the gaps in the district attorney's proof and indulged in what cannot be characterized as even reasonable guesses, because the guesses are not only not based upon the record but are contrary thereto.

It thus appears that except for the fact that petitioner suggested the road to take, but not the stopping place, there is not one suspicious circumstance up until the time the robber appears. And then what happens? Under the robber's orders petitioner removes the wallet from Caulfield's pocket. The theory of the district attorney was, of course, that she was a confederate of the robber—that she was a participant in the robbery. But what does this supposed robber do? She removes $30 in bills from the wallet and leaves in the wallet a $20 bill, and returns the wallet to Caulfield! Then the robber orders her to remove Caulfield's watch. The theory was that the robber must have observed this watch while petitioner and Caulfield were in the bar drinking. But petitioner tells the robber that there is no watch. The majority opinion seeks to explain this by Caulfield's testimony that he was wearing a jacket that partially covered the watch, but, if this explanation is sound, Durham, sitting across the room from Caulfield saw the watch, but the petitioner, who it is assumed was plotting to rob Caulfield, after sitting next to him for over half an hour in the bar, did not see the watch! It is obvious that up to this point there is no evidence, or even a suspicious circumstance, to connect petitioner with the robbery.

Then what happens? The robber asks petitioner for her purse. She says that it is in the car. He orders her to get it. She goes to the car, gets her purse and coat, and runs away—in what direction does not appear. It should be here noted that there is not one word of testimony that she did not immediately report the affair to the police. For all that appears, she may have immediately informed the police. There is no support for any inference that she did not.

The majority opinion talks about the unconcern of the robber at this point, and makes much of the fact that the robber must have been very dumb indeed to permit petitioner to go back to the car alone to get her purse. While that may warrant a guess that the two were confederates, it equally warrants the surmise that the robber was dumb, and that petitioner took advantage of his dumbness to escape and to save her purse.

The majority opinion places great reliance on what is characterized as the "combination of suspicious circumstances." Upon analysis each "suspicious circumstance" turns out to be an inference not justified by the record—a mere guess on the part of the majority, and a guess not based upon the record. If one guess does not constitute evidence sufficient to constitute reasonable and probable cause, two or more guesses cannot be held to constitute such cause.

Those are the facts. There is not one bit of evidence that petitioner ever knew Durham, who was identified as the robber by Caulfield, and I submit that there is not one bit of evidence to support a "strong" or "reasonable" suspicion that petitioner was a participant in the robbery. The inferences indulged in by the majority, as already pointed out, are simply guesses unsupported by the evidence.

I am not so naive as to believe that petitioner may not have been a confederate of the robber. She may have been, and, from what has transpired since the preliminary examination, she probably was. But we have no legal right to consider what has happened since the date of the preliminary examination. The point is that, at that examination, the district attorney just failed to connect her with this crime. We cannot

and should not consider facts not appearing in the record. We are limited to the record. In the proper administration of criminal justice it is required that the district attorney produce at the preliminary examination some evidence to connect the accused with the crime charged. If he fails to do so, as he did in this case, the accused is entitled to a writ of prohibition from this court. In my opinion such a writ should here issue.




83 Cal.App.2d 416

**FERRULA et al. v. SANTA FE BUS LINES.**

**LYNCH v. SAME.**

**Civ. 15950, 15951.**

District Court of Appeal, Second District, Division 1, California.

Jan. 29, 1948.

**1. Automobiles ⇐168(1), 245(40)**

The speed at which an automobile travels upon a highway, considered as an isolated fact and in terms of so many miles an hour, is not proof either of negligence or of the exercise of ordinary care, and whether that rate of speed is a negligent one is a question of fact. Vehicle Code, § 510.

**2. Automobiles ⇐245(41)**

In an action for damages resulting when bus collided with an automobile which made a left turn in front of the bus on a curve in the highway whether bus driver was violating the speed law was a question of fact for the jury. Vehicle Code, § 510.

**3. Automobiles ⇐246(56)**

In action for damages resulting when bus collided with an automobile making a left turn across the highway in front of the bus on a curve in the highway, refusing instruction respecting negligent speed of the bus was error under the evidence. Vehicle Code, § 510.

**4. Automobiles ⇐147**

A violation of the Motor Vehicle Act constitutes negligence per se or negligence as a matter of law.

**5. Automobiles ⇐246(8)**

In action for damages resulting from a collision between a bus and an automobile which turned left across the highway in front of the bus on a curve in highway where court gave instruction respecting violation of statute respecting passing vehicles proceeding in opposite directions, but refused instructions that violation of statute constituted negligence as a matter of law so that jury was left without guidance as to what effect a violation of the statute had, court erroneously deprived plaintiffs of any theory upon which a finding of defendant's negligence could be predicated.

**6. Trial ⇐203(1)**

Trial court has duty to give instructions expounding the law upon any reasonable theory of the case finding support in the evidence.

**7. Trial ⇐260(8)**

In automobile collision action, refusing instructions respecting contributory negligence of deceased passengers in the automobile was not error in view of instructions given on presumption of exercise of due care by decedents.

**8. Automobiles ⇐246(58)**

In action for damages resulting from a collision between an automobile and a bus on a curve in a six-lane highway, instructions respecting application of the provisions of the Vehicle Code relating to left turns at intersections were properly refused under the evidence. Vehicle Code, §§ 540(b), 544(b), 546(a).

**9. Witnesses ⇐291**

In automobile collision action, cross-examination respecting revocation of driver's license of plaintiff after the accident for "blackouts" was not improper in view of redirect examination covering the same subject matter.

**10. Trial ⇐110**

In action for damages resulting when an automobile collided with a bus, defend-

ant's counsel was not guilty of misconduct in examination of plaintiff respecting the circumstances of the collision.

**11. Appeal and error ⇐1064(1)**
**Evidence ⇐77(1)**

In action for damages resulting when automobile collided with defendant's bus plaintiff who testified on direct examination regarding statements made by him to police in hospital after collision regarding a "blackout" was under no duty to bring in the investigating officers, and instruction requiring jury to distrust weaker and less satisfactory evidence offered if party could produce stronger and more satisfactory evidence was not prejudicial.

**12. Automobiles ⇐242(8)**

In action for damages resulting when automobile collided with defendant's bus on highway, defendant had burden of showing that operator's license of plaintiff driver of automobile was revoked because plaintiff had a "blackout" at time of collision which caused the collision.

**13. Appeal and error ⇐1170(1)**

In action for damages resulting from a collision between a bus and an automobile, trial errors did not result in a miscarriage of justice requiring reversal of a judgment for defendant as respects plaintiff driver, where the overwhelming evidence established the contributory negligence of plaintiff. Const. art. 6, § 4½.

**14. Negligence ⇐93(1)**

In action for damages resulting when automobile collided with defendant's bus on highway, negligence of driver of automobile could not be imputed to passengers in the automobile.

**15. Appeal and error ⇐1170(9)**

In an action for damages resulting when an automobile collided with a bus, error in refusal of all instructions on plaintiff's theory of defendant's negligence respecting passengers in the automobile who were killed in the accident, required a reversal of the judgment for defendant as to such passengers where it could not be said that such errors did not contribute to or result in a miscarriage of justice. Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Consolidated actions by Lucco Ferrula and Mary Ferrula, husband and wife, and Harriet Robertson, and by Lester D. Lynch, against Santa Fe Bus Lines, a corporation, for damages resulting from a collision between a bus operated by defendant and an automobile. From judgments in favor of defendant, plaintiffs appeal.

Judgments affirmed in part and reversed in part.

Samuel P. Young, of Los Angeles, for appellants.

Spray, Davis & Gould, of Los Angeles, for respondent.

BARTLETT, Justice.

This is an appeal from judgments in favor of respondent in two consolidated actions for damages resulting from a collision between a bus operated by respondent and an automobile driven by the appellant Lester D. Lynch, as a result of which Lester D. Lynch was injured and three passengers in his car were killed.

The appellants Lucco Ferrula and Mary Ferrula are the parents of a minor daughter, one of the passengers who was killed. The appellant Harriet Robertson is the mother and sole heir of Edward Robertson, age 23 years, another of the passengers who met his death in this accident.

On October 16, 1945, about 9:30 p. m., Lester D. Lynch was driving his car along San Fernando Road in the direction of Los Angeles near its intersection with Fox Street which is the boundary line between the City of Los Angeles and San Fernando. In the opposite direction respondent's bus, driven by its employe James Dailey, was traveling at a speed estimated variously to be between 20 and 30 miles per hour. At the place of the collision, San Fernando Road is a six-lane through highway 60 feet wide. The place where the accident occurred was in the approximate center of an elongated "S" curve in San Fernando Road on the Los Angeles side of Fox Street, to the right of the center line in the direction in which the bus was traveling. Lynch, who at the time was traveling about 20 miles per hour, testified that he saw the

lights of the bus approaching; that both cars were proceeding in the lane nearest the center line. Then he said, "He was coming, going normally, until he got near Fox Street and I saw the lights cross the double line and I made a sudden left turn. That is the last I remember." Dailey, the bus driver, and all other witnesses testified the bus driver never crossed the center line.

The appellants urged at the trial that the bus driver violated the basic speed law, that he violated section 527 of the Vehicle Code requiring that each driver shall give to the other at least half of the main-travelled portion of a highway; and that he violated the provisions of the Vehicle Code relating to left turns at intersections. Having these theories in mind the appellants offered certain instructions the refusal of which they charge as error. One of the instructions offered was the following:

"The speed at which a vehicle travels upon a highway, considered as an isolated fact and simply in terms of so many miles an hour, is not proof either of negligence or of the exercise of ordinary care.

"Whether that rate of speed is a negligent one is a question of fact, the answer to which depends on all the surrounding circumstances.

"The basic speed law of this state is as follows:

" 'No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property.' [Vehicle Code, § 510.]

"A violation of this basic rule is negligence."

[1, 2] This instruction was refused and no instruction upon the subject embraced in it was given. There can be no contention that the offered instruction was not a correct statement of the law. Whether or not the bus driver was violating these provisions of the law under the testimony in this case was a question of fact for the jury. Porter v. Signal Trucking Service, 59 Cal.App.2d 289, 138 P.2d 753.

[3] There is testimony in the record that this accident took place in the center of the "S" curve of San Fernando Road referred to. That prior to entering this curve the bus driver had been traveling in the outside lane, but in taking the curve he had swung over to the inside lane. The bus driver testified that he was traveling at 20 miles an hour and that he could stop his bus within 35 to 40 feet when traveling at from 20 to 25 miles an hour. There is also testimony that appellant Lynch was 85 feet from the bus at the time he made his turn in front of it. Nevertheless the bus skidded for 75 feet after the impact and hit Lynch's car with such force as to cave in the front door of the car, break the front seat clear off, and kill three people. With these facts in the record, the refusal of the instruction was error.

The court gave the jury the following instruction at appellants' request:

"The California Vehicle Code, which was in full force and effect at the time and place of the accident herein, provides as follows:

" 'Section 527. Passing Vehicles Proceeding in Opposite Directions. (a) Drivers of vehicles proceeding in opposite directions shall pass each other to the right, * * * each driver shall give to the other at least one-half of the main traveled portion of the roadway whenever possible.' "

[4-6] Both appellants and respondent requested instructions that a violation of a section of the Motor Vehicle Act constituted negligence per se or negligence as a matter of law. The court refused the requests of both parties, although the requested instructions were correct. Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279. Based upon the testimony of the appellant Lynch that he saw the lights of the bus cross the center line of San Fernando Road as it neared Fox Street, it was one of appellants' contentions that respondent's conduct had violated the provisions of this section of the Vehicle Code and constituted negligence. The court evidently considered this evidence sufficient to justify the giving of the instruction regarding the provisions of Sec-

tion 527 of the Vehicle Code, but by refusing to give these instructions requested by both parties the jury was left without any guidance as to what effect a violation of this section had. "Its duty was to give instructions expounding the law upon any reasonable theory of the case finding support in the evidence." Bickford v. Pacific Elec. Ry. Co., 120 Cal.App. 542, 8 P.2d 186, 189.

It is to be noted that at the conclusion of the appellants' case, a motion for a nonsuit was made upon the ground, among others, that respondent was guilty of no negligence and that this motion was denied. However, by its failure to give the instructions in reference to the effect of a violation of the Vehicle Code and also by its refusal to instruct as to the basic speed law at all, the court deprived the appellants of any theory upon which a finding of defendant's negligence could be predicated.

[7] Appellants complain of the court's refusal of their offered instructions in reference to the lack of evidence as to any contributory negligence on the part of Marianna Ferrula and Edward Robertson who were killed in the accident and who were passengers in the car. The record shows that this phase of the matter was covered by the court's instruction to the effect that it was presumed that the decedents took ordinary care of their own concerns, that this in itself was evidence and should be accepted as a proven fact unless overcome by satisfactory evidence and that no negligence on the part of Lynch could be imputed to them.

[8] Appellants also complain of the refusal of the court to instruct the jury regarding three sections of the Vehicle Code relating to the subject of left turns. Suffice it to say that there is no substantial evidence in the record that made these sections applicable to the case.

[9] Respondent offered an instruction which was given by the court and reads as follows: "If and when you should find that it was within the power of a party to produce stronger and more satisfactory evidence than that which was offered on a material point, you should view with distrust any weaker and less satisfactory evidence actually offered by him (or her) on that point."

The reason for appellants' claim that this instruction prejudiced their case is stated by them in the following language: "Counsel for respondent was guilty of misconduct in offering, and the court committed prejudicial error in allowing, hearsay and improper evidence that the operator's license of plaintiff Lynch was revoked after the accident because of reported blackouts."

We cannot agree with appellants' contention in this regard. Counsel for the respondent on the cross-examination of the appellant Lynch asked him if his driver's license was revoked after the accident due to the fact that he had had malaria and had had several recurrences of this disease and had suffered blackouts. The court sustained an objection to this question. Lynch was then asked if he suffered from any sort of an ailment that caused him to have blackouts and he said that he had not. He was then asked if he had a driver's license, and he replied that he did have at that time. In answer to the question, "Why was it revoked? A. It was revoked—. Q. If you know? A. It was revoked on supposedly blackouts."

The court then stated the objection was made after the answer was in and overruled it.

Regardless of whether or not the objection was made before or after the answer was given, at that stage of the proceedings that was all of the evidence there was upon the subject. Lynch was then examined by counsel for appellants on re-direct examination and was questioned at length in regard to blackouts he had had as far back as in 1939, all of this in spite of a suggestion made by the court, outside of the hearing of the jury, that this line of examination on the part of appellants was just magnifying the situation.

Also, during this re-direct examination he was interrogated regarding certain statements he had made to the police in the hospital at Glendale regarding this particular subject.

Following this re-direct examination concerning his statements to the police, Mr. Lynch was questioned further as follows:

"Q. Mr. Lynch, what was the occasion for this conversation that you had with the officer in Glendale? A. Well, they sent me a letter and told me to report in to Glendale. It said it was a matter as to whether I was going to keep my license or whether my license was going to be taken away from me."

After the answer was in, an objection was made to the question, which was overruled by the court.

In view of the questions asked of Lynch by his own counsel, the question referred to was a natural one and was proper cross-examination.

Following this a police officer was called and asked if he had a notice of revocation of Lynch's license which constituted a part of his files. Appellants very properly objected to this question and the objection was sustained.

[10] The appellants seem to be confused as to the state of the record. They say in their opening brief, "As already pointed out, Lynch testified to all events up to his making the turn over the center line. (Even his statement to the bus company investigator at the hospital while he was still 'foggy because he was pretty sick' told of remembering making the turn to avoid the collision.) Counsel for respondent, knowing he could not introduce the above record in evidence, questioned Lynch concerning this matter."

In appellants' closing brief we find the following, "Respondent has quoted portions of the statement of Lynch given at the time he was in the hospital a few days after he was injured which show that at that time he was confused concerning the events leading up to the accident; but confused as he was he there also stated, as he did at the trial, that *the last thing he remembered was that he turned left to avoid a collision with the bus.*" (Italics supplied by appellants.)

These allegations on the part of appellants are not correct. The statement which he was questioned about was introduced in evidence by respondent and read to the jury without any objection on the part of the appellants. This report, which was made a short time after the accident, is replete with utterances at variance with his testimony on the witness stand at the trial and this is evidenced by the very portions of the statement to which appellants refer. After saying, "I might have swung over a little to the left, but I don't remember definitely", the following occurred:

"Q. Do you remember when you first saw the bus coming toward you? A. The only thing I remember—the first and last thing I remember was this bus right on top of me.

"Q. Then the crash happened? A. Yes.

"Q. Do you remember where the accident happened, that is, on which side of the road? A. No, I don't.

"Q. You don't remember pulling over to the left just before the crash? A. No, I don't—all I remember is just seeing this bus, just a flash of it, that is all, and then the crash.

"Q. Did you recognize it as a bus? A. I never knew until the next day that it was a bus.

* * * * * *

"Q. You cannot tell us on what side of the double line you were when the crash occurred? A. No, I cannot—I know I came right straight down San Fernando Road—I am going on what I heard—I don't remember anything about it at all myself.

"Q. What you have been telling me is what somebody told you; is that right? A. Well, yes—I remember the bus, and that is all, and then there was a crash.

"Q. You don't remember the bus making a turn yourself? A. No.

"Q. What was the last thing you remember before the crash? A. Seeing the bus—I was under the impression there was another bus in front of me, going in the same direction I was.

"Q. You were under the impression there was another bus ahead of you and you were trying to pass it? A. I guess I thought there was another bus ahead of me, and I started to swing to go around him.

"Q. And then the next thing you remember is the crash? A. Yes, that will

be my picture of it until my dying day—I thought this bus had just pulled out of the bus station there."

There was nothing in the conduct of respondent's counsel which justifies any charge of misconduct on his part.

[11, 12] To the giving of the instructions, the appellants correctly say, "There was no duty on appellants to bring in the officers who made the investigation with reference to the revoked operator's license. If defendant desired to show that Mr. Lynch's operator's license was revoked because he had a blackout at the time of the accident which caused the accident he had full opportunity to do so by proper means and process." This being true, the giving of the instructions could not have prejudiced appellants' case. The burden to show that Lynch's license was revoked because he had had a blackout at the time of the accident was on the respondent.

The respondent strenuously urges that assuming that there may have been error in the trial of the case, such error could not have produced a miscarriage of justice, and therefore that in the light of the provisions of Section 4½ of Article VI of our State Constitution, the judgments must be affirmed, citing Hastings v. Serleto, 61 Cal. App.2d 672, 143 P.2d 956.

[13] There are two judgments to be considered in these consolidated actions. In the case of Lynch v. Santa Fe Bus Lines, a careful examination of the record discloses that regardless of any negligence on the part of respondent there is such an overwhelming evidence of the contributory negligence of Lynch that none of the errors complained of could have contributed to a miscarriage of justice.

[14, 15] There is an entirely different situation in the case of Ferrula et al. v. Santa Fe Bus Lines. Lynch's negligence could not be imputed to those who were merely passengers in the car and who were killed in the accident. The only evidence in the record regarding these unfortunate persons is that just prior to the accident they were alive and that their dead bodies were taken out of the car after the accident. The refusal of all instructions on appellants' theory of respondent's negligence undoubtedly prejudiced the case of these appellants. As stated in Herbert v. Lankershim, 9 Cal.2d 409 at page 476, 71 P.2d 220 at page 253, "In such cases the provisions of article 6, § 4½ of the Constitution cannot be invoked in aid of the affirmance of the judgment, unless it can be said that the justice of the cause preponderated so heavily on the side of the prevailing party that none of such errors did or could have contributed to or resulted in a miscarriage of justice." In the instant case no such statement can be made.

The judgment in Lynch v. Santa Fe Bus Lines, Civ. No. 15951, is affirmed. The judgment in Lucco Ferrula et al. v. Santa Fe Bus Lines, Civ. No. 15950, is reversed.

DORAN, Acting P. J., and WHITE, J., concur.






83 Cal.App.2d 475

## PEOPLE v. CARLTON.

Cr. 4189.

District Court of Appeal, Second District, Division 2, California.

Feb. 5, 1948.

**1. Poisons ⊂9**

Evidence sustained conviction of possessing narcotics in violation of the Health and Safety Code. Health and Safety Code, § 11500.

**2. Poisons ⊂9**

In prosecution for possessing narcotics, evidence was sufficient to sustain implied finding that defendant knew that cigarette found in his possession contained marijuana. Health and Safety Code, § 11500.

**3. Poisons ⊂9**

In prosecution for possession of narcotics, mere possession of cigarette containing marijuana constituted substantial evidence to sustain a finding that possessor knew contents of cigarette. Health and Safety Code, § 11500.

**4. Criminal law ⇐37**

In order to constitute "entrapment", evidence must disclose that defendant was induced by police officers to commit the act for which he is prosecuted.

See Words and Phrases, Permanent Edition, for all other definitions of "Entrapment".

**5. Criminal law ⇐37**

Where third person, who was not a police officer, sold defendant two cigarettes for $5, and defendant was arrested and there was found in his pocket a marijuana cigarette, and third person was also arrested, and in his possession were found two five-dollar bills which police had delivered to a police informer, there was no "entrapment" of defendant.

---

Appeal from Superior Court, Los Angeles County; C. C. McDonald, Judge.

Armal H. Carlton was convicted of possessing narcotics, and he appeals.

Judgment and order affirmed.

Fred N. Howser, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for plaintiff and respondent.

Martin S. Ryan, of Los Angeles, for defendant and appellant.

McCOMB, Justice.

From a judgment of guilty of violating section 11500* of the Health and Safety Code (possession, etc., of narcotics) after trial before the court without a jury, defendant appeals. There is also an appeal from an order denying his motion for a new trial.

Viewing the evidence in the light most favorable to the people (respondent) the essential facts are:

On May 15, 1947, between 10:30 p.m. and 11:00 p.m. defendant was seated in a taxicab in front of 514 South Main Street, Los Angeles. In the cab with defendant in addition to the driver was another passenger named Mr. Young. The cab drove north on Main street and east on Fifth street being followed by two police officers in another car, and parked near 725 East Fifth Street.

Shortly thereafter a colored man named Edward Morris came out of an east Fifth street cafe and approached the taxicab. He leaned into the taxicab and sold defendant two cigarettes containing marijuana for the sum of $5. Subsequently defendant was arrested and there was found in his pocket a marijuana cigarette. Edward Morris who was not a police officer was also arrested and in his possession were found two five dollar bills from which the police officers had made notation of the serial numbers. They had earlier in the evening delivered them to a police informer in Harry's Cafe located on south Main street.

The record fails to disclose the journey of the bills from the police informer to Edward Morris.

There are three questions presented for our determination.

First: *Is there substantial evidence to sustain the finding of facts upon which the judgment of guilty was necessarily predicated?*

[1] This question must be answered in the affirmative. Two police officers of the city of Los Angeles gave direct testimony of each and every fact set forth above. This evidence constituted substantial evidence to sustain the judgment of the trial court. (People v. Pianezzi, 42 Cal.App.2d 265, 269, 108 P.2d 732; People v. Savage, 66 Cal.App.2d 237, 242, 152 P.2d 240.)

Second: *Was there substantial evidence to sustain the implied finding that defendant knew that the cigarette found in his possession contained marijuana?*

[2] This question must likewise be answered in the affirmative. From the evidence set forth above that defendant had

* Section 11500 of the Health and Safety Code reads: "Except as otherwise provided in this division, no person shall possess, transport, sell, furnish, administer or give away, or offer to transport, sell, furnish, administer, or give away, or attempt to transport a narcotic except upon the written prescription of a physician, dentist, chiropodist, or veterinarian licensed to practice in this State."

(The substance of this section was found prior to 1945 in section 11160 of the Health and Safety Code.)

paid $5.00 for two cigarettes, the trier of fact would be justified in drawing the inference that defendant knew that the cigarette found in his possession contained marijuana.

[3] In addition the law is established in California that the mere possession of a narcotic constitutes substantial evidence to sustain a finding that the possessor of a marijuana cigarette knows its contents. (People v. Sweeney, 66 Cal.App.2d 855, 859 et seq., 153 P.2d 371; People v. Randolph, 133 Cal.App. 192, 196, 23 P.2d 777.)

Third: *Did the police officers entrap defendant?*

[4] This question must be answered in the negative. The record is devoid of any evidence tending to establish entrapment of defendant. In order to constitute entrapment the evidence must disclose that defendant has been induced by the police officers to commit the act for which he is prosecuted. (People v. Lee, 9 Cal.App.2d 99, 109 et seq., 48 P.2d 1003.)

[5] The record in the instant case fails to show that any one other than defendant was the cause of his purchasing the prohibited cigarettes. Hence the alleged defense of entrapment is utterly devoid of merit.

The judgment and order are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.




83 Cal.App.2d 478

**GEORGE et al. v. BEKINS VAN & STORAGE CO.**

Civ. 16182.

District Court of Appeal, Second District, Division 3, California.

Feb. 5, 1948.

Rehearing Denied March 2, 1948.

Hearing Denied April 1, 1948.

**1. Appeal and error ⇐113(5)**

Where change made in judgment by court in ruling on motion for new trial materially affects court's conclusions of law, judgment, and rights of parties against whom it is rendered, modified judgment is new judgment and appeal lies only from second judgment. Code Civ.Proc. § 662.

**2. Judgment ⇐306**

The general rule respecting court's power to modify judgment does not preclude court from correcting clerical errors and misprisions either in entry of judgment or due to court's inadvertence.

**3. Judgment ⇐306**

The term "clerical error," which court may correct by modifying judgment, covers all errors, mistakes or omissions not resulting from exercise of judicial function.

See Words and Phrases, Permanent Edition, for all other definitions of "Clerical Error".

**4. Judgment ⇐306**

An error, mistake or omission, resulting from inadvertence but for which a different judgment would have been rendered is a "clerical error" warranting correction of judgment to correspond with what it would have been but for such inadvertence.

**5. Judgment ⇐306**

A court has inherent power to correct clerical errors but for which different judgment would have been rendered by it, and such power extends to striking out fact findings, conclusions of law and judgment and substituting wholly different findings, conclusions and judgment.

**6. Judgment ⇐325**

In correcting clerical error or mistake affecting judgment, trial judge may give effect to facts within his personal knowledge and to his recollection.

**7. Judgment ⇐331**

Where judgment is corrected because of clerical error or mistake, either by amendment or by substitution of wholly different judgment, amended or substituted judgment speaks as though originally entered in amended or substituted form.

**8. Judgment ⇐331**

Amendment of judgment to correct clerical error or mistake leaves original judgment otherwise effective and unimpaired.

**9. Judgment ⇐386(1)**

The period in which party must act to get relief from order or judgment against him depends on whether he could have obtained relief on proper showing before nunc pro tunc order was made or whether he could have made application for relief as judgment, order or record was and could have maintained appeal from judgment as first entered.

**10. Appeal and error ⇐346(2)**

A party who can obtain desired relief from judgment against him before it is amended must appeal therefrom within time allowed after its entry, and if amendment materially affects judgment and rights of such party, he must appeal from corrected judgment within time allowed after entry thereof.

**11. Judgment ⇐1**

A "judgment" is final determination of rights of parties in action or proceeding. Code Civ. Proc. § 577.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment".

**12. Appeal and error ⇐66**

A judgment must be final judgment to be appealable. Code Civ.Proc. § 963, subd. 1.

**13. Judgment ⇐237(1)**

A judgment for plaintiff against only one of two defendants is necessarily in favor of other defendant.

**14. Appeal and error ⇐337(2)**

An original judgment for plaintiffs against corporate defendant only, without deciding plaintiffs' claims against individual defendants, was final judgment as between plaintiffs and corporate defendant, so that such defendant's appeal therefrom was not premature because notice of appeal was filed before entry of order, amending and correcting judgment by providing that plaintiffs should take nothing against individual defendants, in denying corporate defendant's motion for new trial. Rules on Appeal, rules 2(a), 3(a); Code Civ. Proc. § 662.

**15. Appeal and error ⇐110**

An appeal does not lie from order denying motion for new trial.

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Raymond George and another against the Bekins Van & Storage Company and others. From a judgment for plaintiffs against named defendant only and an order denying its motion for a new trial, named defendant appeals. On plaintiffs' motion to dismiss the appeal.

Appeal from order denying motion for new trial dismissed, and motion to dismiss appeal from judgment denied.

Chase, Rotchford, Downen & Chase, of Los Angeles, for appellant.

C. Paul DuBois, of Los Angeles, for respondents.

VALLÉE, Justice, pro tem.

Motion to dismiss an appeal from a judgment and from an order denying a motion for a new trial. Plaintiffs sued Bekins Van & Storage Company (referred to as "Bekins") and fourteen individual defendants. Bekins answered separately. Eleven of the individual defendants answered jointly. After the cause had been tried the trial judge signed findings of fact and conclusions of law, in which he concluded that plaintiffs were entitled to a judgment against Bekins for $3,126.15. There was no conclusion of law as to how the issues between plaintiffs and the individual defendants should be adjudicated. On February 5, 1947, judgment was entered that plaintiffs have judgment against Bekins for the amount stated, with interest, and for plaintiffs' costs. No decision was made in the judgment with respect to plaintiffs' alleged claims against the individual defendants.

On February 11, 1947, Bekins served and filed a notice of motion for a new trial. On March 18, 1947, the motion for a new trial was heard and submitted. The parties agree that on the hearing of the motion, counsel for appellant directed the court's attention to the fact that the conclusions of law and the judgment entered February 5, 1947, did not dispose of the issues between plaintiffs and the individual defendants. On April 4, 1947, the court made a minute order denying the motion for a new trial and ordering that the conclusions of law be amended to include

a conclusion that defendants other than Bekins were entitled to dismissal and ordering that the judgment entered February 5, 1947, be amended to include a judgment for costs to said defendants. On April 23, 1947, a formal written order was entered denying a new trial, amending and correcting the conclusions of law to conform to the findings of fact, and amending and correcting the judgment to conform to the findings of fact and the conclusions of law as therein corrected. This order recited that a collective motion, of the individual defendants who answered, for the amendment and correction of the conclusions of law and of the judgment, was heard with the motion for a new trial. It amended the conclusions of law by adding thereto conclusions that the answering individual defendants were entitled to judgment, that plaintiffs take nothing as against them, and that they were entitled to judgment against plaintiffs for their costs. This order also amended the judgment entered February 5, 1947, to provide that plaintiffs take nothing against the answering individual defendants and that they have judgment against plaintiffs for their costs.

On April 11, 1947, Bekins filed a notice of appeal from the judgment entered February 5, 1947, in favor of plaintiffs and against Bekins and from the order of April 4, 1947, denying the motion of Bekins for a new trial. No appeal has been taken by any party from the minute order entered April 4, 1947, in so far as it amended the judgment entered February 5, 1947, or from the order entered April 23, 1947.

Respondents, plaintiffs below, have moved to dismiss the appeal upon the grounds that the judgment appealed from is not the final judgment; that the notice of appeal was filed prior to the final judgment and that, therefore, it was premature and ineffective; and, in so far as the appeal from the order denying the motion for a new trial is concerned, on the ground that no appeal lies from that order. If an appeal lies from the judgment entered February 5, 1947, the appeal was within time. Rules on Appeal, 2(a), 3(a), 22 Cal.2d 1, 2.

[1] Before Code of Civil Procedure section 662 was enacted in 1929, the power of the court over a judgment ceased when the judgment became final unless reserved by statute or by some action of the court itself. Lankton v. Superior Court, 5 Cal.2d 694, 55 P.2d 1170; Cikuth v. Loero, 14 Cal. App.2d 32, 34, 57 P.2d 1009. Section 662 gave the court power in ruling upon a motion for a new trial to modify the judgment in whole or in part. A change made in ruling upon a motion for a new trial under authority of Code of Civil Procedure, section 662, which materially and in a substantial respect affects the conclusions of law and judgment and the rights of the parties against whom it is rendered constitutes a readjudication of the case, and the modified judgment entered is a new judgment, and an appeal lies only from the second judgment. R. Barcroft & Sons Co. v. Cullen, 213 Cal. 208, 2 P.2d 353; California Machinery Etc. Co. v. University City Syndicate, 3 Cal.App.2d 425, 39 P.2d 853; McConville v. Superior Court, 78 Cal.App. 203, 248 P. 553.

[2-10] The general rule with respect to the power of the court to modify a judgment does not preclude the court from correcting clerical errors and misprisions either in the entry of the judgment or due to inadvertence of the court. The term "clerical error" covers all errors, mistakes, or omissions which are not the result of the exercise of the judicial function. If an error, mistake, or omission is the result of inadvertence, but for which a different judgment would have been rendered, the error is clerical and the judgment may be corrected to correspond with what it would have been but for the inadvertence. Kowalsky v. Nicholson, 23 Cal.App. 160, 162, 137 P. 607; Freeman on Judgments, 5th Ed., vol. 1, p. 283, sec. 146. The court has inherent power to correct such errors. This power extends to striking out findings of fact and conclusions of law and a judgment and substituting wholly different findings of fact and conclusions of law and judgment. In correcting a clerical error or mistake the trial judge may give effect to facts within his personal knowledge and to his recollection. In re Estate of Goldberg, 10 Cal.2d 709, 717, 76 P.2d 508; Bastajian v. Brown, 19 Cal.2d 209, 214, 215, 120 P.2d 9; Martin v. Ray, 74 Cal.

App.2d 922, 928, 170 P.2d 75; Annotations 67 A.L.R. 828; 126 A.L.R. 956. If a judgment is corrected because of a clerical error or mistake either by amendment or the substitution of a wholly different judgment, the amended or substituted judgment speaks as though originally entered in its amended or substituted form. Such an amendment leaves the original judgment otherwise effective and unimpaired. Savings & Loan Soc. v. Horton, 63 Cal. 310; Fallon v. Brittan, 84 Cal. 511, 24 P. 381; McConville v. Superior Court, 78 Cal.App. 203, 248 P. 553. Not every alteration of a judgment by the court which rendered it will operate as a readjudication of the case. McConville v. Superior Court, supra. In Spencer v. Troutt, 133 Cal. 605, at page 607, 65 P. 1083, the court stated: "The test as to whether the period in which the party must act in order to get relief from an order or judgment against him must be whether he could have obtained the desired relief (on a proper showing) before the nunc pro tunc order was made. Could he have made his application as the judgment, order, or record was? * * * Could petitioner, against objection, have maintained an appeal from the judgment as first entered?" Under the test stated in Spencer v. Troutt, if a party can obtain the desired relief from a judgment before it is amended, he must act—appeal therefrom—within the time allowed after its entry. If the amendment materially and in a substantial respect affects the judgment and the rights of a party against whom it is rendered, and a party desires relief therefrom, he must appeal from the corrected judgment within the time allowed after entry thereof. Amell v. Amell, 10 Cal.2d 153, 73 P.2d 888; Combination Land Co. v. Morgan, 95 Cal. 548, 30 P. 1102; McConville v. Superior Court, 78 Cal.App. 203, 207, 248 P. 553.

[11-14] A judgment is the final determination of the rights of the parties in an action or proceeding. Code Civ.Proc. sec. 577. To be appealable a judgment must be a final judgment. Code Civ.Proc. sec. 963, subd. 1; Bakewell v. Bakewell, 21 Cal.2d 224, 226, 130 P.2d 975. The judgment of February 5, 1947, ascertained and fixed absolutely and finally the rights of plaintiffs as against Bekins in relation to the subject matter of the litigation between them. No issue between them was left for further consideration. It is clear that the amendment was the correction of a clerical error. The court originally, no doubt, inadvertently failed to make the conclusions of law conform to the findings of fact and to make the judgment run in favor of the individual defendants. That it originally intended to do so is made manifest by the findings of fact and by its subsequent orders. Whether the original judgment, considered with the findings, was in favor of the individual defendants without amendment, is not argued and need not be decided. It has been held that when two or more defendants are sued and the judgment for plaintiff runs against only one, it is necessarily in favor of the other. Ernsting v. United Stages, Inc., 206 Cal. 733, 737, 276 P. 103; Miller v. More, 170 Cal. 557, 561, 150 P. 775; Treat v. Laforge, 15 Cal. 41. The order amending the judgment did not, in any wise, affect the original judgment as between plaintiffs and Bekins. Bekins was not aggrieved by the amendment. Respondents can be as fully heard on Bekins' appeal from the original judgment as they could have been had Bekins appealed from the judgment as amended. The original judgment was the final judgment as between respondents and appellant. Bakewell v. Bakewell, 21 Cal.2d 224, 130 P.2d 975; Lyon v. Goss, 19 Cal.2d 659, 670, 123 P.2d 11.

[15] As an appeal does not lie from an order denying a motion for a new trial, the appeal from that order is dismissed. Carlin v. Pickett, 81 Cal.App.2d 688, 184 P.2d 945. The motion to dismiss the appeal from the judgment is denied.

SHINN, Acting P. J., and WOOD, J., concur.

## MUSES et ux. v. HOUSING AUTHORITY OF CITY & COUNTY OF SAN FRANCISCO et al.

Civ. 13382.

District Court of Appeal, First District, Division 1, California.

Feb. 6, 1948.

Hearing Denied April 1, 1948.

**1. Municipal corporations ⇐745½**

Generally, cities and municipal utility districts are liable for the torts of their agents committed while acting in a proprietary capacity but not while acting in a governmental capacity, and the capacity in which they act at the time of the tort determines the liability.

**2. Eminent domain ⇐46**
**States ⇐14**
**United States ⇐3**

A state may donate or sell its land to the United States government, or the United States government may, by condemnation proceedings, acquire state land and devote it to federal purposes without withdrawing such land from the jurisdiction of the state, and the respective governments may enter into mutual agreements on question of jurisdiction relative to such acquired land.

**3. States ⇐191(1)**

The provision in the Housing Authorities Law that a corporate agency may "sue and be sued" does not, in and of itself, create a liability against the state where none existed before, and whether sovereign immunity has been bestowed on the state or on a state agency is purely a jurisdictional question. Gen. Laws, Act 3483, § 8.

**4. States ⇐112**

The state, to the extent that it must remain within its realm of power, protecting benefits as originally intended, is sovereign, but when it steps out from its supreme position and competes with industry or labor, then, so far as tort liability is concerned, it must be held to be acting in a "proprietary capacity" and be subject to the same liability for its torts as private persons.

See Words and Phrases, Permanent Edition, for all other definitions of "Proprietary Capacity".

**5. Municipal corporations ⇐733(1)**

The state, by creating and operating through the Housing Authority of the City and County of San Francisco, has entered a commercial field and is liable for tort, though intention of Housing Laws is that they should be administered without profits. Government Code, §§ 16021, 16041; Gen. Laws, Acts 3481, 3482, 3483.

**6. Municipal corporations ⇐742(4)**

In tort action against the Housing Authority of the City and County of San Francisco, complaint alleging that plaintiffs rented living quarters from authority, that authority, without notice or right, and, in violation of the Emergency Price Control Act, evicted plaintiffs and wrongfully retained and refused to surrender plaintiffs' property was not demurrable. Government Code, §§ 16021, 16041; Gen. Laws, Acts 3481, 3482, 3483; Emergency Price Control Act of 1942, § 1 et seq., as amended, 50 U.S.C.A.Appendix, § 901 et seq.

---

Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

Action by Mack Muses and Azzielle Muses, his wife, against the Housing Authority of the City & County of San Francisco, a public body, corporate and politic, and others, to recover damages for tort. From a judgment sustaining a demurrer to the complaint without leave to amend, the plaintiff appeals.

Judgment reversed.

Edward D. Mabson, of San Francisco, for appellants.

William A. O'Brien, of San Francisco, for respondents.

WARD, Justice.

This is an appeal from a judgment sustaining a demurrer without leave to amend. The complaint is entitled "Complaint for Damages and Claim and Delivery" and alleges that the Housing Authority of the

City and County of San Francisco is a public body politic.

The demurrer interposed particularly raises the question of the jurisdiction of the persons and the subject of the action. The purpose of the demurrer was to raise the question of the liability, if any, of this agency for tort. Added thereto are other grounds more or less special in their nature which need not be considered here. If defendant's contention that the court has not jurisdiction is correct the matter is at an end. If plaintiffs have a right to maintain an action against defendant corporation, then it was error to sustain the demurrer without leave to amend. The questions, including the title to the personal property and matters akin thereto and other allegations that may be subject to special demurrer, may be disposed of in the trial court.

Defendant answers the contention that it is liable for tort as follows: "That it is the law of this state under the decision in People v. Superior Court [29 Cal.2d 754, 178 P.2d 1] that where the state engaged in 'industrial' or 'business' enterprises, as distinguished from purely governmental activities, tort liability will attach, we concede.

"That Respondent, while exercising its function, under the California Authorities Law and the California War Housing Law, was engaged in an 'industrial' or 'business' enterprise, we deny."

The admission heretofore noted by defendant needs elucidation as a matter of demonstrating the error in the denial that accompanies the concession as applied to the demurrer and the ruling thereon in this case.

In Housing Authority of Los Angeles County v. Dockweiler, 14 Cal.2d 437, page 449, 94 P.2d 794 page 800, dealing with slum clearance, it was said: "It must be admitted that the questions involved in this litigation are of great public concern and importance. While there are a number of issues presented, the one of fundamental importance, and upon the determination of which several of the lesser and incidental issues will turn, is whether slum clearance and public housing projects for low-income families are public uses and purposes for which public money may be expended and private property acquired. Preliminarily, it should be recalled that the federal statute and our state statutes are premised upon the expressly declared policy that elimination of substandard dwellings and the providing in their place and stead of safe and sanitary dwellings of low rental for those otherwise required by lack of income to remain in the substandard dwellings are public uses and purposes and are governmental functions of state concern."

The welfare purpose of this act may be considered separate and apart from its business activities if the latter constitutes competition with industry or labor. The welfare feature may continue without denying the beneficiary the right to claim damages for a legal injury.

To determine the correctness of the order sustaining the grounds of the demurrer this court is called upon to study (1) the present and previous statutes, (2) the allegations of the complaint as it stands, and (3) the possibility of amendment of the complaint to bring it within the law.

The question whether public corporations engaged in purely governmental activities are immune from tort liability is gradually simmering down from a boiling point reached by two extreme lines of thought, one, by those who believe that the state itself in its corporate entity acts as a sovereignty in all respects, and the other by those who believe that sovereignty is a cloak that should be torn from the invisible form of the public corporation representing the state, and that it should be regarded as any incorporated body, enjoying like privileges and subject to like obligations. The purpose of government is the benefit, protection and security of the people. (Const. of Calif., art. 1, sec. 2.) To attain this purpose it must assume a position of authority.

[1] Over a long period it was held that the distinction between governmental and proprietary acts does not apply to the state or to state agencies; that practically all sovereign immunity continues and that the activities of state agencies should be classified as governmental in character. How-

ever, "Municipal and quasi-municipal corporations, such as *cities* and *municipal utility districts,* are not considered purely state agencies, and their functions are not exclusively governmental. Hence the general rule applicable to them is that they are liable for the torts of their agents committed while acting in a *proprietary capacity* and not while acting in a *governmental capacity.* The capacity in which they act at the time of the tort determines the liability." (Witkin's Summary of California Law, Sixth Ed., Vol. 1, p. 643, sec. 26.) The same volume states (p. 644): "The following are among municipal activities which have been held to be proprietary: Water, gas and electric systems (Davoust v. [City of] Alameda, 1906, 149 Cal. 69, 84 P. 760 [5 L.R.A.,N.S., 536, 9 Ann.Cas. 847]); municipal auditorium (Chafor v. [City of] Long Beach, 1917, 174 Cal. 478, 163 P. 670 [L.R.A.1917E, 685, Ann.Cas.1918D, 106]); garage for repair of city automobiles (Bertiz v. [City of] Los Angeles, 1925, 74 Cal.App. 792, 241 P. 921); municipal airport (Coleman v. [City of] Oakland, 1930, 110 Cal. App. 715, 295 P. 59; General Pet [roleum] Corporation v. [City of] Los Angeles, 1937, 22 Cal.App.2d 332, 70 P.2d 998 [72 P.2d 551] [furnishing municipally employed harbor pilots]; see 14 Cal.L.Rev. 229; 3 So.Cal.L.Rev. 353.)"

Morrison v. Smith Bros., Inc., 211 Cal. 36, 293 P. 53, 54 (consolidated with other cases) is a case involving damages for the alleged wrongful death of a certain named person. The district in which the accident happened had been organized under and pursuant to the Municipal Utility District Act. Stats.1921, p. 245. While referred to as a "municipal" act, it was in fact an act empowering one county to enter into a contract with another to maintain ferries across streams, and empowering one county, in the event the second county refused, to enter into a county to acquire landing places on the opposite boundary. The defendant municipal district demurred generally and the trial court sustained the demurrers. The question in dispute was stated to be "that the respondent district, like a municipality, is liable to suit when injury results from the negligence of its officers or agents exercising powers in reference to matters not purely governmental but of a proprietary character. Respondent, on the other hand, urges that it is to be dealt with as an agency of the state, that is, as a separate and distinct governmental entity whose purposes, activities, and functions are necessarily public or governmental in character. Respondent concedes that incorporated cities and towns have been held liable in tort and have been held to be acting in a proprietary character when engaged in activities similar to those designated by the statute under which it was formed, but argues that this does not in any sense make the same activities proprietary when engaged in by a corporation such as it declares itself to be." In the Morrison case the court said (pages 39, 40, 44, 45 of 211 Cal., page 54 of 293 P.): "Within the general class of public corporations, this court has already distinguished between two different species of such corporations, as far as liability for tort is concerned. On the one hand there are incorporated cities and towns, usually referred to as municipal corporations. In reference to this type of public corporation the rule is well settled that their liability for tort depends on the nature of the work being done at the time the tort is committed. If the agents were acting in a governmental capacity no liability attaches to the corporation, under the elementary rule that the state or its various subdivisions are not liable for the torts of their agents while acting in a governmental capacity. But it is equally well settled that an incorporated city or town is liable for the torts of its agents committed while acting in a proprietary capacity. * * * The other type of public corporation upon whose tort liability this court has already passed is typified by irrigation, reclamation or drainage organizations, whose main purpose is to assist the state in reclaiming, improving and aiding the productivity of farm lands. In reference to this type of organization the law is well settled that, subject to certain exceptions not important in this case, they are not liable for the torts of their agents, upon the theory that they are state agencies, performing a governmental function. * * *

"We feel that sufficient has been said to show that such quasi-municipal corporations

as respondent more closely resemble municipal corporations proper than they do state agencies, such as irrigation and reclamation districts. Under such circumstances we deem the better rule to be that, so far as tort liability is concerned, such liability is to be governed by the same rules as are applicable to municipal corporations proper. No good reason occurs to us why those districts should be cloaked with the immunity that respondent claims when acting in a purely proprietary capacity; and, in fact, many reasons exist why the same rule that applies to municipal corporations proper should apply to respondent. It would certainly be an anomalous situation if a municipality engaged in a proprietary function, such as running, operating or constructing waterworks, would be liable for the torts of its agents, but if that same municipality should join with other municipalities and organize a municipal utility district it would thereby immunize itself from all such liability. Such a rule does not appeal to our sense of justice nor to our reason. The rule excluding state agencies from liability for tort is an exception to the general rule which we are not inclined to extend. In so far as liability for tort is concerned, the respondent district is to be governed by the same rules as govern municipal corporations with reference to the same question—that is, respondent is liable for the torts of its agents if said torts are committed while the agents are acting in a proprietary capacity."

There are cases that do not agree with Morrison v. Smith Bros., supra, or, on slightly different facts, have adhered to the strict doctrine of sovereign immunity. Rauschan v. State Comp. Ins. Fund, 80 Cal. App. 754, 253 P. 173, decided prior to the Morrison case, held that the State Compensation Insurance Fund was immune. Subsequently a county hospital operated without profit was declared to be immune. Calkins v. Newton, 36 Cal.App.2d 262, 97 P.2d 523. To the same effect, see Griffin v. Colusa County, 44 Cal.App.2d 915, 113 P.2d 270 and cases cited therein.

However, Yolo v. Modesto Irr. Dist., 216 Cal. 274, 13 P.2d 908 was an appeal from a judgment of nonsuit in a tort action. The court commented as follows (pages 276, 277 of 216 Cal., page 909 of 13 P.2d): "Preliminarily it may be said that, in numerous cases dealing with tort liability, this court has distinguished between two species of public corporations. In the one class have been placed incorporated cities, towns, and similar organizations, denominated 'municipal corporations,' which may be held liable for torts of their agents committed while acting in a proprietary capacity. Chafor v. [City of] Long Beach, 174 Cal. 478, 163 P. 670, L.R.A.1917E, 685, Ann.Cas.1918D, 106; Davoust v. City of Alameda, 149 Cal. 69, 84 P. 760, 5 L.R.A.,N.S., 536, 9 Ann.Cas. 847; Morrison v. Smith Bros., 211 Cal. 36, 293 P. 53. In the other class have been placed irrigation, reclamation, drainage, and similar organizations, variously denominated 'public corporations,' for 'governmental purposes,' 'agents or representatives of the state in the particular locality in which they exist,' 'public agencies,' etc., which (with certain exceptions such as liability created by statute) are not generally liable for torts of their agents because they are held to be state agencies performing governmental functions. Whiteman v. Anderson-Cottonwood Irr. Dist., 60 Cal. App. 234, 212 P. 706; Nissen v. Cordua Irr. Dist., 204 Cal. 542, 269 P. 171; Morrison v. Smith Bros., supra. The case last cited also recognizes a third classification, corporations such as a district organized under the Municipal Utility District Act (Stats. 1921, p. 245), denominated 'quasi-municipal corporations' or public corporations of a quasi-municipal character, more nearly resembling municipal corporations proper than state agencies and subject, so far as liability for tort is concerned, to the rules governing municipal corporations, that is, being generally liable for torts committed by their agents while acting in a proprietary capacity." The Modesto Irrigation District was primarily created and operated as an irrigation district to perform governmental functions, but subsequently, by amendments to the original statute, it was permitted to manufacture and distribute electric power, light and energy, thereby (page 277, 216 Cal., page 909 of 13 P.2d) "competing with a public service corporation." A broken wire used in its business of transmitting power caused the accident which resulted in the tort action. The court held (pages

279, 280 of 216 Cal., page 910 of 13 P.2d): "The inhabitants of Modesto and outlying districts desired to operate an electrical distribution system under public ownership. Had this end been accomplished through the city itself, a municipal corporation, it would have been liable for all torts committed by it in conducting such a proprietary enterprise (Davoust v. City of Alameda, supra; Ruppe v. City of Los Angeles, 186 Cal. 400, 199 P. 496; Sincerney v. City of Los Angeles, 53 Cal.App. 440, 200 P. 380); had it been accomplished through a public utility district, such district might also have been liable. (In re Orosi Public Utility District, in Tulare County, 196 Cal. 43, 235 P. 1004); the same is true of a municipal utility district (Morrison v. Smith Bros., supra)."

The trend, legislatively by enactment of statutes and judicially by construction of statutes, has been to permit persons who have valid claims against the state to bring suit under certain circumstances, subject to the statute of limitations and other specified conditions, in a court of competent jurisdiction to determine the justice of the claim to the end and purpose of final judgment. (Stats.1893, Ch. 45, p. 57.) Statutes of 1929 added new sections to the Political Code which by substitution became a part of Government Code sec. 16041 (Stats.1945, Ch. 119, p. 511) which provides: "Any person who has a claim against the State (1) on express contract, (2) for negligence, or (3) for the taking or damaging of private property for public use within the meaning of Section 14 of Article 1 of the Constitution, shall present the claim to the board in accordance with Section 16021. If the claim is rejected or disallowed by the board, the claimant may bring an action against the State on the claim and prosecute it to final judgment, subject to the conditions prescribed by this chapter." Section 16021 provides the time and the manner of presenting claims.

Having reached the conclusion that the action herein may not be prohibited by law, it becomes necessary to examine the present act and other legislation bearing upon the general subject in order to answer the question disputed by the respective parties, and perhaps later examine the pleadings.

[2] At the outset it may be well to observe that a state may donate or sell its land to the United States government, or the latter may, by condemnation proceedings, acquire state land and devote it to federal purposes without withdrawing such land from the jurisdiction of the state. The respective governments may enter into mutual agreements on the question of jurisdiction relative to such acquired land. Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502.

[3] Plaintiff stresses the point that the Housing Authorities Law, Deering's California General Laws, Vol. 2, Act 3483, p. 1297, sec. 8 provides: "An authority shall constitute a public body corporate and politic, exercising public and essential governmental functions, and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this act, including the following powers in addition to others herein granted: (a) To sue and be sued." The provision in a statute creating a corporate agency that it may "sue and be sued" in and of itself does not create a liability against the state where none existed before. Whether sovereign immunity has been bestowed upon the state or upon a state agency is purely a jurisdictional question. In People v. Superior Court, 29 Cal.2d 754, 178 P. 2d 1, this question, after consideration of leading cases on the subject, was disposed of (page 759 of 29 Cal.2d page 4 of 178 P.2d) as follows: "Thus there was adopted in this state the doctrine that state consent to be sued for negligence did not waive sovereign immunity from liability for tort." It is unnecessary to consider the cases cited in People v. Superior Court, supra.

The legislative history of state housing acts is interesting and throws light on the general purpose of housing plans, limited dividend housing corporations (Deering's California General Laws, Vol. 2, Act 3481, Stats.1933, p. 1426), and Community Land Chest Act, Deering's California General Laws, Vol. 2, Act 3482, Stats.1933 p. 1465,

when considered with later housing authority.

The division of immigration and housing, Stats.1921, Ch. 604, p. 1031, as subsequently amended by Stats.1927, Ch. 440, p. 733, and Stats.1931, Ch. 978, p. 1989, is a part of the same legislative enactment developing a general scheme of industrial relations and welfare. Industry is made a part of the foundation upon which the War Housing Law is built. The props used as support were loaned or donated by the federal and state governments.

The Limited Dividend Housing Corporations Act, supra, provided: "The term 'actual cost' includes in addition to the cost of the lands and buildings, charges for financing and supervision, and carrying charges during construction, including interest on borrowed money and invested capital, when such charges have been approved by the commission. * * * The term 'fixed charges' includes all operating and maintenance charges, taxes, assessments, insurance and depreciation, amortization, interest sinking fund, and other expenses and charges in amounts approved by the commission. * * * The term 'security' shall include any share, stock, bond, note, treasury stock, debenture, evidence of indebtedness, certificate of interest or participation, or beneficial interest in title to property, profits or earnings or any other instrument commonly known as a security. * * * The term 'slum area' means any area of property partially or totally occupied by deteriorated, obsolete, unsafe or unsanitary single or multiple dwellings. The determination of the question as to whether or not any building is deteriorated, obsolete, unsafe or unsanitary rests solely with the commission. * * * The provisions of law as to corporations generally shall be applicable to corporations formed under this act, except where inconsistent with the corresponding provisions of this act, in which case the provisions of this act shall prevail. * * * The par value of all shares of capital stock of the corporation, and all shares must have a par value. * * * Any limited dividend housing corporation incorporated under this act shall have power and authority, when authorized by the commission: 1. To borrow money from or to sell, pledge or discount its securities to the Reconstruction Finance Corporation, Federal Home Loan Bank, or any other corporation or agency established under the authority of the United States Government. 2. To comply with the provisions for membership and to become a member of the Federal Home Loan Bank or of any other corporation or agency established under the authority of the United States Government and to comply with any provisions or regulations of the Reconstruction Finance Corporation." (Deering's California General Laws, Vol. 2, pp. 1279–1280.) Other provisions indicate as above that the state intended the creation of a permanent housing, building and maintenance corporation under reasonably protected restrictions. (Stats. 1933, p. 1429, sec. 8, subd. 3d.)

The statutes of 1933, p. 1465 show the passage of the the "Community Land Chest Act," which approved the organization of non-profit corporations to provide housing in rural and suburban districts with the privilege (pp. 1466–1467, sec. 6, subds. 1 and 2) "To borrow money from or to sell, pledge or discount its securities, or to mortgage, pledge or otherwise hypothecate its property to the Reconstruction Finance Corporation, Federal Home Loan Bank, or any other corporation or agency established under the authority of the United States or of this State. 2. To comply with the provisions for membership and to become a member of the Federal Home Loan Bank or of any other corporation or agency established under the authority of the United States or of this State and to comply with any provisions or regulations of the Reconstruction Finance Corporations." The purpose of aiding industry and business is apparent from the following (sec. 21, p. 1472, Gen.Laws, Act 3482): "Since the building trades in the State of California are now dormant, it is of vital interest to the people of this State that corporations may be formed as provided in this act to take advantage of such proffered assistance to the end that such building trades be again revived and many thousands of people now unemployed be put to work."

It appears that one of the original purposes of the California Housing Authorities Law (1945 Supp. to Deering's California General Laws, Vol. 2, Act 3483, Stats.1938, Extra Session, Ch. 4, p. 9) was to effect slum clearance. " 'Housing project' shall mean any work or undertaking to be financed in whole or in part by the Federal government: (1) to demolish, clear or remove buildings from any slum area; such work or undertaking may embrace the adaptation of such area to public purposes, including parks or other recreational or community purposes; or (2) to provide decent, safe and sanitary urban or rural dwellings, apartments or other living accommodations for persons of low income; such work or undertaking may include buildings, land, equipment, facilities and other real or personal property for necessary, convenient or desirable appurtenances, streets, sewers, water service, parks, site preparation, gardening, administrative, community, health, recreational, educational, welfare or other purposes; or (3) to accomplish a combination of the foregoing. The term 'housing project' also may be applied to the planning of the buildings and improvements, the acquisition of property, the demolition of existing structures, the construction, reconstruction, alteration and repair of the improvements and all other work in connection therewith." Deering's California General Laws, Act 3483, sec. 3, subd. 1, p. 1293, Stats.1938, Extra Session, Ch. 4, sec. 3, subd. 1, pp. 11–12. The act was an outgrowth of United States Housing Act of 1937, 42 U.S.C.A. §§ 1401–1430, which declared a policy to promote general welfare by remedying unsafe and unsanitary housing conditions. Housing Authority of Los Angeles County v. Dockweiler, 14 Cal.2d 437, 94 P.2d 794. The act has been added to several other acts as appears in Deering's California General Laws, Stats.1938, Extra Session, Ch. 1, p. 1, Ch. 3, p. 9, Stats.1939, Ch. 301, p. 1572, Stats. 1943, Ch. 798, p. 2590, Stats.1945, Ch. 1021, p. 1970.

The permitted utility of the housing projects in various parts of the country, unless authorized by special act of Congress, grew out of the plan authorized in 1940 by the Lanham Act Public Law No. 849, 76th Congress, Third Session, 54 Stats.L. 1125, 42 U.S.C.A. § 1521 et seq. The general purpose of this and somewhat similar acts was national defense; the specific purpose was to provide housing for persons engaged in national defense activities, including workers in industries connected with and essential to national defense. Johnson v. Morrill, 20 Cal.2d 446, 126 P.2d 873. In the Johnson case it is said (page 452 of 20 Cal.2d, page 877 of 126 P.2d): "Section 10 of the Lanham Act [42 U.S.C.A. § 1547] reads: 'Notwithstanding any other provision of law, the acquisition by the Administrator of any real property pursuant to this Act * * * shall not deprive any State or political subdivision thereof * * * of its civil or criminal jurisdiction in and over such property, or impair the civil rights under the State or local law of the inhabitants on such property.'

"* * * Notwithstanding the fact that the United States may acquire exclusive jurisdiction over such defense housing projects, exclusive jurisdiction is not to be deemed to be created by pursuing the authority vested by this act."

The 1943 act to aid the prosecution of the war (Stats.1943, Ch. 798, sec. 2, p. 2590, which provided for the housing of persons engaged in war industries or activities set forth: "For the purpose of developing or administering War Housing Projects to aid in the prosecution of the war, any housing authority established and authorized to transact business on or before March 1, 1943, pursuant to Chapter 4 of the Statutes of 1938, Extra Session, as amended (herein called the 'Housing Authorities Law') may cooperate with, act as agent for, or lease such War Housing Project from, the Federal Government; provided, that a War Housing Project owned, leased, or administered under this act by a housing authority shall not be subject to the limitations provided in Section 10 or in the second sentence of Section 9 of the Housing Authorities Law." The noted sections do not affect this controversy. It may be noticed that housing authority previous acts are applicable except as above stated. The

limitation therein does not preclude suit by or against the state agency.

The last mentioned statute (Chapter 798 of Stats.1943) was amended several times by the Legislature in 1945. The only amendment that appears to be pertinent hereto is Stats.1945, Ch. 433, p. 922, where it refers to the power to "transact business." "Housing project" is declared (p. 923) to apply to "the planning of the buildings and improvements, the acquisition of property, the demolition of existing structures, the construction, reconstruction, alteration and repair of the improvements and all other work in connection therewith." In Chapter 431, p. 919, it is said that in any suit relating to any contract of the authority "the authority shall be conclusively deemed to have become established and authorized to *transact business* and exercise its powers hereunder upon proof of the adoption of a resolution by the governing body declaring the need for the authority." (Emphasis added.) Chapter 766, Stats. 1945 provides, as in previous enactments, for leasing, selling and transferring property and (p. 1451) "To arrange or contract for the furnishing by any person or agency, public or private, of services, privileges, works or facilities for or in connection with, a housing project or the occupants thereof."

There is attached to the brief for respondent a copy of an amendment to the "War Housing Law." Therein it is provided that *"any housing authority* * * * authorized to *transact business"* may act as agent for, or lease such War Housing Project, owned, leased or administered under the act by a housing authority. (Second emphasis added.) Under previous acts the housing authority is authorized to conduct an industrial enterprise and transact business. In the same year, to say nothing of previous years, the corporate housing agency was permitted to sell and transfer property (Stats.1945, Ch. 766) and transact business (Stats.1945, Ch. 433). The provisions of law as to corporations generally are applicable to corporations formed under the present act.

People v. Superior Court, supra, 29 Cal. 2d pages 761, 762, 178 P.2d page 5, contains a discussion of the leading cases on the subject of the liability of the state for damages based upon the negligent acts of its representatives. "With the possible exception of Rauschan v. State Comp. Ins. Fund, supra, 80 Cal.App. 754, 253 P. 173, which followed Riddoch v. State, supra, 68 Wash. 329, 123 P. 450, 42 L.R.A.N.S. 251, Ann.Cas.1913E, 1033, the decisions in this state do not foreclose, but seem to favor the proposition that sovereign liability exists for negligence in the state operation of an industrial or business enterprise. Therefore, pursuant to those decisions headed by the case of Green v. State, supra, 73 Cal. 29, 11 P. 602, 14 P. 610, it should be concluded that where the state engages in industrial or business enterprises, as distinguished from purely governmental activities, tort liability attaches and may be adjudicated pursuant to the consent statute. Insofar as the decision in Rauschan v. State Comp. Ins. Fund, supra, 80 Cal.App. 754, 253 P. 173, is not in harmony with the conclusion herein, it is disapproved." In Manney v. Housing Authority, 79 Cal.App.2d 453, 457, 464, 180 P.2d 69, 72 (see Deering's California General Laws, Vol. 2, Act 3483), it is said: "In the operation of this dormitory it was engaged in a proprietary and not a governmental function. Any doubt which might have existed as to its liability to suit for negligence while acting in a proprietary capacity has been resolved in People v. Superior Court, 29 Cal.2d 754, 178 P.2d 1. Cf. Housing Authority of Birmingham Dist. v. Morris, 244 Ala. 557, 14 So.2d 527, 535." "The fact that the dormitories were built by a federal agency would not excuse appellant from attempting to remedy a dangerous fire hazard in the dormitories after it was operating them, if one existed."

[4] The state, to the extent that it must remain within its realm of power, protecting the benefits as originally intended, is sovereign, but when it steps out from its all supreme position as ruler and competes with industry or labor, then, so far as tort liability is concerned, it must be held to be acting in a proprietary capacity and be subject to the same liability for its torts as private parties.

[5] The fact that the intention of the act is that it shall be administered without profit is beside the point. The state through its agency has entered the commercial field. Having created and operated a business enterprise it is liable for a tort. The trial court is authorized under the terms of the statute to pass upon the merits of the case if the complaint shows jurisdiction of the subject matter and the balance of the complaint may be amended to state a cause of action against the persons involved in their official capacities.

[6] The complaint alleges that defendant corporation was created and existed under the laws of the State of California; that it transacted business and exercised its power under said laws, having its principal place of business in the City and County of San Francisco within the said state; that it is the owner and in complete control and management of a certain housing project at Hunters Point in San Francisco.

Plaintiffs rented a certain dwelling house or living quarters from defendant corporation upon a written lease at a monthly rental of $41, paid the required deposit of $10, entered into possession "and lived there continuously thereafter paying the rent each month" for several months. In October 1945 it is alleged "while he [plaintiff] was at work, without legal written notice, or any notice whatsoever of termination of tenancy, unlawfully, without right and contrary to statute in such case made and provided, and, in violation of the Office of Price Administration Rent Regulation for Housing as provided in the Emergency Price Control Act, as amended in 1942, 50 U.S.C.A.Appendix, § 901 et seq., governing the removal of tenants, take possession of said premises, evict plaintiffs therefrom, and did wilfully, wrongfully without plaintiffs' knowledge or consent, remove from said premises each, all and every article of plaintiffs' personal property and effects, to the value of Five Hundred Twenty-Nine and 8/100 ($529.08) Dollars, consisting of clothing, shoes, dishes, radio, jewelry, blankets, bed linen, a watch, hand luggage, bed spreads and private papers and documents, and did lock the doors of said premises, thereby wrongfully excluding said plaintiff from access to said premises, depriving him of a place to sleep and rest after his day's work, and by reason of present shortage of housing accommodations said plaintiff was, as a result of defendants aforesaid wrongful acts, compelled to and did walk the streets all that night, and for the following week said plaintiff slept in a garage where he had been formerly employed." It is also alleged that on the day following the eviction defendant still had in its possession the original $10 deposit; that on the day following the eviction one of the plaintiffs, Mack Muses, demanded the immediate return of his property and private papers and was informed that the property was held to secure payment of $10.74; that plaintiff Mack Muses paid the amount but defendant failed and refused to surrender the property. Plaintiffs allege that defendant stated that the property and papers "were no longer in its possession and therefore could not be returned to plaintiff." There is an allegation of damage and special damages in stated amounts, and a prayer therefor.

It must be determined that the pleading sufficiently alleges that the California Authorities Law as mentioned by respondent, or the California Housing Authorities Law, or the California War Housing Law, though all may not be specifically named, are the basic laws upon which the alleged wrong was grounded. The complaint should be amended and, if necessary, a demurrer filed.

In accordance with the views herein expressed it was error for the trial court to have sustained the demurrer without leave to amend.

The judgment appealed from is reversed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; EDMONDS, J., dissenting.

83 Cal.App.2d 521

## SILVA v. SUPERIOR COURT IN AND FOR SAN JOAQUIN COUNTY.

Civ. 7418.

District Court of Appeal, Third District, California.

Feb. 7, 1948.

Hearing Denied April 1, 1948.

**1. Executors and administrators ⇐17(6), 236, 238**

Where heirs of deceased judgment debtor made no effort to probate deceased's estate for more than four years after his death, probate court had jurisdiction to appoint a stranger as administratrix of deceased's estate, on petition of deceased's judgment creditors, and probate court's approval of the claims of the judgment creditors while the administratrix was qualified to act, was valid, and probate court properly denied widow's motion to rescind and disallow the claims. Probate Code, §§ 423, 711, 713.

**2. Limitation of actions ⇐83(2)**

Judgment creditor's judgment was not barred by five year limitations where judgment was filed by creditor as a claim against deceased judgment debtor's estate and was approved within five years, first by administratrix, while she was the qualified administratrix of the estate, and then by the probate judge. Code Civ.Proc. § 336.

**3. Executors and administrators ⇐241**

Approval by administratrix and by probate judge of judgment creditor's claim based on judgment, did not constitute a new judgment, but merely recognized the claim as a valid debt to be ranked among the acknowledged debts of the estate, to be paid in due course of administration. Probate Code, §§ 711, 713.

**4. Executors and administrators ⇐228(1)**

Personal notice of the presentation and allowance of claims against a deceased's estate need not be given to deceased's heirs. Probate Code, §§ 706, 711.

**5. Executors and administrators ⇐32(2)**

Proper acts of administratrix, including her approval of claims against the estate while she was so qualified, were valid, though her letters were thereafter revoked when a son of deceased applied for revocation of the letters and applied for letters of administration in his own behalf. Probate Code, § 450.

**6. Executors and administrators ⇐17(6)**

Where judgment debtor's heirs made no effort to probate debtor's estate for more than four years after debtor's death, judgment creditors were entitled to petition for letters and to nominate an administratrix. Probate Code, §§ 422, 423.

**7. Executors and administrators ⇐20(4)**

Where application for appointment of administratrix who had been nominated by deceased's judgment creditors when more than four years elapsed after deceased's death without deceased's heirs making any effort to probate deceased's estate, was posted as required by the Probate Code, probate court had jurisdiction, though all heirs did not have personal notice of the application. Probate Code, §§ 440, 441.

**8. Limitation of actions ⇐83(2)**

Where judgment was rendered on June 3, 1940, and judgment debtor died intestate on July 4, 1942, and no administrator of his estate was appointed until November 12, 1946, when an administrator was nominated by judgment creditors after judgment debtor's heirs made no effort to probate the estate for more than four years, claim filed by creditor against the estate on the judgment on November 29, 1946, was not barred by five year limitations, since time to commence suit was extended by judgment debtor's death for one year after letters of administration were issued to his estate. Code Civ. Proc. §§ 336, 353; Probate Code, §§ 422, 423.

**9. Executors and administrators ⇐239**

On certiorari to review an order of probate court in an estate proceeding refusing to rescind approval of two creditors' claims, District Court of Appeal assumed, in absence of proof to the contrary, that the claims were presented in proper form. Probate Code, §§ 706, 732.

**10. Executors and administrators ⇐241**

Where a claim represented by a judgment was allowed by administratrix and

judge, and was filed in the estate, the presumption was that sufficient evidence of the existence of an unpaid judgment was first presented. Probate Code, §§ 706, 711.

**11. Executors and administrators ⇐234**

Fact that administratrix who was appointed on nomination of judgment creditors of deceased after no effort had been made to probate estate for more than four years, was a secretary in office of attorneys, did not disqualify her from allowing judgment creditors' claims represented by the judgments against the estate. Probate Code, §§ 423, 703.

**12. Executors and administrators ⇐234**

A personal representative who is personally interested in a claim against the estate is disqualified from approving the claim. Probate Code, § 703.

**13. Executors and administrators ⇐17(6)**

Judgment creditors of deceased, whose heirs made no effort to probate his estate for more than four years after his death, were entitled to have an administratrix appointed for the estate and to present their claims to the estate within the time allowed by law, and were not required to proceed by enforcing execution of their judgments after a lapse of five years from the entry thereof by leave of court. Code Civ. Proc. §§ 353, 685; Probate Code, § 423.

**14. Executors and administrators ⇐239**

On certiorari to review order of probate court refusing to rescind approval of two claims against estate by judgment creditors of deceased, District Court of Appeal was not concerned with merits of administratrix' suit to set aside gift deed of realty from the deceased to his wife prior to his death, on ground of fraud, since allowance of claims based on judgments was a mere acknowledgment of the estate's debt, and was merely a necessary prerequisite to maintenance of suit thereon.

**15. Executors and administrators ⇐129(3)**

Where there was a deficiency of assets in hands of administratrix with which to pay claims of judgment creditors of deceased, it was administratrix' duty to institute an action against deceased's wife for benefit of the creditors, to set aside gift deed of realty from deceased to his wife, if there was reason to believe that deed was executed to defraud creditors. Probate Code, § 579.

**16. Executors and administrators ⇐129(3), 423**

The statute respecting action by personal representative of deceased does not preclude a defrauded creditor from maintaining an action in his own name to set aside deed executed by deceased to defraud creditors and authorizes a representative to bring suit under proper circumstances and makes it his imperative duty to bring suit when requested to do so by a creditor who has made provision for costs of litigation. Probate Code, § 579.

**17. Executors and administrators ⇐423**

Before a deceased's creditor who has been defrauded by deceased's conveyance during deceased's lifetime, is entitled to have deceased's executor or administrator institute action to recover the property conveyed, the creditor's claim must have been presented and allowed or rejected. Probate Code, § 579.

---

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Certiorari proceeding by Mercedes Silva against the Superior Court of the State of California in and for the County of San Joaquin, respondent, to review an order in the estate of Manuel Silva, deceased, refusing to rescind a former approval of two creditors' claims.

Order affirmed.

Lafayette J. Smallpage and Harold J. Willis, both of Stockton, for petitioner.

Crozier C. Culp and Marvin Sherwin, both of Oakland, for respondent.

Darrah & Ellis, of Stockton, for Margaret Buckmaster, Adm'x, etc., respondent.

THOMPSON, Justice.

By means of certiorari the petitioner seeks to review an order of the Probate Court in San Joaquin County, in the estate of Manuel Silva, deceased, refusing to rescind a former approval of two creditors'

claims. The claims were approved by the administratrix, Margaret Buckmaster, while she was serving as a representative of the estate. Her letters were subsequently revoked, under Section 450 of the Probate Code, and a son of the deceased was appointed and qualified in her stead. A motion to rescind the approval of the claims was denied.

From the pleadings and transcript of proceedings it appears that George G. Prytz secured a judgment against Manuel Silva, for the sum of $5,261.44, June 3, 1940, and the Indemnity Insurance Company obtained a judgment against the same defendant, for the sum of $3,495.08, April 15, 1942. Neither judgment was paid. September 22, 1941, Manuel Silva deeded to his wife, Mercedes Silva, as a gift, a 240 acre farm in San Joaquin County, which cost him $50,000. That conveyance left them possessed of only a one-half undivided interest in one acre of land near Holt, upon which some buildings had been constructed. That lot was held in common with his brother, Daniel Silva. It was rented for $15 per month. Manuel filed a homestead on that property in June, 1941. Manuel died July 4, 1942, possessed of no other property. The assets of the estate were insufficient to pay the claims which were subsequently approved. The deceased left surviving him a widow and four adult children. No effort was made to probate the estate for more than four years, and until, upon the nomination of the judgment creditors pursuant to Section 423 of the Probate Code, Margaret Buckmaster was appointed and qualified as administratrix on November 12, 1946. She was employed as secretary in the law office of Darrah & Ellis, at Stockton, which firm represented her as attorneys for the estate. Notice to creditors was duly published. The claims of the judgment creditors were presented, allowed and approved by the administratrix on November 29, 1946, and by the probate judge on December 2, 1946, and filed in the estate.

December 18, 1946, said administratrix commenced suit in San Joaquin County to set aside the deed of conveyance from Manuel Silva to his wife on the ground that it was fraudulently made to defeat creditors. She was represented in that suit by the law firm of Darrah & Ellis and by Mr. Crozier C. Culp. That action is still pending and undetermined.

April 5, 1947, Conrad Silva, the son of Manuel Silva, deceased, filed a petition under Section 450 of the Probate Code to revoke the letters formerly granted to Margaret Buckmaster. Conrad also applied for letters of administration in his own behalf. Upon hearing, the petition was granted. The letters of Margaret Buckmaster were revoked, and Conrad Silva was appointed and qualified as administrator of the estate on April 22, 1947.

Upon notice, Mercedes Silva, the widow of said deceased, moved the court in said estate to rescind the approval of the claims of said two judgment creditors on the grounds that the Prytz claim was barred by the statute of limitations, that the claims were allowed ex parte, without personal notice to the heirs, and that the court lacked authority to approve them. That motion was heard upon oral and documentary evidence. The proceedings are before this court. The court denied that motion to rescind and disallow the claims. This petition for certiorari was then filed in this court to review that proceeding.

The only issue on this review is the question of whether the probate judge was legally authorized to deny petitioner's motion to revoke and rescind the former approval of the claims of the two judgment creditors. We assume that if the probate court acquired jurisdiction to issue the letters of administration to Margaret Buckmaster, that if she qualified as such administratrix and the claims were legally allowed by her and by the probate judge while she was thus qualified to act as a representative of the estate, the approval of the claims would remain valid and binding, notwithstanding the fact that her letters were subsequently revoked under Section 450 of the Probate Code.

[1] We are of the opinion that the probate court had jurisdiction to appoint Margaret Buckmaster as administratrix of the estate of Manuel Silva; that the claims of the judgment creditors were duly allowed by her and by the probate judge while

she was qualified to act as administratrix, and that the approval of those claims is valid. The court therefore properly denied the widow's motion to rescind and disallow the claims.

[2, 3] There can be no doubt that the judgment upon which the claim of Indemnity Insurance Company was allowed was not barred by the statute of limitations. The five-year limitation with respect to judgments under Section 336 of the Code of Civil Procedure had not expired when that claim was presented and approved. The judgment was rendered April 15, 1942. It was duly approved, first by Margaret Buckmaster, while she was the qualified administratrix of the estate, and also by the probate judge on December 2, 1946. The approval of the claim did not constitute a new judgment. It merely recognized the claim as a valid debt which "shall be ranked among the acknowledged debts of the estate, to be paid in due course of administration." Probate Code, sec. 713; Saunders v. Simms, 183 Cal. 167, 170, 190 P. 806; Murphy v. Davids, 55 Cal.App. 416, 422, 203 P. 802; Pacific Gas & Electric Co. v. Elks Duck Club, 39 Cal.App.2d 562, 103 P.2d 1030.

[4] Personal notice to the heirs of a decedent, of the presentation and allowance of claims against the estate, is not required. The claims were presented and allowed pursuant to the provisions of Section 711 of the Probate Code. When a claim is presented to the judge for his allowance or approval, he may, *in his discretion,* examine the claimant and others on oath, and hear any legal evidence touching the validity of the claim. Probate Code, Sec. 706. But the code provides for no personal notice to the heirs of the presentation or allowance of claims.

[5-7] The proper acts of an administratrix, including her approval of claims while she is so qualified, are valid and binding, notwithstanding the fact that her letters may thereafter be revoked under Section 450 of the Probate Code. In this case Margaret Buckmaster was nominated by the judgment creditors under Section 423 of the Probate Code. Since the heirs made no effort to probate the estate of Manuel Silva for more than four years after his death, the creditors were entitled to petition for letters under Section 422 of that code, and having that right they were entitled to nominate an administratrix. She served personal notice of her application on the surviving widow of the deceased, and upon some of the other heirs. But they were not all given personal notice of the application. Her petition conformed with the provisions of Section 440 of the Probate Code, by giving the names and addresses of the heirs, "so far as known to the applicant." There was no fraud in that application. It was the only method the judgment creditors had of presenting their claims to the estate. Section 440 provides "No defect of form or in the statement of jurisdictional facts actually existing shall make void an order appointing an administrator or any of the subsequent proceedings." The clerk posted notices of the application as required by Section 441 of that code. That conferred jurisdiction on the probate court. No appeal was taken from the order appointing the administratrix, notwithstanding the fact that some of the heirs had personal notice of the application. Section 302 of the Probate Code provides that: "In the absence of fraud in its procurement, an order of the superior court granting letters, when it becomes final, *is a conclusive determination of the jurisdiction of the court* (except when based upon the erroneous assumption of death), and cannot be collaterally attacked." (Italics added.)

We therefore conclude that the appointment of Margaret Buckmaster, and the approval of the judgment creditors' claims, were valid and binding. It is immaterial that her letters were subsequently revoked under Section 450 of the Probate Code. Those letters were automatically revoked under that section upon the mere application of the son of the deceased. No fraud in procuring the letters was charged or found to have existed by the court. That section reads: "When letters of administration have been granted to any person other than the surviving spouse, child, grandchild, parent, brother or sister of the intestate or the public administrator, any one of them who is competent and had a prior right to letters, or any competent

person at the written request of any one of them who is competent and had such prior right, may obtain the revocation of the letters, and be entitled to the administration, by filing a petition praying the revocation, and that letters of administration issue to him."

[8] The judgment upon which the claim of George G. Prytz was presented to the estate and approved was not outlawed. The judgment was rendered against Manuel Silva June 3, 1940. He died intestate two years thereafter, on July 4, 1942. No administrator of his estate was appointed until November 12, 1946. Since the statute of limitations had not barred an action on the judgment prior to the death of Manuel Silva, the time to commence suit was extended by his death for one year after letters of administration were issued in his estate. Code of Civil Procedure, sec. 353; Schwartz v. Edmunds, 20 Cal.App.2d 530, 67 P.2d 351; Pacific Gas & Electric Co. v. Elks Duck Club, 39 Cal.App.2d 562, 103 P.2d 1030; Casey v. Gibbons, 136 Cal. 368, 372, 68 P. 1032; In re Bullard's Estate, 116 Cal. 355, 48 P. 219; Hibernia Savings & Loan Society v. Herbert, 53 Cal. 375; 11B Cal. Jur. 359, sec. 940.

[9, 10] We assume, in the absence of proof to the contrary, that the claims were presented in proper form. Section 732 of the Probate Code provides in part that: "A judgment against the decedent for the recovery of money must be filed or presented in the same manner as other claims." The claims, as allowed by the administratrix and the probate judge, are not before this court, but in support of the order refusing to rescind the approval thereof, we must presume they were presented in the form required by Section 706 of the Probate Code. That section provides that such claims, if founded on a written instrument, shall have a copy of the instrument, together with the endorsements contained thereon, attached to the claim. We assume that was done. The section last mentioned specifically states that the original instrument need not be attached to the claim, and that the original instrument must be exhibited to the executor or judge, only "upon demand." When a claim has been allowed by the administratrix and the judge, and filed in the estate, the presumption is that sufficient evidence of the existence of an unpaid judgment was first presented. In re Estate of Crosby, 55 Cal. 574. It is said in that regard, at page 579 of the last-cited case, that: "It was the duty of the Judge to require proper and sufficient evidence of the existence of the judgment, *and it must be presumed that he did.* [Italics ours.] If he had erred by allowing the claim upon insufficient evidence, this would not have deprived his *allowance* of its prima facie quality as evidence of the validity of the claim."

[11] The petitioner assumes that because Margaret Buckmaster was nominated as administratrix, and that she was a secretary in the office of her attorneys, Darrah & Ellis, she was disqualified from allowing the claims. We think not. In support of that contention, Section 703 of the Probate Code is cited. That section merely provides in part that: "If the executor or administrator *is a creditor of the decedent,* he shall file his claim with the clerk, who must present it for allowance or rejection to the judge. Its allowance by the judge is sufficient evidence of its correctness, and it must be paid as other claims in due course of administration. * * *" (Italics added.)

[12] That section applies only to claims of an executor or administrator who "is a creditor of the decedent." Margaret Buckmaster was not a creditor of the decedent. She testified that she had no personal interest in either of the claims. She was advised by her attorneys that the claims were not barred by the statute of limitations, and that they were valid claims. It is true that if she was personally interested in the claims she would be disqualified from approving them. Estate of Hill, 67 Cal. 238, 244, 7 P. 664. But the evidence in this case is that the administratrix was not personally interested in the claims. Since the administratrix was not a creditor of the decedent, she was not required to first file them with the clerk. Moreover, the claims were presented to the judge, and he duly approved and allowed them. We are cited to no authority which holds that an executor or administrator must file claims with the

clerk, to be by him presented to the judge for his approval, except when the executor or administrator is a creditor of the decedent.

We conclude that the claim of George G. Prytz was not outlawed at the time it was approved and filed in the estate. The judgment upon which it was founded was rendered June 3, 1940. No portion of the debt was paid. Silva deeded the property to his wife, as a gift, September 22, 1941. The judgment debtor died July 4, 1942. The judgment became dormant upon the death of the judgment debtor. 49 C.J.S., Judgments, § 532f. Prytz had a valid action against the judgment debtor, either to renew his judgment before the statute of limitations expired, or to set aside the deed on the ground that it was executed to defraud creditors. Under such circumstances, Section 353 of the Code of Civil Procedure extended the time to commence those actions for one year after the issuance of letters of administration. That section provides in part: "* * * If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survive [his death], an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration."

No administration of the estate of Manuel Silva occurred until Margaret Buckmaster was appointed, at the request of the judgment creditors, on November 12, 1946. The filing of the claims was a necessary prerequisite to the maintenance of the actions. Unless the judgment creditors are entitled to the remedies provided by either Section 685 or Section 353 of the Code of Civil Procedure, the heirs of the deceased debtor could defeat valid judgments by refraining from probating his estate until after five years from the rendering thereof. We may assume that is exactly what the heirs attempted to do in the present case.

The case of Quivey v. Hall, 19 Cal. 97, decides the chief issue of this case adversely to this petitioner. It is there held, under Section 141 of the Probate Act, then in effect, which is practically the same as the present Section 732 of the Probate Code, that the statute of limitations does not expire for maintaining a suit based on a judgment rendered against the debtor who thereafter dies, until an administrator of his estate is appointed and notice to creditors has been published according to law. As we have previously held, the judgment becomes dormant in the meantime, and the statute of limitations for commencing the action does not expire, under Section 353 of the Code of Civil Procedure, until "one year after the issuing of letters testamentary or of administration." That case holds that the action on the judgment could not be maintained after the death of the judgment debtor until the claim was first presented to his estate and either rejected or allowed, and that the judgment was a proper claim against the estate. The only distinction between that case and this one is that the claim was there rejected, while in the present action it was properly allowed. But the court definitely held, in the Quivey case, upon facts exactly like this one, that the statute of limitations had not expired, and that suit on the rejected claim was properly maintained. The court said, "The statute substituted the presentation of the claim for suit, allowing the administrator to acknowledge it and place it on the list of recognized debts of the estate." That case is conclusive of that issue.

The cases cited and relied upon by this petitioner are not in point. They differ from this action upon the facts involved. In those cases the statute of limitations had either expired before the death of the judgment debtors, or the claims were not presented and filed in their estates within the time allowed by the statute.

[13] It is conceded the judgment creditors might have proceeded to enforce execution of their judgments after the lapse of five years from the entry thereof, "by leave of the court", pursuant to Section 685. The creditors did not proceed under that section. The petitioner contends that is the only method of enforcing the judgments after the lapse of five years from the entry thereof. We think not. The judgment creditors were entitled to proceed under the method provided by Section 353 of the

Code of Civil Procedure by presenting their claims to the estate of the deceased debtor within the time allowed by law, which they did. The statute of limitations expired. The judgments became dormant upon the death of the judgment debtor. The statute of limitations ceased to run after the death of the debtor until letters of administration were issued in his estate on November 12, 1946. The judgments were then revived, and the judgment creditors were granted, by Section 353 of the Code of Civil Procedure, one year after the issuing of letters of administration on the estate of the deceased debtor, within which to commence their suits. They could not commence those actions to bind the estate to pay the judgments without first presenting claims therefor.

The judgment creditors were not required to proceed under Section 685 of the Code of Civil Procedure for consent of the court which rendered the judgments as a prerequisite to the enforcement of the judgments. They were entitled to present their claims to the estate, under the circumstances of this case, within one year after letters of administration were issued. The allowance of claims in the estate of the judgment debtor is an alternative method "substituted by law in place of enforcement by writ of execution." Saunders v. Simms, supra [183 Cal. 167, 190 P. 807]; Murphy v. Davids, 55 Cal.App. 416, 422, 203 P. 802; Pacific Gas and Electric Co. v. Elks Duck Club, supra; Probate Code, Sec. 713.

In the Elks Duck Club case, supra, it was held that it was not necessary for a judgment creditor to first procure leave from the court under Section 685 of the Code of Civil Procedure to enforce a judgment after five years had elapsed since its rendition. In that case judgment was rendered against Banta, one of the defendants, more than five years prior to the granting of letters of administration on his estate. After rendition of the judgment, Banta died intestate December 18, 1938. On January 12, 1939, letters of administration were issued to Dorothy Banta. Notice to creditors was duly published. Within the time allowed therein the Pacific Gas & Electric Company "filed its claim based on the said judgment * * * without the judgment creditor obtaining permission [under section 685, C.P., or at all] to file the same from the Court in which the judgment was rendered or from any Court." [39 Cal.App.2d 562, 103 P.2d 1031] The time for filing claim expired July 13, 1939. Some three months later the judgment creditor applied to the Superior Court of the City and County of San Francisco, which rendered the judgment, for leave to prosecute an action upon its claim based on that judgment, which was granted. From that order the appeal was perfected. The appellant contended that the order was invalid because the claim had been prematurely filed before leave had been granted under Section 685 of the Code of Civil Procedure. The appellate court held otherwise and affirmed the order. It said that: "The judgment upon which the proceedings are founded was not barred by the statute of limitations found in section 336 of the Code of Civil Procedure. [Citing authorities.] * * * *The statutes do not require permission of the court to file a claim against the estate upon a judgment against the testator or intestate.* A claim which is not barred by the statute of limitations is not required to be rejected by the executor or administrator. Hence, *since the judgment is not barred, the claimant was privileged to file his claim within the statutory period and have it approved or rejected without first resorting to the superior court for leave to file.*" (Italics added.)

After quoting from the last paragraph in 11A California Jurisprudence, section 508, at page 717, the statement that an outlawed judgment may be enforced by execution after the lapse of five years, by procuring leave of court under Section 685 of the Code of Civil Procedure, and thus bind the estate of the deceased debtor by subsequently filing the claim in that estate, the court further said in that regard: "Such a case *is an exception authorized by statute as a substitute for the execution authorized by section 685 of the Code of Civil Procedure.*" (Italics added.)

The court then concluded: "We cannot read either of these cases [Saunders v. Simms, and Faias v. Superior Court, 133 Cal.App. 525, 24 P.2d 567] as holding that a claim presented to the estate before permission to enforce the judgment is granted

is a premature claim and therefore unenforceable. * * * Upon principle and reason we are in full accord with the conclusion of that court reading: '* * * it is not material that the order permitting the enforcement of the judgment against the estate was obtained subsequent to the presentation of the claim to the administrator.'"

The preceding case definitely holds that it is not necessary to obtain leave of court under Section 685 of the Code of Civil Procedure to enforce a judgment after five years have elapsed before a claim based thereon may be lawfully presented and filed in the estate of the deceased judgment debtor. The case from which we have last quoted is in accord with Saunders v. Simms, supra, and Murphy v. Davids, supra, in the first of which it was said that a judgment rendered against an administrator "'upon any claim for money against the estate' only establishes the claim in the same manner as if it had been allowed by the executor or administrator and a judge, * * *. This is the method for enforcing a judgment after the death of a judgment debtor *substituted by law in place of enforcement by writ of execution. It is the same procedure that would have been required after the death of the judgment debtor if the statute of limitations had not run on the demand.*" (Italics added.)

We conclude that the claims of the judgment creditors were properly allowed and filed in the estate of Manuel Silva, deceased, and that the court properly refused to subsequently disallow or reject the claims for failure to first secure leave of court under Section 685 of the Code of Civil Procedure, or otherwise.

[14] We are not concerned on this appeal with the merits of the suit to set aside the gift deed from the decedent to his wife on the ground of fraud. If that suit is prosecuted it must be determined on its own merits. The allowance of those claims was a mere acknowledgment of the debt of the estate. In re Estate of Naegely, 31 Cal. App.2d 470, 475, 88 P.2d 715; In re Estate of Bell, 168 Cal. 253, 259, 141 P. 1179; 11A Cal.Jur. 807, sec. 574. The allowance or rejection of a claim against an estate for an antecedent debt of the decedent is merely a necessary prerequisite to the maintenance of suit thereon.

[15] Clearly it was the duty of the administratrix of the estate of Manuel Silva, deceased, under Section 579 of the Probate Code, since there was a deficiency of assets in her hands with which to pay the claims of the judgment creditors, to institute an action for the benefit of the creditors to set aside the gift deed from the deceased to his wife, if there was reason to believe that it was executed to defraud creditors. That section provides: "If the decedent, in his lifetime, conveyed any real or personal property, or any right or interest therein, with intent to defraud his creditors, or to avoid any obligation due another, or made a conveyance that by law is void as against creditors, or made a gift of property in view of death, and there is a deficiency of assets in the hands of the executor or administrator, the latter, on application of any creditor, must commence and prosecute to final judgment an action for the recovery of the same for the benefit of the creditors."

[16, 17] The foregoing section does not preclude the defrauded creditor from maintaining an action in his own name to set aside the deed executed by the decedent to defraud creditors. 11B Cal.Jur. 408, sec. 979. But it is an enabling act authorizing the executor or administrator to sue under the specified circumstances. The representative of the estate may elect to bring the suit under proper circumstances, and when requested to do so by the creditor, who has made provision for the costs of litigation, it is his imperative duty to prosecute the action. 11B Cal.Jur. 405, sec. 977, and cases cited; 33 C.J.S., Executors and Administrators, § 124. The application of the preceding quoted section depends upon the existence of a defrauded creditor of the deceased, and the insufficiency of the assets of the estate to meet the demands. 11B Cal.Jur. 404, secs. 975, 976. Preliminarily to the maintenance of such an action, the claim upon which it is based must first be presented and allowed or rejected. Scholle v. Finnell, 166 Cal. 546, 552, 137 P. 241; Liuzza v. Bell, 40 Cal.App.2d 417, 430, 104 P.2d 1095. We conclude that the

administratrix was a proper party to maintain the action to set aside the deed, under the circumstances of this case. But, as we have said, we are not here concerned with the merits of that case.

The order denying the motion to rescind the approval of the claims of the judgment creditors is affirmed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; SCHAUER, J., dissenting.




83 Cal.App.2d 661

**SHINN v. JOHNSON et al.**

Civ. 16133.

District Court of Appeal, Second District, Division 2, California.

Feb. 11, 1948.

**1. Appeal and error ⇐927(3), 989**

On plaintiff's appeal from judgment for defendants on their motion for nonsuit, consideration can be given only to evidence most favorable to plaintiff, to every reasonable inference that may be drawn therefrom, and to every presumption that can fairly arise in support of her allegations.

**2. Landlord and tenant ⇐169(11)**

In action against trailer park manager and owner for injuries sustained when trailer occupant's clothing caught fire from flame in gas heater in washroom, issues whether heater was defective, whether manager and owner were negligent in not providing screen in front of flame and in not repairing broken window and thereby preventing draft, whether draft caused flame to extend beyond heater, and whether occupant was contributorily negligent, should have been submitted to jury.

**3. Principal and agent ⇐178(1)**

A principal is charged with and bound by knowledge of agent while agent is acting within scope of authority.

**4. Evidence ⇐243(4)**

In action against trailer park manager and owner for injuries sustained when trailer occupant's clothing caught fire from flame in gas heater in washroom, manager's statements that manager knew heaters were dangerous and should be replaced were admissible against owner.

---

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Personal injury action by Gladys C. Shinn against C. Stanley Johnson and another. From a judgment rendered in favor of defendants on their motion for a nonsuit, the plaintiff appeals.

Reversed.

Lyle W. Rucker, of Los Angeles, for appellant.

Crider, Runkle & Tilson, of Los Angeles, for respondents.

WILSON, Justice.

[1] On plaintiff's appeal from a judgment rendered in favor of defendants on their motion for a nonsuit consideration can be given only to the evidence most favorable to plaintiff's cause of action, to every reasonable inference that may be drawn therefrom and to every presumption that can fairly arise in support of her allegations. Weck v. Los Angeles County Flood Control District, 80 Cal.App.2d 182, 190, 181 P.2d 935, 940; Anthony v. Hobbie, 25 Cal.2d 814, 817, 155 P.2d 826; Lashley v. Koerber, 26 Cal.2d 83, 84, 156 P.2d 441; Wood v. Samaritan Institute, 26 Cal.2d 847, 849, 161 P.2d 556. By reason of this rule we conclude that it was error to grant the motion for a nonsuit and that the issue should have been determined by findings of fact.

Defendant Johnson was the owner of a trailer park accommodating from 350 to 500 people including approximately 50 children of tender years. Defendant Shane was employed by Johnson as manager of the trailer park. Plaintiff and her husband rented space in the park for their trailer which they occupied at the time of the oc-

currence that is the basis of this action. Defendants maintained restrooms or washrooms upon the premises for the benefit and common use of the patrons of the trailer park, each building having separate accommodations for men and women. In each restroom there were toilet facilities, hot and cold water for bathing, shower stalls and washbowls.

Plaintiff entered one of the restrooms about 10:30 o'clock in the evening of the accident in question for the purpose of making her preparations for retiring for the night. She was attired in a rayon nightgown over which was a dotted swiss robe. There were three washbowls with a mirror over each available for her use. She chose the washbowl and mirror over which the light was brightest. While preparing her toilet she stood at a distance of approximately 14 inches from the front of an open-faced portable gas heater which was maintained by defendants for heating the restroom.

The gas in the heater was burning when plaintiff entered the room. The heater was connected with the main gas pipe by means of a flexible hose about two feet long. The heater could have been moved about within the radius of the flexible hose but plaintiff did not move it or touch it, nor did her clothing touch the stove. Her robe and nightgown caught fire from the flame in the gas heater, causing severe burns upon her body for which she seeks to recover damages in this action.

The flexible hose serving the heater was connected with the pipeline which supplied gas to the automatic water heater located a few feet distant from the gas heater in the washroom. The heater was an old type and had no barrier in front of the flame except three small metal rods; there was no screen or other protection to prevent the flame from flashing beyond the front of the stove or to prevent clothing from being drawn into the flame by a sudden draft of air. The heater was approximately 20 inches in length, 12 inches in depth and 14 inches high. The entrance to the washroom was directly opposite the place where plaintiff was standing and the window over the washbowl which she was using was broken.

[2] Whether or not the gas heater was defective; whether defendants were negligent in maintaining it with no screen or barrier in front of the flame; whether they were negligent in having failed to repair the broken window over the washbowl where plaintiff stood, thus preventing a draft when the outside door directly opposite the window was open; whether such draft would or did cause the flame to extend beyond the front of the heater; whether when the flame under the water heater was automatically shut off the increased gas pressure would cause the flame in the gas stove, which was connected with the main gas line of the water heater, to increase in volume; whether plaintiff was guilty of contributory negligence—these and other questions of fact and such pertinent inferences as may be drawn from the evidence are matters which must be determined by findings of fact and not brushed aside by the granting of a motion for a nonsuit.

Since the judgment must be reversed a specification of error upon the rejection of evidence should be determined for the guidance of the trial court in further proceedings.

[3, 4] Evidence given by witnesses as to statements made by defendant Shane, Johnson's manager, to the effect that he had known that the gas heaters in the washrooms were dangerous and should be replaced, was admitted by the court as against Shane but not as against Johnson. A principal is chargeable with and bound by the knowledge of his agent while the agent is acting within the scope of his authority. Dressel v. Parr Cement Co., 80 Cal.App.2d 536, 540, 181 P.2d 962, 964; Faires v. Title Insurance & Trust Co., 15 Cal.App.2d 350, 354, 59 P.2d 428; McKenney v. Ellsworth, 165 Cal. 326, 329, 132 P. 75. Since Shane was Johnson's manager in the operation of the trailer park the court erred in rejecting the evidence as against Johnson.

Judgment reversed.

MOORE, P. J., and McCOMB, J., concur.

83 Cal.App.2d 649

## WILLIAMS v. GRAHAM (ZIEROLD, Intervener).

Civ. 15965.

District Court of Appeal, Second District, Division 2, California.

Feb. 11, 1948.

1. Appeal and error ⇐110

Order denying motion for new trial is nonappealable.

2. Fraud ⇐47

Complaint alleging deposit on contract to purchase land and rental paid by purchaser after sale of his own property in reliance upon vendor's ability to convey, followed by prayer for judgment for amounts expended, was sufficient without formal allegation of damage in those amounts.

3. Fraud ⇐27

Vendor, who concealed and instructed his agent not to reveal to purchaser the fact that he did not own the property he was selling, was guilty of fraud in making statements of fact as to his ownership upon which purchaser had a right to rely. Civ.Code, § 1572.

4. Fraud ⇐23, 35

Where vendor sold property he did not own and later informed purchaser that he would be able to convey, purchaser in relying on the assurances did not waive rights to recover damages caused by his actions after receiving knowledge that vendor did not have title, where truth of vendor's express statements was not within purchaser's knowledge but known to vendor and purchaser was under no obligation to make an investigation. Civ.Code. § 1572.

5. Fraud ⇐27

A vendor was not required to own property when he made an agreement to convey, but he was required to be prepared, within the period fixed by contract, to convey a good title, and on failure so to do as agreed he was liable in damages.

6. Fraud ⇐60

A purchaser defrauded into paying a deposit on property not owned by the vendor, and later incurring liability for rental for six months after sale of his own premises on vendor's assurance that he would convey as agreed, was entitled to damages in the amounts of the deposit and rentals paid. Civ.Code, §§ 3306, 3343.

7. Fraud ⇐60

Where purchaser relying on fraudulent representations of vendor's ability to convey, incurred rental liability for six months and made down payment upon the property, purchaser was entitled to recover interest on rentals paid and on the deposit, since amounts were certain and the right to recoup became vested on the day on which each separate amount was expended. Civ.Code, §§ 3287, 3288.

---

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Affirmed.

Action by Lester W. Williams against Roy W. Graham, Herman A. Zierold intervening, for specific performance of an agreement to convey real property. From judgment in favor of intervener, and from an order denying his motion for new trial, plaintiff appeals.

Appeal from order denying motion for new trial dismissed. Judgment affirmed.

Sidney Fischgrund and Samuel H. Sherman, both of Los Angeles, for appellant.

Edmund F. Barker, of Montebello, for intervenor and respondent.

WILSON, Justice.

Defendant Graham agreed to convey certain real property to plaintiff. The latter agreed to convey it to intervenor. Upon defendant's failure to make a conveyance plaintiff brought this action to compel specific performance of the agreement. Intervenor filed his complaint in intervention praying judgment in his favor for specific performance in the event that plaintiff should be successful in his action against defendant, or in the alternative for the damages suffered by him if plaintiff should be unable to convey title.

Upon trial of the case on the issues arising between plaintiff and defendant the

court adjudged that by reason of plaintiff's failure to perform his part of the contract he was not entitled to a decree for specific performance against defendant. The trial then proceeded on the complaint in intervention. Since the decree that plaintiff was not entitled to a conveyance of the property from defendant precluded a judgment of specific performance against him in favor of intervenor, the only issue remaining was whether the latter could recover the damages suffered by him by reason of plaintiff's default and if so how much.

At the time plaintiff entered into the agreement to convey the property to intervenor the latter made a deposit of $1,000 on the purchase price. Plaintiff did not inform intervenor that he was not the owner of the property or that there was any impediment to his making a conveyance of good title. About three weeks after the execution of the agreement and the making of the deposit plaintiff and intervenor met in the office of the real estate broker who had negotiated the sale where plaintiff "explained exactly how the title to the property was," and assured intervenor that there was no doubt that he, plaintiff, would receive title to the property and that he would then convey it as required by their contract. He advised intervenor "to go on with his plans, and wait, because he would get title to the property."

The court found (1) that at the time the agreement was made plaintiff fraudulently concealed from intervenor the fact that plaintiff was not the owner of and did not have title to the property and fraudulently instructed his agent not to inform intervenor of that fact; (2) that when intervenor learned that plaintiff did not have title the latter thereupon falsely represented to intervenor that he, plaintiff, would get title to the property and would convey the same to him; (3) that the fraudulent concealment by plaintiff of his lack of title to the property and his later false representations relative thereto were made with the intent that intervenor should rely on the belief that plaintiff did have or could get title to the property; (4) that relying on such fraudulent representations intervenor sold property which he then owned and occupied in his business and because he could not obtain title to the property involved in this action he was compelled to rent as a tenant a portion of the premises previously owned and sold by him at a rental of $150 per month for six months in order to carry on his business.

[1] The court rendered judgment in favor of intervenor for the sum of $1900, representing the deposit on the purchase price and the amount paid by intervenor for rental. Plaintiff has appealed from the judgment and from the order denying his motion for a new trial. The latter is a nonappealable order and the appeal therefrom will be dismissed.

[2] 1. *Intervenor is entitled to damages.* Plaintiff contends that the complaint in intervention does not state a cause of action for damages for the reason that it is not specifically alleged that intervenor has been damaged. The facts hereinbefore stated as to the payment of the deposit and the rental which intervenor was compelled to pay after he had sold his property furnish a plain inference that intervenor has suffered monetary damage in the sums mentioned. The allegations of fact are followed by a prayer for judgment for the amounts expended. The absence of a formal allegation that intervenor had been damaged in those amounts does not render the complaint in intervention insufficient. Riser v. Walton. 78 Cal. 490, 491, 21 P. 362; Bryant v. Broadwell, 140 Cal. 490, 494, 74 P. 33; Gallagher v. California Pac. T. & T. Co., 13 Cal.App.2d 482, 486, 57 P.2d 195; Tucker v. Cooper, 172 Cal. 663, 666, 158 P. 181.

[3] Whether plaintiff positively asserted to intervenor that he had title or suppressed or concealed his lack of title, he was guilty of fraud. Civil Code, sec. 1572. His statements were not matters of opinion but were statements of fact on which intervenor relied and had a right to rely. Intervenor had no knowledge when he entered into the contract to purchase the property that plaintiff did not possess the title. The evidence is undisputed that plaintiff not only did not inform intervenor that he did not own the property but in

order to keep the latter in ignorance of the facts he instructed his agent not to tell intervenor that he did not have title. When plaintiff at a later date informed intervenor that he did not own the property he gave positive assurance that he would receive title and would convey the property to intervenor. He asked the latter "to just be patient, and not go on through with any other plans but to wait because he would deliver title to Mr. Zierold" [intervenor].

[4] The latter did not waive or lose any of his rights under the contract or his right to recover damages by his actions after having been told that plaintiff did not have title. He relied on the assurance of plaintiff that the contract would be fulfilled and did not know until, in the trial of the instant action as between plaintiff and defendant, the court adjudged that the former would not receive a conveyance from the latter. He had a right to rely on plaintiff's express statement of an existing fact since the truth of such fact was not within his knowledge but was known to plaintiff, and he was under no obligation to make an investigation concerning the truth of such statement. Spreckels v. Gorrill, 152 Cal. 383, 395, 92 P. 1011. Macdonald v. deFremery, 168 Cal. 189, 203, 142 P. 73.

[5] It was not necessary that plaintiff should have owned the property when he made the agreement to convey it to intervenor but he must have been prepared at all times within the period fixed by the contract to convey a good title. On failure to convey as agreed he was liable in damages. Ellwood v. Niedermeyer, 12 Cal. App.2d 699, 704, 707, 56 P.2d 279.

[6] 2. *The measure of damages.* Plaintiff contends that section 3306 of the Civil Code fixes the amount of damages that may be recovered by intervenor and that the court erred in rendering judgment for the amount stated. The judgment is for the correct amount. Section 3343 of the Civil Code rather than section 3306 determines the measure of damages to be applied. Section 3343 provides that one defrauded in the purchase of property is entitled to recover the difference between the actual value of that with which he parted and the actual value of that which he received "together with any additional damage arising from the particular transaction." Under that section a defrauded party is enabled to recover losses that are not provided for in section 3306. Section 3343 permits the recovery not only of damages suffered by the loss of the bargain but of any other loss arising from the transaction. Rothstein v. Janss Inv. Corp., 45 Cal.App.2d 64, 73, 113 P.2d 465; Jacobs v. Levin, 58 Cal.App.2d Supp. 913, 917, 137 P.2d 500. Intervenor is entitled to recover not only the deposit made on the purchase price but all damages suffered by him by reason of plaintiff's inability to convey, including the amount which he was required to pay as rent for property on which to conduct his business.

[7] 3. *Interest is recoverable.* Since (1) the amount which intervenor is entitled to recover is certain and his right to recoup became vested on a particular day, to wit, the date on which each separate amount was expended (Civil Code, sec. 3287), and (2) his right to recover is based on the fraudulent representations of plaintiff (3288), he is entitled to interest as decreed by the court on the several amounts which he paid out by reason of his reliance upon plaintiff's misrepresentations. McCowen v. Pew, 18 Cal.App. 482, 123 P. 354; Taylor v. Wright, 69 Cal. App.2d 371, 386, 159 P.2d 980.

Judgment affirmed. The appeal from the order denying a new trial is dismissed.

MOORE, P. J., and McCOMB, J., concur.

## MAYER v. BEONDO.

Civ. 16171.

District Court of Appeal, Second District, Division 2, California.

Feb. 11, 1948.

Rehearing Denied March 2, 1948.

See 190 P.2d 23.

**1. Specific performance ⇐97(1, 2)**

Where at time of commencement by purchaser of action for specific performance of contract to convey, no tender had been made of purchase price, and only a small portion thereof had been deposited in escrow, purchaser's allegations that he had performed conditions of the contract and had made a tender, were untrue, and purchaser was therefore not entitled to prevail.

**2. Specific performance ⇐97(1)**

Before purchaser could prevail in action for specific performance of contract for sale of realty, purchaser must have fulfilled or offered to fulfill all conditions imposed on him by the contract, including payment or tender of balance of purchase price. Civ.Code § 1439.

**3. Specific performance ⇐114(2)**

Purchaser's complaint failed to state facts sufficient to constitute a cause of action for specific performance of contract for sale of realty, where complaint contained no allegation that consideration was adequate or that contract was just and reasonable as to the vendor, and there were no allegations of fact from which conclusions to that effect might be drawn. Civ. Code § 3391, subds. 1, 2.

**4. Trial ⇐396(1)**

Findings of fact must be responsive to the pleadings.

**5. Appeal and error ⇐1039(13)**

The admission of evidence as to matters not within the pleadings is prejudicial error.

**6. Specific performance ⇐117**

In action by purchaser for specific performance of contract for sale of realty, wherein complaint failed to allege, as required by code section, that consideration was adequate or that contract was just and reasonable as to the vendor, admission of evidence, over vendor's objection, to establish alleged fact that consideration was adequate or that contract was just and reasonable, was error. Civ.Code § 3391, subds. 1, 2.

**7. Specic performance ⇐117**

Code sections respecting immaterial variance were not applicable in purchaser's action for specific performance of contract for sale of realty, wherein evidence was introduced over vendor's objection, that vendor received an adequate consideration as required by code section, though there was no allegation to that effect in purchaser's complaint. Civ.Code § 3391, subds. 1, 2; Code Civ.Proc. §§ 469, 470.

---

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by George P. Mayer against Toms Beondo, etc., for specific performance of a contract to convey realty. From a judgment for the plaintiff, the defendant appeals.

Judgment reversed with directions to enter judgment for defendant.

Gerard Remington and John A. Jorgenson, both of Los Angeles, for appellant.

Syril S. Tipton and Fulcher & Wynn, all of Los Angeles, for respondent.

WILSON, Justice.

The judgment rendered in favor of plaintiff directing specific performance by defendant of a contract to convey real estate must be reversed.

(1) The contract which is in the form of an option provides for the payment of $5,680 in cash less the amount of a trust deed on the property. It appears that approximately $2,500 remained unpaid on the trust deed. The complaint alleges "that plaintiff has duly performed all of the conditions of said agreement on his part to be performed, and has tendered to defendant the purchase price set forth in said option." This allegation is denied in defendant's answer. There is no evidence that plaintiff ever offered or tendered the purchase price

to defendant or deposited it for the latter's account. Plaintiff testified that he opened an escrow at a bank and made a deposit in the escrow but did not state the amount. He testified that he had sufficient money available to complete the transaction. The escrow instructions signed by plaintiff recite "I will hand you $3180.00 approx." The evidence of the escrow officer who handled the transaction at the bank is that plaintiff opened an escrow and deposited $500 therein, and no more. This is the only evidence concerning any tender or deposit of any part of the purchase price. Although (1) there was no evidence of tender and (2) defendant's counsel expressly directed the attention of the court to that fact, the court made a finding that plaintiff had fully performed his part of the contract and had tendered the amount of the purchase price.

[1] Since at the time of the commencement of the action no tender had been made of the purchase price and only a small portion thereof had been deposited in escrow the allegations of the complaint to the effect that plaintiff had performed the conditions of the contract imposed upon him and that he had made the tender are untrue and plaintiff therefore is not entitled to maintain an action for specific performance. Milton Kauffman, Inc. v. Smith, 82 Cal. App.2d 328, 186 P.2d 11; hearing in Supreme Court denied January 5, 1948.

[2] Moreover, before plaintiff could require defendant to perform the latter's part of the agreement he must have fulfilled or offered to fulfill all conditions imposed upon him by the contract. Civil Code, sec. 1439; Boone v. Templeman, 158 Cal. 290, 298, 110 P. 947, 139 Am.St.Rep. 126; Lifton v. Harshman, 80 Cal.App.2d 422, 432, 182 P.2d 222, 228; hearing in Supreme Court denied August 14, 1947.

[3] (2) Specific performance cannot be enforced against a party to a contract if he has not received an adequate consideration therefor and if it is not, as to him, just and reasonable. Civil Code, sec. 3391, subds. 1 and 2. The complaint fails to state facts sufficient to constitute a cause of action for the reason that it contains no allegation that the consideration was adequate or that the contract was just and reasonable as to defendant, and there are no allegations of fact from which conclusions to that effect may be drawn. Mayers v. Alexander, 73 Cal.App.2d 752, 762, 167 P. 2d 818, and cases cited; Milton Kauffman, Inc. v. Smith, supra.

Plaintiff closed his case without offering any evidence upon this subject, whereupon counsel for defendant directed attention to the provisions of the code above mentioned, to the deficiency in the complaint in that regard and to the fact that no evidence had been offered upon the subject. Thereupon the court on its own motion, over defendant's objection, permitted plaintiff to reopen the case for the purpose of introducing evidence upon that point. Defendant's counsel objected stating that he was not prepared to meet the issue and that he "would have to get in witnesses to testify on the question of the adequacy of the consideration." The objection should have been sustained. Notwithstanding defendant's protest the court received evidence as to the value of the property, counsel for the defendant making timely objections to questions asked in that regard. When the evidence was closed and the case was submitted defendant's counsel again called the court's attention to the provisions of section 3391 of the Civil Code.

[4-6] Disregarding the insufficiency of the complaint and the constant objections made by defendant's counsel, the court made a finding of fact that the consideration provided in the agreement "was and is a fair, adequate and equitable consideration for said property." Findings of fact must be responsive to the pleadings. Consolidated Lumber Co. v. City of Los Angeles, 33 Cal.App. 698, 700, 166 P. 385; Graydon v. Doane, 55 Cal.App. 642, 643, 203 P. 1018. The admission of evidence as to matters not within the pleadings is prejudicial error. Richter v. Adams, 19 Cal. App.2d 572, 576, 66 P.2d 226. Hence the court erred in receiving the evidence and in making the finding referred to for the obvious reason that the evidence was not responsive to any allegation in the pleadings and the finding of fact was outside the issues.

[7] Plaintiff concedes in his brief "that the complaint herein was technically deficient as a complaint for specific performance, in failing to state facts which would show that the consideration specified in the contract was adequate and that the contract was just and reasonable as to the defendant." Having made this concession he relies on sections 469 and 470 of the Code of Civil Procedure which provide that a variance between the allegations in a pleading and the proof will not be deemed material unless it has actually misled the adverse party to his prejudice. Manifestly those sections have no application to the instant case for the reasons (1) the question of variance between pleading and proof cannot arise because there is a total absence from the complaint of an indispensable allegation and there is no pleading on behalf of either party that justifies the admission of the evidence to which we have referred; and (2) since defendant objected to the introduction of evidence on issues not pleaded, plaintiff was not misled by any act of commission or omission on the part of defendant.

Plaintiff has cited cases in which the complaints were deficient in their averments but which were tried on the theory that they contained sufficient allegations, the defendants having made no objection to the evidence offered. Examples of such cases are Asnon v. Foley, 105 Cal.App. 624, 629, 288 P. 792, and Greiss v. State Inv. & Ins. Co., 98 Cal. 241, 244, 33 P. 195. The instant case was not tried on the theory that the complaint was sufficient or that the justness or reasonableness of the contract to defendant or the adequacy of the consideration were in issue, for, as we have pointed out, defendant's attorney, by his repeated objections to the introduction of evidence concerning those matters, never for a moment permitted the court or plaintiff's counsel to overlook the insufficiency of the complaint or to assume that defendant was consenting to the trial of unpleaded issues.

Defendant had a right to go to trial relying on the allegations which he found in the complaint as being the only matters on which he would be required to produce evidence. The record indicates that he was ready to meet such allegations but was not prepared as to matters not set forth in the complaint. If he had had previous warning that the value of the property, the adequacy of the consideration, or the justness and reasonableness of the contract would be tried he would have had the opportunity to produce witnesses whose testimony on those subjects might have required the court to render judgment in his favor. The record discloses a unilateral trial as to the matters under discussion.

For the reasons stated section 4½ of Article VI of the Constitution cannot be invoked, as contended by plaintiff, to sustain the judgment. It cannot be said from an examination of the entire record that the errors complained of have not resulted in a miscarriage of justice.

Judgment reversed with directions to enter judgment in favor of defendant who shall also recover his costs expended in connection with the trial.

MOORE, P. J., and McCOMB, J., concur.






83 Cal.App.2d 620

**OREGON - NEVADA - CALIFORNIA FAST FREIGHT, Inc. v. FRUEHAUF TRAILER CO.**

**Civ. 13548.**

District Court of Appeal, First District, Division 1, California.

Feb. 10, 1948.

**1. Appeal and error ⇐1010(1)**

Where trailer manufacturer contended on appeal that evidence was insufficient, on either theory of warranty or of negligence, to sustain finding that failure of adaptor pin was proximate cause of accident, District Court of Appeal could not disturb finding unless there was no evidence or no reasonable inference from the evidence to sustain that finding, and it

was necessary that any inferences indulged in were reasonable, based on evidence, and were not result of mere guess, surmise, or conjecture.

**2. Negligence ⇐134(11)**
**Sales ⇐441(1, 3)**

In action by motor carrier against trailer manufacturer on theory of implied warranty and of negligence to recover damages from accident in which trailer became detached from tractor, evidence sustained finding that failure of adaptor pin purchased from manufacturer and used in connecting trailer to tractor was proximate cause of accident and sustained recovery on either theory alleged.

---

Appeal from Superior Court, San Francisco County; Hon. Pat R. Parker, Judge.

Action by the Oregon-Nevada-California Fast Freight, Inc., against the Fruehauf Trailer Company of California on causes of action brought on theory of implied warranty, and of negligence. Judgment for plaintiff, and defendant appeals.

Affirmed.

Geo. M. Naus and Donald Seibert, both of San Francisco, for appellant.

Hauerken, Ames & St. Clair, of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff is a common carrier transporting highway freight in trucks and trailers. A considerable portion of plaintiff's trailer equipment was purchased from defendant, a corporation engaged in the manufacture and retailing of such equipment. In August of 1944 plaintiff purchased from defendant two semi-trailers. Such trailers are equipped with rear wheels only, the forward end of the trailer resting upon the rear end of the tractor that furnishes the motive power to pull such equipment. The evidence shows that underneath the forward part of the trailer, and on the rear of the tractor, there are metal bearing plates where the two come into contact. These bearing plates are called "fifth wheels." In order to hook the trailer to the tractor a so-called adaptor pin or kingpin is used. This pin is a substantial piece of equipment, and fits into slots cut into the respective fifth wheels. Various kinds of pins are used in different equipment. If both pieces of equipment are full automatic, the kingpin is a fixed part of the tractor's construction, and when both are semi-automatic the kingpin is a fixed part of the trailer's equipment. But when a full automatic is connected with a semi-automatic they are joined with a detachable kingpin which is then called an adaptor pin. The evidence shows that when plaintiff purchased the two semi-trailers defendant was informed that the hookup was to be automatic to semi-automatic, that the parties discussed the type of adaptor pin to be used, and that defendant advised plaintiff as to how this pin should be used. Such a pin was purchased from defendant by plaintiff at the time of the purchase of the two semi-trailers, at which time one semi-trailer was delivered to plaintiff.

The two fifth wheels have slots cut into them to fit the kingpin. The pin itself is fitted into a piece of boiler plate about 10" long and 1" thick, and of irregular shape that fits into the irregularly cut hole of the fifth wheel. Through one end of the boiler plate a hole is bored and into this hole the pin is pressed. The pin is of very hard steel. On one end it is 2½" in diameter with a flange left on as an integral part of the pin. That is the upper side of the pin which projects upward from the boiler plate about 2½". The lower end of the pin projects below the boiler plate about 2" and is machined to 2" in diameter. At the outer end of the lower side of the pin is a flange of soft metal, being a ring ½" thick and ½" wide. This soft metal flange is welded to the hard metal pin. The upper flange keeps the adaptor pin from falling through the upper fifth wheel, and the lower flange keeps it from bouncing out of the lower fifth wheel. The causes of action here involved are based upon the alleged failure of this adaptor pin and flange to perform the services required of them.

Shortly after purchasing the pin and accepting delivery of the first trailer from

defendant, one of the drivers of plaintiff had an accident in which the new semi-trailer tipped over. After the accident it was discovered that the soft metal flange on the new adaptor pin had broken off. Plaintiff's president immediately discussed the matter with the branch manager of defendant. Plaintiff's president then expressed fear that the adaptor pin was not safe to use. The manager, after conferring with other officers of defendant, assured plaintiff's president that the pin was safe and stated that he would guarantee them. Under these circumstances plaintiff purchased from defendant another adaptor pin and accepted delivery of the second semi-trailer. It was on the first round trip that this equipment was used that the accident occurred that forms the basis of this action.

The accident occurred at about 1:30 a.m. on October 1, 1944, in Oregon. At that time plaintiff's tractor, weighing six tons, was drawing the new semi-trailer connected with the new adaptor pin. The trailer when empty weighs seven tons, and at the time of the accident it was loaded with fifteen tons of cargo. The truck driver, Olin, was thoroughly familiar with the route, having driven it many times. On the night in question he had been driving about seven and one-half hours before the accident, and, up to the time of the accident, had had an entirely uneventful run. The accident happened just before the equipment entered upon a bridge crossing the South Umqua Creek in Oregon. For some distance before the bridge is reached the highway is relatively level, is smooth, is two-laned, is paved with asphalt, and is twenty-six feet wide. There was no other traffic on the road at the time. A short distance before the bridge is reached there is an upgrade, and just before the bridge is reached there is a sharp left turn still on the upgrade. The bridge, also on the upgrade, is but 19.3' wide, this width being narrower than the highway.

Olin testified that the maximum speed of his tractor on the level was 43 to 45 miles per hour; that prior to the accident, and while on the level, he had been in the highest speed; that when he hit the upgrade he was going about 35 miles per hour and that he then shifted gears to a lower driving speed; that he approached the left-hand curve at about 25 miles per hour; that he was on his side of the road and took the curve at the speed he normally drove around that curve; that it was a normal operation "the same as every night"; that just before he entered the bridge the tractor spurted or lurched ahead with accelerated speed; that he looked through the mirror and saw that the trailer had disappeared. He stopped and discovered that the detached trailer had rolled down the embankment. It was still on its wheels but the sides and top had broken open. The trailer and its load were practically a total loss. Olin examined the fifth wheel of the trailer and discovered that the soft metal flange had torn off the adaptor pin. He later found the flange.

Based upon these facts the plaintiff brought the present action. The complaint is in two counts, one on the theory of an implied warranty and the other on negligence. Both causes of action are based on the theory that the trailer became detached because of the failure of the adaptor pin. The cause was tried before the court without a jury. The trial court found in favor of plaintiff on both causes of action and judgment was entered in favor of plaintiff for $14,665.54.

On this appeal defendant's basic contention is that the evidence is insufficient, on either the warranty or negligence theory, to sustain the finding that the failure of the adaptor pin was the proximate cause of the accident. At the trial it was defendant's theory that the flange was torn off because the driver took the turn too fast and tipped over the trailer, and that in normal operations no strain at all is placed on the lower flange. Defendant now urges that plaintiff failed to prove that the failure of the flange was the proximate cause of the accident.

[1] It is elementary law that on such an appeal this court cannot disturb a finding of fact unless there is no evidence or no reasonable inference from the evidence to sustain that finding. Crawford

v. Southern Pac. Co., 3 Cal.2d 427, 45 P.2d 183; Dawson v. Boyd, 61 Cal.App.2d 471, 143 P.2d 373. The above rule applies to a finding of proximate causation. Matsuda v. Luond, 52 Cal.App.2d 453, 126 P. 2d 359. Of course, the inference or inferences indulged in must be reasonable, must be based on the evidence, and cannot be the result of mere guess, surmise or conjecture. Reese v. Smith, 9 Cal.2d 324, 70 P.2d 933; Puckhaber v. Southern Pac. Co., 132 Cal. 363, 64 P. 480; McKellar v. Pendergast, 68 Cal.App.2d 485, 156 P.2d 950.

[2] Tested by these standards we are of the opinion that the reasonable inferences from the evidence amply support the finding that the failure of the soft collar flange on the adaptor pin to sustain the load placed upon it in a normal road operation was the proximate cause of the accident. Most of the evidence on this issue was that of experts. In addition, the adaptor pin and the torn off flange were introduced into evidence, and the trial judge examined not only the exhibits but the fifth wheels into which the adaptor pin fits.

The plaintiff's experts had examined not only the broken flange and pin, but had examined other pins manufactured and sold by defendant. These were also introduced into evidence. All the exhibits have been transmitted to this court pursuant to Rule 10(b) of the Rules on Appeal. Plaintiff's experts testified that the purpose of the soft metal flange on the lower end of the pin was to prevent the pin from bouncing out of the fifth wheel and from slipping out of the connection. All of the experts agreed that on a level smooth road no force would be exerted vertically on the pin, all the force then being a horizontal pull. It is quite clear to anyone, however, that with various road conditions, upgrades, downgrades, curvature of the road, road irregularities, turns, etc., pressure is exerted on the pin in a vertical or partially vertical direction, the amount and extent of such pressure varying with the conditions. Plaintiff's expert Dresser stated that from his examination of the pin, the scratches thereon, and of the distortion of the broken flange, he would say that approximately a vertical force was exerted against the pin and flange and that this caused the flange to be forced off. The broken flange was so distorted that it indicated to him that a sort of prying action had forced off the pin. The flange, according to this witness, was forced off because of the failure of the weld by which it was attached to the pin. The weld was on the lower or outside portion of the flange. Dresser opined that the weld would have been much stronger to withstand a vertical or a prying force had it been on the inside or upper side of the flange, and would, of course, have been very much stronger had it been welded on both sides. He gave it as his opinion that "the way it was done is the weakest way that it could be done." Plaintiff's engineer King stated that the weld was "a very light weld" and that the method employed by defendant to weld the pin was "very very poor." To him the distortion of the collar demonstrated that there was a "rocking" force exerted upon the pin and flange from both sides. The scratches on the pin and flange demonstrated to him that there had been a progressive fracturing of the weld and that some final strain forced it off. He opined that with a sufficient weld the welded portion would have been as strong as the metal itself. He also gave it as his opinion that the marks on the pin and collar could not have been made by the trailer capsizing first, because, if that had happened, only one side of the pin would have been marked, while here both sides were marked, indicating a rocking force exerted on both sides; that by the laws of physics the centrifugal force exerted in rounding a curve is always exerted towards the outside and not the inside of the curve, and here the pin was scratched on both sides.

Defendant's testimony conflicted with some of the above. Its manufacturing manager testified that the company had manufactured and sold some 2,000 such pins, and that to his knowledge the only pins that had ever failed in operation were the two sold to plaintiff. The purpose of the collar, according to him, was to keep the pin from bouncing out of the fifth

wheel, and, unless the trailer capsized, no appreciable force would be exerted against the flange. The weld, to him, was "a good average weld." When the trailer was empty there would be a bouncing force on the pin, but with a loaded trailer on a normal road operation there would not be enough bouncing force to disengage the pin. Expert Woodruff, called by defendant, thought the weld was "of better than average quality," and he was of the opinion that the flange was twisted off by such a force as would have been exerted if the trailer had capsized.

This is a fair summary of the evidence. Interpreted most favorably in favor of plaintiff, it shows that the trailer became disengaged from the tractor; that the adaptor pin which holds the two pieces of equipment together became disengaged; that the flange which keeps the adaptor pin from becoming disengaged was broken off the pin; that the flange was attached by a very weak weld, and that several practical means had not been adopted to make that weld stronger; that, had the weld held, the two pieces of equipment could not have become disengaged; that, had the weld held, the trailer could not have capsized without tipping over the tractor or tearing out the fifth wheel assembly; that the tractor did not tip over, and that the fifth wheel assembly did not rip out; that the two vehicles became disengaged during a normal road operation; that when they became disengaged the tractor spurted forward—not to the side as it obviously would have done if the trailer started to tip over; that the flange was forced off by a rocking motion exerted on the pin; that a rocking or prying force would have been exerted against the pin and flange by a heavily laden truck going around a curve. From that evidence it is certainly at least a reasonable inference (if not an inevitable one) that the two pieces of equipment became disengaged as a proximate result of the pin becoming disengaged during a normal road operation, and that such pin became disengaged because of the failure of the welded flange to sustain the normal load intended to be exerted upon it. This being so, the finding of proximate cause is amply supported. This sustains the jundgment on either theory here pleaded and found.

The judgment appealed from is affirmed.

WARD and BRAY, JJ., concur.

**PEOPLE v. CITY OF LOS ANGELES et al.**

Civ. 15691.

District Court of Appeal, Second District, Division 1, California.

Feb. 11, 1948.

Rehearing Denied March 10, 1948.

Hearing Denied April 7, 1948.

**1. Evidence ⇐23(1)**

The pollution of beach on Santa Monica Bay from sewage is a matter of common knowledge.

**2. Evidence ⇐48**

The fact that State Department of Public Health granted permit to Los Angeles to construct and use a sewage treatment plant may be judicially noticed.

**3. Nuisance ⇐80**

Cities and sanitation districts emptying their sewage into ocean through Los Angeles sewage system, maintained sewage system works, sewer pipes, or conduits for treatment and discharge of sewage into ocean, so that court had jurisdiction under Health and Safety Code to restrain cities and districts from discharging sewage into ocean without permit from State Department of Public Health, where precise amount of sewage which each city and district emptied into ocean through the Los Angeles system was shown. Health and Safety Code, § 5443.

**4. Health ⇐28**

Contracts of cities and sanitation districts with Los Angeles for disposal of sewage of such cities and districts through the Los Angeles system did not affect statutory requirement that Los Angeles have permit from State Department of Public Health to maintain sewage system and to discharge sewage into ocean, and department was not bound by such contracts, and department's power to revoke such permits was not affected thereby. Health and Safety Code, §§ 5414, 5418, 5420.

**5. Health ⇐28**

Cities and sanitation districts cannot relieve themselves by contracts with other cities of their obligation to dispose of sewage accumulating within their boundaries in such a way as not to bring injury or damage to others. Health and Safety Code, §§ 5410–5464.

**6. Health ⇐28**

Contracts of cities and sanitation districts with Los Angeles for disposal of sewage of such cities and districts through the Los Angeles sewer system did not relieve cities and districts of responsibility for public nuisance created by discharge of sewage through the Los Angeles system into the Pacific Ocean. Health and Safety Code, §§ 5410–5464.

**7. Nuisance ⇐84**

Defendants whose actions separately constitute a nuisance may not be sued separately but can be joined in a single action. Code Civ.Proc. § 379a.

**8. Nuisance ⇐79**

The pollution of ocean waters and adjoining beaches by municipalities discharging their sewage into ocean is a nuisance which can be abated without regard to whether municipalities are negligent. Health and Safety Code, §§ 5410–5464.

**9. Nuisance ⇐79**

Whether Los Angeles sewage disposal system was public utility was immaterial as respects right of state to abate, as against cities and sanitation districts using the Los Angeles system, the nuisance arising from pollution of ocean by discharge of sewage from Los Angeles and such cities and districts into ocean through the Los Angeles system. Health and Safety Code, §§ 5410–5464.

**10. Nuisance ⇐85**

In action against Los Angeles and other cities and sanitation districts to abate nuisance arising from pollution of ocean and adjoining beaches by sewage originating in Los Angeles and cities and districts and discharged into ocean through Los Angeles sewage disposal system, the courts could not prescribe the means or facilities that should be constructed or used to abate the nuisance. Health and Safety Code, §§ 5410-5464.

**11. Nuisance ⇐85**

In action against Los Angeles and other cities in sanitation districts to abate

nuisance arising from pollution of ocean and adjoining beaches by sewage originating in Los Angeles and cities and districts and discharged into ocean through Los Angeles sewage disposal system, judgment approving the sewage disposal system proposed by Los Angeles and authorizing the other cities and districts to dispose of their sewage through such proposed system or to adopt some other plan approved by State Board of Public Health did not improperly dictate to the other cities and districts the facilities to be constructed to abate the nuisance. Health and Safety Code, §§ 5410–5464.

**12. Nuisance ⇐84**

In action against municipalities to abate nuisance arising from pollution of ocear by discharging sewage therein, trial court sat as a court of equity and as such was clothed with broad powers to accomplish the ends of justice in the action.

**13. Nuisance ⇐85**

In action against Los Angeles and other cities and sanitation districts to abate nuisance arising out of pollution of ocean and its adjoining beaches by sewage originating in Los Angeles and cities and districts and discharged into ocean through Los Angeles sewage disposal system, the other cities and districts could not complain that the court ordered the construction by Los Angeles of a sewage treatment plant larger than was necessary to abate the nuisance, where Los Angeles agreed to take all the capacity not allotted to the other cities and districts. Health and Safety Code, §§ 5410–5464.

**14. Nuisance ⇐81**

In action against Los Angeles and other cities and sanitation districts to abate nuisance arising from pollution of ocean and adjoining beaches by sewage originating from Los Angeles and cities and districts and discharged into ocean through Los Angeles sewage disposal system, inability of other cities and districts to finance construction of sewage disposal facilities independent of new facilities to be built by Los Angeles would not warrant reversal of judgment authorizing other cities and districts to dispose of their sewage through the new Los Angeles facilities or to adopt some other plan approved by State Board of Public Health. Health and Safety Code, §§ 5410–5464.

**15. Health ⇐28**

The State Board of Public Health is vested with exclusive jurisdiction to approve or disapprove plans for facilities used in connection with disposal of sewage by municipal corporation. Health and Safety Code, §§ 5410–5464.

**16. Evidence ⇐48**

In action against Los Angeles and other cities and sanitation districts to abate nuisance arising from pollution of ocean and adjoining beaches by sewage originating in Los Angeles and cities and districts and discharged into ocean through Los Angeles sewage disposal system, reviewing court could judicially notice that State Board of Public Health had approved and had issued a permit to city of Los Angeles authorizing construction of new proposed sewage disposal plant. Health and Safety Code, §§ 5410–5464.

**17. Constitutional law ⇐276**

In action against Los Angeles and other cities and sanitation districts to abate nuisance arising from pollution of ocean and adjoining beaches by sewage originating in Los Angeles and cities and districts and discharged into ocean through Los Angeles sewage disposal system, judgment authorizing other cities and districts to dispose of their sewage through system proposed by Los Angeles or to adopt some other plan approved by State Board of Public Health did not deprive other cities and districts which had existing contracts with Los Angeles for disposal of their sewage through Los Angeles system of their property without due process of law. Health and Safety Code, §§ 5410–5464, U.S.C.A. Const.Amends 5, 14; Const.Cal. Art. 1, § 13.

---

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by the People of the State of California against the City of Los Angeles, a municipal corporation, and the City of

Culver City, a municipal corporation, and others, to restrain defendants from maintaining sewage treatment works without permit from State Board of Public Health and for other relief. From the judgment, the City of Culver City and others appeal.

Affirmed.

M. Tellefson, City Atty., of Culver City, for appellant City of Culver City and its officers.

Henry McClernan, City Atty., John H. Lauten, Asst. City Atty., and Joseph R. Roark, Deputy City Atty., all of Glendale, for appellant City of Glendale and its officers.

Thomas V. Cassidy, City Atty., of Huntington Park, and Edward R. Young and E. L. Searle, Special Counsel, both of Los Angeles, for appellant City of Vernon and its officers.

Richard C. Waltz, City Atty., and Richard L. Sieg and Charles S. Callahan, Asst. City Attys., all of Beverly Hills, for appellant City of Beverly Hills and its officers.

Hugh Gordon, of Los Angeles, for appellants South Bay Cities Sanitation Dist., County Sanitation Dist. No. 4 and County Sanitation Dist. No. 11, and their officers.

Fred N. Howser, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

WHITE, Justice.

This is an action in equity instituted by the People of the State of California against all the above-named defendants and appellants and certain of their officers and employees, to restrain them from maintaining, without a permit from the State Board of Public Health, any sewage treatment works, sewers and pipes or conduits, or other pipes or conduits for the treatment or discharge of sewage; to restrain the defendants from discharging into any of the salt waters of the state any sewage, impure waters, or matters offensive, injurious or dangerous to the public health, and to restrain the defendants from maintaining a public nuisance on Santa Monica Bay by reason of their deposits therein of sewage and other matters offensive and injurious or dangerous to public health, or deleterious to fish or plant life; and further, for a judgment that the defendants be required to plan, finance, construct, operate and maintain sewage treatment works, sewer pipes and conduits for the safe and sanitary disposal of sewage; and for the abatement of a public nuisance.

Two causes of action are set up in the complaint, the first of which charged the operation of sewage treatment works, sewer pipes and conduits, and the discharge of sewage into the salt waters of the state without a permit; while the second sought to restrain the maintainance of a public nuisance.

Judgment was ordered for plaintiff on both counts, but defendants were given until December 31, 1947, to abate the nuisance.

The only defendants appealing from the judgment are the City of Culver City, its defendant officers and employees; City of Vernon, its defendant officers and employees; South Bay Cities Sanitation District of Los Angeles County, a public corporation, its defendant officers and employees; County Sanitation District No. 4 of Los Angeles County, a public corporation, its defendant officers and employees; County Sanitation District No. 11 of Los Angeles County, a public corporation, its defendant officers and employees; City of Glendale, its defendant officers and employees; and City of Beverly Hills, its defendant officers and employees. The appeal of the last-named municipality and its officers and employees was on motion dismissed by this court.

The factual background surrounding this litigation, as reflected by the record, shows that when some years ago appellant cities and sanitation districts were confronted, because of increasing population, with the necessity of finding a solution to their sewage disposal problems to avoid endangering the health and welfare of their inhabitants, they found themselves financially unable to construct an adequate sewer system which would carry their sewage to the Pacific Ocean or to another location which might safely be used for sewage disposal works without endangering the health and welfare of the inhabitants of other communities which might be affected by any sewage disposal facilities within the financial means of these various municipal and public corporations to construct.

In the meantime, the City of Los Angeles had constructed and was operating an outfall sewer system, the capacity of which was greatly in excess of the then foreseeable needs of the inhabitants of that city. When it became apparent that the sewage of the aforesaid municipalities must be provided with disposal facilities without further delay, each of them turned to the City of Los Angeles, seeking the use of the latter's sewage disposal facilities for a solution of their very acute problems. Thereupon, commencing in 1909, when the City of Vernon made its first contract with the City of Los Angeles for the disposal of sewage originating within the territorial limits of the former municipality, and during the years immediately following, each of the above-named appellant municipalities, and later still the foregoing appellant sanitation districts, made contracts with the City of Los Angeles under the terms whereof the last-named city agreed, for a cash consideration, to dispose of some or all of the sewage originating within the particular contracting municipalities and sanitation districts. It is noteworthy that the contracts between the City of Los Angeles and the other municipalities and sanitation districts under discussion were for an indefinite period, or, in some instances, for the life of the outfall sewer system itself, and in no instance carried any provision permitting the contracts to be cancelled when or if the City of Los Angeles required the use of that portion of the capacity of its outfall sewer system covered by the above-mentioned contracts.

In 1922 the City of Los Angeles filed its application with the State Board of Public Health of the State of California for a permit to dispose of sewage through its outfall sewer system into Santa Monica Bay in the Pacific Ocean at Hyperion; and subsequently, pursuant to a permit or order issued January 6, 1923, constructed a treatment plant and submarine tube at Hyperion, which at all times since completion have been used by the City of Los Angeles for the treatment and disposal of all of the sewage disposed of by the Los Angeles Outfall Sewer System, including that sewage flowing into the Los Angeles Outfall Sewer System from the various other municipalities and sanitation districts mentioned above, pursuant to their contracts with the City of Los Angeles for its disposal.

The record shows without contradiction that the Los Angeles Outfall Sewer System, the treatment plant at Hyperion and the submarine tube extending into the Pacific Ocean at that point are owned in their entirety by the City of Los Angeles, and that none of the appellants contracting with the City of Los Angeles for the disposal of their sewage through that outfall sewer system owns or has any right, title or interest in or to the sewer system, treatment plant, or the submarine tube extending into the Pacific Ocean.

There is evidence that on September 30, 1940, and for a long time prior thereto, the City of Los Angeles had violated the terms of the permit of January 6, 1923. In brief, these violations were as follows: A large portion of the sewage was not screened and some of the screen slots were larger than authorized, and frequently raw sewage was bypassed around the screen and discharged either into the submarine tube or directly on the beach. Garbage, fecal matter, solid matter and oily sludge, recognizable as of sewage origin, was visible on all the beaches on Santa Monica Bay from State Park Beach located at the mouth of Santa Monica Canyon south to Malaga Cove. The quality of water along the beach was not safe and suitable for bathing purposes as a result of such discharge and the bacterial count of *escherichia coli* had exceeded 10 per cubic centimeter in an area extending along the beach for a distance of approximately 10 miles from Brooks Avenue north of the Venice Pier in Los Angeles to 14th Street, north of the Hermosa Beach Pier in Hermosa Beach. During the year 1945 said area on the north was extended to Seaside Terrace in the City of Santa Monica. There was an objectionable odor condition in the waters and along the beach used by the public. The operation of the treatment works and the disposal of screenings had been conducted in such a manner that it was a menace to public health and had created an offensive odor nuisance. Additional treatment works, changes in outfall, improvements in operation, and ordinary maintenance had not

been provided by defendant City of Los Angeles nor by the other corporate defendants.

By reason of the foregoing violations, the State Board of Public Health, on September 3, 1940, suspended the permit and notified the City of Los Angeles, but granted said city a temporary permit upon condition that it proceed at once to prepare plans for the construction of adequate treatment works and outfall structures, and for the financing of the necessary construction. Such plans were to be filed with the state board and the city was to be ready to commence construction within a year from date. The City of Los Angeles and its officers failed to comply with the terms of the temporary permit, and the State Board of Public Health, on May 18, 1942, revoked said temporary permit and notified the City of Los Angeles thereof. Permits held by certain other defendant municipalities and sanitation districts were also revoked.

[1] All of the appellants concede that a public nuisance existed and that the findings in that regard must be sustained. Indeed, as found by the court, the pollution of the beach was a matter of common knowledge. So much so, that approximately 10 miles of beach were quarantined by the State Board of Public Health on April 3, 1943, and following a survey made in 1945 by the State Board of Public Health, it was disclosed that the conditions existing at the beach had become steadily worse since the summer of 1942, and the State Board of Public Health thereupon quarantined an additional area extending from Brooks Avenue in Venice to Seaside Terrace in Santa Monica, on the northerly end of the theretofore quarantined area. With reference to the conceded existence of a public nuisance, we quote the following from the brief filed on behalf of all but two of the appellants: "* * * we believe it suffices to say that the testimony and other evidence introduced by plaintiff established without question the existence of an unhealthful and unsanitary condition in the waters of the Pacific Ocean adjacent to the Santa Monica Bay Beach and extending some fifteen miles along that beach, and that plaintiff's testimony, likewise, conclusively showed the existence of a condition not only unsanitary but dangerous to the health of any one making use of the beaches immediately adjacent to the contaminated waters of the Pacific Ocean in Santa Monica Bay. We repeat, there can be no question that this condition was adequately and conclusively proven."

Upon the conclusion of plaintiff's case, at the request of plaintiff's counsel, paragraph V of the complaint was stricken by the court, leaving the pleading without an allegation that the corporate defendants other than the City of Los Angeles owned any right, title or interest in or to the Los Angeles sewer system, the Hyperion plant or the Hyperion submarine tube, or that said defendants, other than the City of Los Angeles, had any right to repair or rebuild the treatment plant or the submarine tube.

By their answers, each of the defendant municipalities and public corporations alleged in substance that the Los Angeles Outfall Sewer System, the Hyperion treatment plant, and the submarine tube were owned in their entirety by the City of Los Angeles, which said city was the only one having any right to operate, maintain or repair the same or any portion thereof. The answers further alleged that the particular municipality or public corporation filing such answer had contracted with the City of Los Angeles for the disposal of sewage originating in the particular municipality or public corporation in question. Each answering defendant alleged that it had no right or jurisdiction to make any repairs, replacements or changes of any nature whatsoever which concerned or affected the Los Angeles Outfall Sewer System, treatment plant or submarine tube, but that on the contrary, the City of Los Angeles had undertaken and agreed by said contracts to operate and maintain said sewer system, including the treatment plant and submarine tube, and to dispose of the sewage entering the same from within the territorial area of the particular contracting parties.

[2] We deem it unnecessary to set forth the findings of the court other than those challenged by appellants. The court found that on February 14, 1944, the City of Los Angeles employed the engineering firm of Metcalf and Eddy, of Boston, Massachusetts, as consulting sanitary engineers, to

investigate the problem of sewage disposal for Los Angeles and associated communities, and to make a report and recommendation for the disposal of sewage from Los Angeles and the corporate defendants named in this action. The report was made on April 25, 1944. The recommendation contained therein was for a high-rate activated sludge plant having a capacity which was the same as the capacity of the existing trunk lines to Hyperion, that is, 240,000,000 gallons per day. That two sites were considered feasible, one at Hyperion now owned by the City of Los Angeles, and the other privately owned land near by, but that the expense of grading and draining the latter site would cost approximately $1,000,000 more than the site at Hyperion. The findings then go into the more technical engineering phases of the plant. It is then found that the recommended plant would produce a clear effluent and would remove most of the grease and at least 75% of the suspended solids from the sewage. That the use of the treatment plant and the new submarine tube as recommended would entirely abate the nuisance created by the discharge of sewage at Hyperion. That the State Board of Public Health had not officially acted upon a permit, but during the trial the Bureau of Sanitary Engineering of said state department had indicated that the proposed treatment plant would be entirely satisfactory. It might here be noted that there was no contradiction of the fact, of which this court may take judicial notice, that the State Department of Public Health did, on April 10, 1946, grant a permit to the City of Los Angeles to construct and use such a treatment plant.

The court further found that on May 12, 1944, the City Council of Los Angeles and its Board of Public Works accepted and approved said report from the above-named consulting engineers and ordered the City Engineer to proceed at once with the design of said proposed treatment plant. The findings then detail the specific steps that had been taken by defendant City of Los Angeles toward the construction of such treatment plant.

The court further found the only other plan for abating the nuisance would be the construction of a sewage treatment plant of what is known as a sedimentation process, which would remove approximately 60% of the suspended solids and grease; that such a plant was recommended by a firm of consulting sanitary engineers of the City of Los Angeles in 1939, but that the recommendations expressly stated that the capacity of such plant would be reached by the year 1944. That the capacity of such plant could be enlarged by construction of a 10,000-foot submarine tube instead of a 5,000-foot one, but that no detailed plans or specifications of any nature whatsoever had been drafted for such proposed alternate plant.

The court found that it was to the best interests of all the defendants to dispose of the sewage arising in each particular area of said corporate defendants and each corporation to discharge its sewage through a treatment plant to be built at Hyperion, and after such treatment to discharge the effluent from there into the Pacific Ocean at not less than 5,000 feet from shore. The court then found that the defendants City of Beverly Hills, City of Culver City, South Bay Cities Sanitation District, and Sanitation Districts Nos. 4 and 11, among other defendants, had no other feasible means whatsoever of disposing of sewage originating in the areas of said corporate defendants. It was found by the court that the defendant City of Vernon and other named defendants could, at additional expense far greater than their proportionate share of construction of a new proposed high-rate activated sludge treatment plant, dispose of sewage arising in the corporate limits of said cities through the sewage system of the County Sanitation District, which treatment plant is located at Harbor City, and the effluent of which is discharged into the Pacific Ocean at White's Point near San Pedro.

With reference to the defendant City of Glendale, the court found that it may have an alternative method of disposing of sewage; that a report and recommendation of a consulting engineer was received in evidence, but that no application had been made to the State Board of Public Health for a permit to construct such a plant. The court further found that it did not de-

termine in this proceeding the feasibility of such a proposed plant, but did find that the natural and probable consequences of the discharge of the effluent from there into the Los Angeles River would be the contamination through percolation of the wells of the communities to the south and west of the Los Angeles River as far as the Inglewood Basin.

The court further found that defendant City of Los Angeles had a sufficient unexpended balance to pay for the engineering services for the completion of final plans and specifications for the high-rate activated sludge treatment plant; that said city had appropriated $2,000,000 for the submarine tube; that at the time of trial said city had approximately $7,200,000 in its reserve fund; and that on April 3, 1945, a bond issue was voted by the electorate of the City of Los Angeles in the sum of $10,000,000 for the payment of the share of said city for the construction of said high-rate activated sludge plant.

It was then found that the City of El Segundo, the City of South Pasadena, the City of Alhambra, and Universal Pictures have at all times prior to the determination of this action been willing and able to pay their respective proportionate shares of said new high-rate activated sludge treatment plant, as was the defendant A. F. Gilmore Company; that on December 4, 1945, the City of Santa Monica approved a bond issue in the principal sum of $875,000 for the purpose of acquisition or the right to use a sewage treatment plant and disposal works under contract to be made with the City of Los Angeles, or other cities, and is now ready, willing and able to pay for its share.

The court then found that except for the defendants set forth in the three preceding paragraphs of the findings, none of the corporate defendants had funds available for the payment of its proportionate share of the cost of a new treatment plant, and that none of them had taken any steps whatsoever to raise funds either by bonded indebtedness or otherwise for the payment of such proportionate share.

With reference to the expense, and the agreement among the various defendants concerning the construction, of the new treatment plant, the court found as follows: "That it was agreed by those present at a meeting of the City Engineers of the various cities, the Chief Engineer and General Manager of the County Sanitation Districts named as defendants herein and representatives of the private corporations named herein, that there be allocated to the defendants the ultimate capacity of said proposed new high-rate activated sludge treatment plant according to the figures on Exhibit 23; that the proportionate cost of each of the corporate defendants was based upon a total estimated cost of $21,000,000; and the cost to each corporate defendant was in the ratio of the gallonage allotted to 240 as the estimated share to be contributed by each corporate defendant is to 21,000,000; that said estimated share of expense was arrived at on the basis of the percentage ultimate flow in the new plant to the total cost thereof and without reference to any other obligations or liabilities as between the City of Los Angeles and the separate respective corporate defendants."

The court then found that it was feasible to have installed, ready for operation, six chlorinating machines by June 1, 1946, and to let a contract for a new submarine tube by April 1, 1946; that it was feasible to have all the detailed plans for the entire new plant completed by July 1, 1946; that it was feasible to advertise for bids for the excavation of the site and to award a contract by March 1, 1946; and that it was feasible to have fully constructed, in its entirety and in full operation, the said proposed new high-rate activated sludge treatment plant by December 31, 1947. That at the time of the signing of the findings the feasibility of intermediate steps could not be determined presently, but if necessary at some future date, evidence of such facts might be received.

In so far as pertinent to a consideration of the issues raised on this appeal, as conclusions of law the court determined that the defendents have and are maintaining a public nuisance in Santa Monica Bay by the discharge of sewage at Hyperion; that the primary duty and obligation rests upon each corporate defendant to dispose of the sewage originating within its respective

limits in a safe and sanitary manner; that any right created by contract between two several defendants did not release either or any of them from the primary obligation to dispose of sewage in a safe and sanitary manner; that regardless of contractual or other relationships existing among the defendants, the plaintiff was entitled to an injunction restraining each and all defendants from maintaining, without a permit from the State Department of Public Health, any sewage treatment works or other facilities for the treatment or discharge of sewage into Santa Monica Bay, such injunction to be effective on and after December 31, 1947. That the plaintiff was entitled to an injunction restraining each one of the defendants from discharging into any of the salt waters within the jurisdiction of the State of California, any sewage or other matter or substance in any manner likely to be offensive, injurious or dangerous to the public health, effective on and after December 31, 1947.

As further conclusions of law, the court determined: "That the plaintiff is entitled to a mandatory injunction requiring the defendants and each of them and their successors, officers, agents, servants and employees to plan, construct, operate and maintain sewage treatment works, pipes and conduits for the safe and sanitary disposal of sewage within as short a time as is feasible; and in this connection the plaintiff is entitled to such other and further orders as may be made from time to time requiring the defendants and each of them and their successors, officers, agents, servants and employees to take such additional steps within such additional time as may be determined by the court for the temporary or permanent abatement of the public nuisance stated herein."

And further: "That each corporate defendant which does not adopt some approved method of disposing of sewage originating in the corporate limits of such defendant other than through a new treatment plant or works at or near Hyperion shall be required to advance the proportionate share of such corporate defendant according to the ultimate proportionate use reserved for such defendant towards the construction of a new treatment plant or works at or near Hyperion; *but no corporate defendant shall be prevented from adopting some other method of disposing of sewage originating in the corporate limits of such defendant providing such method is approved by the State Board of Public Health of the State of California, and that such method is a safe and sanitary method of disposal of sewage, and providing that said plan or method is in full operation on or before the 31st day of December, 1947.*" (Emphasis added.)

Judgment was entered accordingly.

Appellants first challenge the right of the court to require them to abate a nuisance resulting from unhealthful conditions caused by sewage emptied into the salt waters within the jurisdiction of the State of California where such sewage is emptied into the ocean through the outfall sewer system, treatment works and submarine tube owned in their entirety by and under the exclusive jurisdiction and control as to maintenance and operation of another municipal corporation where the latter corporation has, by contract with the appellant municipalities or public corporations, undertaken, for a price, to accept such sewage and to dispose of the same in the Pacific Ocean through its outfall sewer system, treatment works, and submarine tube, in a good and workmanlike manner, and without creating a public nuisance. Appellants rest their claim in this regard on the premise that the instrumentality causing the nuisance must be shown to have been owned, operated and controlled by a defendant sought to be enjoined, either alone or acting jointly with all other defendants, and that to validate the judgment entered herein, it must be shown that the presence of the sewage in the waters of Santa Monica Bay and on the shores adjacent thereto, which caused the nuisance, resulted from the unlawful or negligent act of each defendant named in the judgment, acting alone, or in concert with all other defendants.

In so far as the cause now engaging our attention is concerned, we are not in accord with appellants' contention.

The instant proceeding is predicated upon two separate causes of action, the first

of which is for violation of the health and safety provisions of the Health and Safety Code, and the second for the maintenance of a nuisance. Judgment was granted on both causes of action.

Sections 5410 to 5464 of the Health and Safety Code contain the law applicable to the disposal of sewage. In section 5414 it is provided that no person, without a permit, shall maintain any sewage treatment works, pipes or conduits for the treatment and discharge of sewage whereby such sewage shall empty, flow, seep, drain, condense into or otherwise pollute or affect any of the salt waters within the jurisdiction of the State. Section 5418 provides that no person, without a permit, shall deposit or discharge any sewage, trade waste, etc., into any salt waters within the jurisdiction of the State. Section 5420 provides that no person, without a permit, shall maintain any sewage treatment works, sewer pipes or conduits for the treatment or discharge of sewage. Sections 5421 to 5430 relate to the applications for permits, hearings, notices, investigations, etc., the findings requisite to issuance of a permit and conditions warranting a denial. Section 5438 provides that this article of the Health and Safety Code does not limit the power of any city or county to declare, prohibit and abate nuisances or limit the power of the State Department of Public Health to declare or abate nuisances. Section 5442 provides for the suspension of a permit.

Section 5443, provides that violation of this article of the code may be enjoined by any court of competent jurisdiction or by the State Department of Public Health. Section 5444 provides that anything done, maintained, or suffered in violation of any of the provisions of this article is a public nuisance, dangerous to health, and may be summarily abated as such.

Sections 5460 to 5464, relating to penalties for violations of the foregoing code provisions, may be disregarded for the reason that during the trial penalties in this proceeding were waived.

The evidence shows that the City of Los Angeles had a permit to discharge sewage at Hyperion from the time of the construction of the screening plant and submarine tube at Hyperion until September 3, 1940, when the permit was suspended. At the time of the suspension of the permit a temporary permit was issued pursuant to section 5435 on condition that the city proceed at once to prepare plans and construct necessary works. The conditions of the temporary permit were not complied with, and on May 18, 1942, the State Board of Public Health revoked the temporary permit. The appellant County Sanitation District No. 11 never at any time had a permit of any kind whatsoever from the State Department of Public Health to maintain any sewage treatment works, sewage pipes, or conduits, or to discharge any sewage into the salt waters of the State. The appellants City of Culver City, City of Vernon, County Sanitation District No. 4 and South Bay City Sanitation District each held a permit from the State Board of Public Health to connect its sewage system to the sewage system of the City of Los Angeles and thereby discharge its sewage at said Hyperion plant, but each of said permits held by said appellants was revoked by the State board on October 16, 1943.

[3] None of the appellants can successfully contend that it is not maintaining sewage treatment works, sewer pipes or conduits for the treatment and discharge of sewage into the salt waters within the jurisdiction of the State, because it was shown quite precisely the amount of such discharge by each of said appellants.

The instant action was instituted in the name of the People of the State of California, on behalf not only of the People, but of the State Department of Public Health, the State Fish and Game Commission and the State Parks Commission. The court was, therefore, pursuant to the provisions of section 5443 of the Health and Safety Code, clothed with jurisdiction, in a proper case, to restrain appellants from maintaining any sewage treatment works and from depositing and permitting to drain into the salt waters of the State any sewage, without a permit from the State Department of Public Health.

[4] The statutory requirement that the City of Los Angeles have a permit, as required by sections 5414, 5418 and 5420 of

the Health and Safety Code, was not affected by any contracts appellants may have had with said city to dispose of their sewage through the screening plant and submarine tube at Hyperion. While the State Department of Public Health was cognizant of the existence of some of such contracts, due to the fact that permits had previously been issued to some of the appellants for the discharge of their sewage at Hyperion, nevertheless such state department is not bound by the terms of contracts with others than itself, and the statutory power to suspend or revoke such permits is not affected or controlled by a contract existing between the permittee and others.

The evidence is uncontradicted that on October 16, 1943, prior to the commencement of this action, the permits held by the appellants, as well as that held by defendant City of Los Angeles, were revoked by the State Department of Public Health. Therefore, under the provisions of the Health and Safety Code hereinbefore set forth, the judgment rendered herein, and based upon plaintiff's first cause of action, could well be affirmed.

However, because of the great public interest attached to this litigation, and its importance to the municipalities and public corporations affected thereby, we are disposed to give consideration to the contentions of appellants that because of their aforesaid contractual relations with the City of Los Angeles, they were not responsible for the admittedly existing unhealthful condition, and cannot be required to abate a conceded public nuisance resulting therefrom.

In support of their contention that they are not legally responsible for the maintenance of a nuisance and cannot be held liable for the cost of abating the same because the instrumentality causing such nuisance was neither owned by nor under their jurisdiction or control, appellants lean heavily upon the case of Carmichael v. City of Texarkana, C. C., 94 F. 561, and 8 Cir., 116 F. 845, 58 L.R.A. 911. In this case riparian owners of a stream sued a city and joined therein either individual householders or industries as parties defendant, for the pollution of the stream by the discharge of sewage therein. The court held that the inhabitants and industries within the city were improperly joined with the municipality in the action, on the ground that the inhabitants of the city had no right or authority to construct or operate a sewer system within the municipality and that they had no control over the manner of its construction, repair or alteration, because all such control was by law vested in the city or town; that the law required the city to operate a sewer system within its boundaries and required it to do so in such a manner that no unnecessary injury would be inflicted upon any one. Holding that the test of liability for the action of another is the power to command or control the manner of the performance of those actions, the court pointed out that the inhabitants were without authority to construct or operate a sewer sysem, but were possessed of the right to have the city dispose of their sewage by means of a system constructed and operated exclusively by the municipality in such a manner as to avoid injury to others. In other words, the inhabitants were not acting jointly with the city in the operation of the sewer system. To the same effect are the cases of Adler & Co. v. Pruitt, 169 Ala. 213, 53 So. 315, 32 L.R.A., N.S., 889, and Hampton v. Spindale, 210 N.C. 546, 187 S.E. 775, 107 A.L.R. 1188, also cited by appellants.

No such situation, however, confronts us in the case at bar. No inhabitants of any municipality or public corporation are joined as defendants herein.

[5, 6] A primary obligation rested upon appellants to dispose of sewage accumulating within their respective boundaries, and an equally binding obligation rested upon them to dispose of the sewage in such a way that it would entail no injury to other parties. And appellants cannot relieve themselves by contract with other municipalities of their primary obligation imposed upon them by law. In the case at bar, the most that can be said is that by contract with the City of Los Angeles, the latter afforded to appellants the use of its sewer facilities to carry and dispose of appellants' sewage at Hyperion. Each appellant proportionately started the chain of circumstances that caused the nuisance sought to be abated when they emptied their sewage

into the outfall sewer of the City of Los Angeles. The mere fact that appellants had a contract with the City of Los Angeles for the disposal of such sewage does not in the least enter into the merits of this action as between the People of the State of California and appellants for abatement of a nuisance arising from pollution of salt waters within the jurisdiction of the State of California and of the adjoining beaches, by sewage originating in part within the territorial limits of the aforesaid appellant municipalities and public corporations. There rested upon appellants a bounden duty to dispose of their sewage in such a manner as not to bring injury or damage to others. It therefore follows, that the fact that the screening plant and submarine tube at Hyperion are owned, maintained and controlled by the City of Los Angeles does not relieve appellants of responsibility for the admitted public nuisance sought to be abated, if they contributed thereto.

The trial court was not concerned, and rightly so, with the contractual relations, privileges and obligations between appellants and the City of Los Angeles, because such contracts will not relieve appellants of an obligation imposed upon them by law. And the liability of appellants was not minimized or affected by the action of the court in striking from the complaint the aforesaid paragraph V.

[7] Appellants' contention that it is improper in a single action to join defendants whose actions separately constitute a nuisance, but that each must be sued separately, is without merit. Whatever may be the rule in other jurisdictions or was formerly the rule in California, since the adoption of section 379a of the Code of Civil Procedure the rule no longer exists.

[8] Appellants' claim that negligence upon their part is a necessary element in an action to abate a nuisance is equally without merit. So far as this case is concerned, the question of negligence is wholly irrelevant. There may be cases wherein the question of whether the maintenance of a given condition amounts to a nuisance depends upon whether or not it is due to negligence, but the pollution of ocean waters and adjoining beaches in the manner charged herein is a violation of the rights of the People of the State of California, which amounts in law to a nuisance, regardless of whether or not it is due to any negligent act or omission. Kafka v. Bozio, 191 Cal. 746, 748, 218 P. 753, 29 A.L.R. 833.

[9] We also regard as immaterial the question of whether the Los Angeles City Outfall Sewer System, treatment plant and submarine tube constitute a public utility, and that as the owner and operator of such public utility the City of Los Angeles is the only party against whom a cause of action herein could be stated. There is no evidence, and certainly it cannot be successfully contended, that the City of Los Angeles operates a public utility for the benefit of appellants or other municipalities or public corporations.

We come now to a consideration of appellants' contention that the trial court was without power to dictate or prescribe the means or facilities which shall be used or constructed to abate a nuisance, or to set forth the means or facilities which it deems necessary to prevent a continuance or recurrence of the nuisance by reason of causes not then in existence but anticipated to occur in the future .

[10, 11] We are in accord with the claim of appellants that the court does not possess the power to indicate or prescribe the means or facilities that shall be constructed or used to abate the nuisance. However, an examination of the record herein reveals that the court did not decree or prescribe the means or facilities to be used, nor require that any particular plant be built. Conclusion of Law XI, hereinbefore set forth, provides that only those appellants who do not adopt *some* approved method of disposing of their sewage, other than through a new treatment plant or works at or near Hyperion, "shall be required to advance the proportionate share of such corporate defendant according to the ultimate proportionate use reserved for such defendant towards the construction of a new treatment plant or works at or near Hyperion; *but no corporate defendant shall be prevented from adopting some other method of disposing of sewage* originating

in the corporate limits of such defendant, providing such method is approved by the State Board of Public Health of the State of California, and that such method is a safe and sanitary method of disposal of sewage, and providing that said plan or method is in full operation on or before the 31st day of December, 1947." (Emphasis added.)

The judgment also gives to each appellant the opportunity to determine whether to withdraw from the Los Angeles city system and set up any method of treatment of their sewage which would take it from the Los Angeles system and thereby remove it as a contributing cause to the admittedly existing nuisance. It should be remembered that the City of Los Angeles was also a defendant in the present proceeding, and throughout the trial took the position that it desired to abate the nuisance and that it already was engaged in planning for the construction of a new sewage treatment plant. During the trial, the court heard evidence as to the nature of those plans and also heard evidence concerning all other possible or suggested plans. None of the appellants had any plan whatever other than that of the City of Los Angeles, except the City of Glendale, which had hired a consulting engineer. That city had an alternative plan, and one of the purposes of receiving evidence with reference to suggested plans was to determine whether or not such plan was feasible to abate the nuisance. There was evidence that the plant proposed to be built by the City of Los Angeles would alleviate conditions which brought about this litigation. There can be no question that the court was justified in giving mandatory directions to the City of Los Angeles to execute the plan which the city had already adopted and submitted to the court. The provisions of the judgment as to the City of Los Angeles have become final. Appellants were given an opportunity by the judgment to erect their own plants or to otherwise provide for their sewage disposal. It would appear from the record that appellants have indicated that their only plan is to dispose of their sewage through the Los Angeles system. The Chief Engineer and General Manager of the County Sanitation Districts positively and unequivocally stated that as far as such districts which had been sewering through Hyperion were concerned, it would be to their best interests to join with the City of Los Angeles in the new plant and that the same situation was applicable to the cities of Vernon and Culver City. The latter municipality has filed an application with the State Board of Public Health to be permitted to do so.

The City of Los Angeles is bound to construct the system which it proposed, which the court approved, and which the judgment has made binding upon that city. To that extent, at least, the final judgment against the City of Los Angeles is final also as to the appellants.

Appellants are permitted to adopt some other method of disposing of their sewage, subject only to the statutory requirment that such method be approved by the State Board of Public Health. They are required to pay a proportionate share toward the Los Angeles system only in the event that they desire to take part in the use of such system. The testimony taken with reference to the different types of treatment plants that could be built was justified by the position taken by the City of Los Angeles at the trial that it desired to abate the nuisance and was already engaged in planning for the construction of a new sewage treatment plant to accomplish that purpose. None of the appellants was prejudiced by such testimony or the findings thereon.

[12] In the type of case now before us, the trial court is sitting as a court of equity, and as such is clothed with broad powers to accomplish the ends of justice in the proceeding. The findings and conclusions of law herein, supported as they are by substantial evidence, indicate that there is a strong possibility of working out some solution at reasonable cost that may be of benefit to all parties concerned. The State has a very definite interest in preserving and protecting public health, and in seeing that the same is not endangered. While not requiring appellants to avail themselves of the Los Angeles municipal system, the court attempted, in the event any of the appellants desired to take part in the construction of the high-rate activated sludge plant

at Hyperion, to work out a fair and just solution of the proportionate costs to be paid by each appellant according to the capacity allotted to it as determined upon by its own engineer. Such a course met with judicial approval in the case of Rancho Santa Margarita v. Vail, 11 Cal. 2d 501, 558, 561, 81 P.2d. 533.

[13] Appellants' contention that the court ordered the construction of a sewage treatment plant larger than necessary to abate the nuisance is answered by the fact that defendant City of Los Angeles has agreed to take all the capacity not otherwise allotted.

[14] That appellant municipalities and sanitation districts, as they assert, were "without exception, according to testimony of their engineers and officers, utterly unable to finance the construction of sewage disposal facilities and sewage treatment works necessary for the disposal of their sewage by means independent of the sewage and treatment plant facilities of the City of Los Angeles," furnishes no ground for a reversal of the judgment herein. That a nuisance existed was admitted. The court was clothed with jurisdiction to order its abatement, and a primary obligation rests upon each appellant to dispose of its sewage in such a manner as not to injure others. The court solved its problem by ordering the abatement of the nuisance, and went further, in answer to appellants' contention that they were financially unable to provide independent facilities to dispose of their sewage, by offering them the use of the Los Angeles city project, requiring only that they pay their proportionate share, based on the use they might make thereof.

[15, 16] It is true, as urged by appellants, that the State Board of Public Health is vested with exclusive jurisdiction to approve or disapprove plans for facilities used in connection with the disposal of sewage. As suggested by respondent, this court may take judicial notice that the State Board of Public Health has approved and has issued a permit to the City of Los Angeles authorizing the construction of the new proposed plant.

[17] Appellants' contention that the judgment rendered herein violates the provisions of article I, section 13, of the Constitution of California, and the Fifth and Fourteenth amendments to the Constitution of the United States, in that its effect is to deprive appellants of their property without due process of law, cannot be sustained. Appellants predicate this argument on the premise that the court was without jurisdiction or right to disregard their several contracts with the City of Los Angeles; that in so doing and requiring appellants to contribute funds toward the construction of the new treatment plant and submarine tube in excess of the amounts which they are severally obligated to pay to the City of Los Angeles under their respective contracts, appellants' property will, to the extent of such excess payments, be taken without due process of law.

The judgment required that each appellant should pay a proportionate share of the cost of the new system according to the capacity allotted to each appellant, but only in the event such appellant desired voluntarily to sewer through Hyperion.

This is a proceeding initiated by the People of the State of California on behalf of the State itself, and on behalf of the State Department of Public Health, as well as other state agencies, against all named defendants, to abate a public nuisance. Therefore, the court rightfully refrained from passing upon any of the rights, obligations or liabilities affecting the various defendants by reason of their contractual relations with each other, and left those matters open for future adjudication in a proper proceeding. Although the aforesaid contracts concerned the disposal of sewage, the court would not be justified in this action to adjudicate the rights existing between the various appellants by reason of their contracts one with the other. In so far as the judgment herein is concerned, if any of the appellants have any rights against the City of Los Angeles, or vice versa, by reason of any existing contract, such rights have been preserved and may be enforced in a proper action. All of appellants' property and rights were preserved to them and the judgment in the instant action does

not impair or violate any of their constitutional rights.

Other points urged for a reversal are noted, but we deem them untenable and therefore requiring no special discussion.

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

Rehearing denied; DORAN, J., dissenting.

Hearing denied; SHENK, J., dissenting.




83 Cal.App.2d 775

## NOBLE v. NOBLE.

Civ. 15718.

District Court of Appeal, Second District, Division 3, California.

Feb. 20, 1948.

**1. Stipulations ⇐14(1)**

Plaintiff, by stipulating that he had already been awarded a divorce decree in Nevada, put himself out of court on issue as to annulment of marriage of the parties.

**2. Divorce ⇐172**

As between the parties, a decree of divorce is also an adjudication of validity of the marriage.

**3. Appeal and error ⇐878(1)**

Where defendant did not appeal from judgment entered, she could not take advantage of error in plaintiff's favor.

**4. Appeal and error ⇐1172(3)**

Fact that trial court improperly ruled that it had no jurisdiction to pass on issue of validity of marriage of the parties did not require reversal of that part of judgment upholding validity of property settlement agreement entered into by the parties, which was properly decided on the merits.

---

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Consolidated actions by Robert P. Noble against Hazel E. Noble to quiet title to realty, annul marriage of the parties and set aside a property settlement agreement. From judgment that property settlement agreement was valid, and declaring that court was without jurisdiction to render a decision on plaintiff's cause of action by which he sought to annul the marriage of the parties, the plaintiff appeals.

Affirmed.

Prior opinion, 187 P.2d 812.

Nadia Williams, of Glendale, and Nathan Asimow, of Los Angeles, for appellant.

Francis R. McKenna, of Montrose, for respondent.

SHINN, Acting Presiding Justice.

This is an appeal by plaintiff from a judgment that a property settlement agreement between the parties, entered into while they were husband and wife, was not procured by the fraud of defendant wife but was valid, and also declaring that the court was without jurisdiction to render a decision on plaintiff's cause of action by which he sought a decree that his marriage to defendant was void.

The parties intermarried in 1938, separated and entered into a property settlement agreement in September, 1945, which provided in part that defendant was to receive a deed to certain real property in Los Angeles County. In the following month plaintiff was awarded a decree of divorce in Nevada and thereafter executed a deed in defendant's favor for the real property described in the agreement. In the following month, without having taken any steps to have the Nevada decree vacated, he filed two actions in Los Angeles County, one to quiet title to the real property, and another with separate causes of action for annulment of the marriage, and annulment of the agreement on the ground of fraud. He alleged in the cause of action for annulment of the marriage that at the time he married defendant she had another husband living, and in the other cause of action that defendant concealed the fact of the void character of her marriage with him, and that he entered into the agreement with her as a result of her fraudulent concealment, and in the belief that she was his lawful wife. Defendant answered in

both actions, admitting in the second action that at the time of her marriage to plaintiff she had another husband living, by virtue of a marriage which had not been dissolved, but alleging that plaintiff was fully advised of that fact, and that he entered into the agreement with full knowledge of the invalidity of his marriage to defendant. Defendant also alleged that plaintiff had obtained a divorce in Nevada and that the property settlement agreement had been approved by the Nevada court. It appeared to have been the purpose of defendant to rely upon the Nevada decree as res judicata as to the validity of the marriage and the agreement. It was stipulated early in the trial that plaintiff had obtained a divorce in Nevada and the parties then proceeded with their proof upon the issue of fraud in connection with the property settlement agreement. Defendant proved to the satisfaction of the court that plaintiff knew when he married defendant that she was not eligible for marriage, and that he entered into the agreement with full knowledge and understanding of the void character of the marriage. Findings were made to this effect and the judgment declared that the agreement and plaintiff's deed to defendant were valid. Plaintiff concedes that the evidence was sufficient to support the findings and he makes no claims of error in the trial of the property issue. It will be noted in what we have said that no trial was had on the plea of res judicata. Defendant offered no evidence in support of that plea. Neither the Nevada judgment nor any part of the record was introduced in evidence, the trial of the issue being solely on the merits.

[1-3] On the annulment issue plaintiff put himself out of court when he stipulated that he had already been awarded a decree of divorce in Nevada. Not only did that fact preclude a decree annulling the marriage, for the reason that the court would not attempt to annul a marriage which did not exist, but for the additional reason that it established the validity of the marriage. As between the parties a decree of divorce is also an adjudication of the validity of the marriage. (In re Estate of Hughes, 80 Cal.App.2d 550, 556, 182 P.2d 253, and cases cited.) Plaintiff evidently did not understand the effect that should be given to the Nevada decree when he brought suit for annulment. Defendant, however, had learned of the rule of the cases above cited and argued to the court that the Nevada decree established the validity of the marriage. However, at the same time, she argued further that the Nevada decree deprived the court of jurisdiction to render any judgment with respect to the validity of the marriage. The trial judge was accommodating, and made a conclusion of law that he had no jurisdiction to pass upon that issue. A proper judgment based on the finding of the divorce would have declared the validity of the marriage. The error was in plaintiff's favor and he, naturally, does not complain; defendant has not appealed and cannot take advantage of the error.

[4] On this factual background appellant seeks a reversal of the judgment insofar as it declares the agreement and deed to be valid. His sole contention is that because the court declined to pass upon the validity of the marriage it should not have passed upon the validity of the agreement. The argument has more merit for originality than for law. On the findings, judgment should have gone against plaintiff on both causes of action. One error of the court in his favor, in failing to declare the marriage valid, did not justify another one on the second cause of action which was properly decided on the merits. Disregarding the discussions in the briefs, especially in that of respondent, of matters wholly irrelevant to the merits of the appeal, there is nothing more to consider. The appeal is devoid of merit.

The judgment is affirmed.

WOOD, J., and VALLÉE, J. pro tem, concur.

83 Cal.App.2d 734

**PEOPLE v. BRANCATO et al.**

**Cr. 584.**

District Court of Appeal, Fourth District, California.

Feb. 19, 1948.

Hearing Denied March 18, 1948.

**1. Criminal law ⇐730(1)**

In robbery prosecution of two defendants, wherein defense counsel on voir dire asked a juror whether he could keep himself free from prejudice because one defendant had been previously convicted, alleged misconduct of district attorney in asking defense counsel which defendant he referred to and in stating that district attorney did not know which defendant defense counsel referred to and that defense counsel refused to divulge which defendant, was harmless, where court instructed jury to disregard remarks.

**2. Criminal law ⇐706**

In burglary prosecution, wherein defense counsel brought out from defendant that he had been previously convicted three times, district attorney's cross-examination of defendant as to when each conviction occurred and what the convictions were for, was not error.

**3. Criminal law ⇐1171(1)**

In robbery prosecution, district attorney's cross-examination of defendant's witness that allegedly gave rise to inference that defendants' counsel had paid a witness for his testimony was not prejudicial error, where district attorney stated that he did not intend to imply that any witness had been paid.

**4. Criminal law ⇐719(3)**

In burglary prosecution, district attorney's statement in argument to jury that he would not believe defendants' alibi witness and that defendants had split up their loot at witness' cabin, was not misconduct on ground that district attorney injected his personal opinion.

**5. Criminal law ⇐720(8)**

In burglary prosecution, district attorney's argument to jury that the defendants were gamblers themselves, was not error, where the remark was made merely to caution jury not to be confused because victims of robbery were gamblers.

**6. Criminal law ⇐726**

In robbery prosecution, district attorney's statement in argument to the jury that one cannot break a dog or an ex-convict of sucking eggs, was not error, where statement was made in reply to an illustration made by defense counsel, and defense counsel themselves brought out the fact that one of the defendants was an ex-convict.

**7. Criminal law ⇐723(1), 1171(1)**

In burglary prosecution, district attorney's statement in final argument to jury that defendants were gangsters, were improper, but were not prejudicially erroneous, where one of the defendants was a professional gambler and the other defendant was an ex-convict.

**8. Criminal law ⇐874, 889**

Where court in burglary prosecution instructed jury that defendants might be found guilty of robbery in first degree, robbery in second degree, or not guilty, and jury was handed forms of those verdicts, and jury returned with verdicts of guilty of first degree robbery, but on polling of jury at request of defendant's counsel, one juror made an equivocal reply, and jury was sent out twice thereafter and such juror twice approved guilty verdict, fact that jury was not given new "not guilty" forms but was only furnished with new forms for guilty verdicts, when jury was sent back and that court thereafter refused to permit defense counsel to attempt again to impeach such juror's verdict, was not error.

---

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Norfio Brancato and Mike Pedrotti were convicted of robbery in the first degree, and they appeal.

Affirmed.

David E. Peckinpah and Denver C. Peckinpah, both of Fresno, for appellants.

Fred N. Howser, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendants were charged with robbery, with prior convictions. They admitted the prior convictions, and a jury found them guilty of robbery in the first degree. They have appealed from the judgment and from an order denying their motion for a new trial.

About 2:00 a. m. on the morning of April 18, 1947, two men armed with revolvers came into the card room of a so-called cafe in Fresno, through an alley entrance. Among other things, one of these men wore a pair of black gloves and the other had on a two-tone brown jacket. At the point of a gun the occupants of the room, who were engaged in gambling, were robbed of something over $3,000 in currency and some watches and jewelry. The wife of one of the owners of the cafe, coming to get her husband, parked her car in the alley near this entrance. She saw a Cadillac car parked across the alley from her. She took the number of this car, which she later reported to the police. While she was waiting the two defendants came hurriedly out of this entrance, entered the Cadillac and drove rapidly away. She positively identified them, as they passed within a few feet of her and under a flood light.

The robbers had ordered the men not to move until five minutes after they left and had pulled out the telephone so it could not be used. The police department received a call concerning the robbery at 2:25 a. m. A description of the automobile and a description of the two robbers was then broadcast by radio. At 3:25 a. m. a call was received from the sheriff's office in Madera stating that this car, with two occupants, had been picked up by the city police. The defendants were taken to the sheriff's office where they were searched. Each of them had about $900 in currency on his person. A revolver, similar to the one used in the robbery, was found in a suitcase in the car. Another similar revolver was found the next morning between two rose bushes near where the Cadillac was parked at the sheriff's office in Madera. A pair of black gloves was found in the pocket of one of the defendants. One of the Madera officers testified that Pedrotti, when he first saw him, was dressed according to the description broadcast from Fresno. While Brancato had on a different coat, a two-tone brown jacket similar to that worn by one of the robbers was in the Cadillac car. It was stipulated that this car belonged to Brancato.

Shortly after 3:25 a. m. one of the victims was taken to Madera where he identified the two defendants as the ones who had committed the robbery. Later, at the Fresno jail, other victims so identified them. At the trial, the woman who was parked in the alley identified the defendants as the two men she had seen hurrying from the entrance and entering the Cadillac. Some six or eight witnesses identified the defendants as the ones who had robbed them. Two of the victims were less positive in their identification. One witness, Tommy Davis, a 19-year old boy who worked in this cafe, testified that the defendants did not look like the hold-up men.

Pedrotti did not take the stand. Brancato testified that he lived in Los Angeles and was a professional gambler; that he came to Fresno on the afternoon of April 16; that he visited gambling establishments looking for a man who had given him a bad check a year and a half before; that he met Pedrotti, whom he had known for two years in Denver and other places; that Pedrotti had arrived that day from Denver; that they took a room together at a motor court near the north edge of Fresno; that about 11:00 p. m. on April 17, he and Pedrotti went out to the Pine Lake Lodge, some four or five miles north of Fresno, to see his friend "Goody Blum"; that they were in Blum's cabin there from about midnight until they left; that Blum joined them about 1:00 a. m. and stayed with them until they left at 2:45 a. m.; that they decided to go to Sacramento and returned to the motor court, packed their grips, and started; and that they were stopped "as we were almost through Madera." Blum testified that he was with the two defendants at his cabin at Pine Lake Lodge between 1:00 a. m. and 2:30 a. m. on this night, and that he remembered the latter time because a woman employee of the Lodge brought him his keys and told

him it was 2:30 a. m. This woman employee testified that she went to this cabin with the keys at 2:30 a. m. or shortly thereafter, and saw the two defendants there.

The defense rested entirely on the alibi claim. In spite of that claim this is not a close case. The guilt of the defendants was shown by very strong evidence, both direct and circumstantial. The defendants' main contention is that the district attorney was guilty of prejudicial misconduct throughout the trial, which amounted to an appeal to the passion of the jurors, and that without such misconduct the jurors might have believed the testimony of their alibi witnesses. It may be observed that while it might be possible for them to have been at Pine Lake Lodge about 2:30 a. m., if they had committed this robbery, it is hardly possible that they could have left there at 2:45, returned and packed their grips, driven to the north edge of Madera, been stopped and taken to the sheriff's office, and a report made to Fresno by 3:25 a. m. Also, the testimony of both Blum and Brancato suggests a much better reason why their statement that the defendants were at Pine Lake Lodge from 1:00 to 2:30 was not believed by the jury. While the jury had a right to believe it, this testimony contains elements which would put a serious strain on the credulity of any reasonable person.

[1] The first charge of misconduct is that on the voir dire examination of the jurors the district attorney, in effect, told them that both defendants had been previously convicted of felonies. The matter was first brought up by defense counsel, who asked a juror whether he would keep himself free from prejudice by reason of the fact "that there has been a conviction heretofore of one of the defendants." The district attorney interrupted and asked counsel to state to which defendant he referred. Thereafter, the district attorney started to ask a juror the same question saying, "I don't know which one, counsel refuses to divulge the one." The remarks of the district attorney in each of these instances were assigned as misconduct and the court instructed the jury to disregard them. No attempt was made to tell the jury that both defendants had been convicted of felonies, the matter was first brought up by defense counsel, and this was done in a manner which rather suggested that only one of them had been so convicted. While perhaps unnecessary, the district attorney's remarks were harmless and the jury was instructed to disregard them.

[2] It is next contended that misconduct appears in the cross-examination of the defendant Brancato with respect to his previous convictions since he had already admitted them. Defense counsel had brought out from this witness that he had suffered three convictions, what they were for, and when the last one occurred. On cross-examination, the district attorney asked a number of questions as to when each conviction had occurred and what they were for. Finally, defense counsel stated: "I have not objected before. I think he is overdoing it." The court remarked that the examination had gone far enough and sustained the objection. No request was made to strike the testimony or that an admonition be given. It neither appears that the examination went beyond permissible matters nor that any prejudice could have resulted. People v. Jacobs, 73 Cal.App. 334, 238 P. 770; People v. Sheridan, 136 Cal. App. 675, 29 P.2d 464.

The next charge of misconduct is too trivial and unsubstantial to require comment.

[3] Misconduct is assigned in connection with the court's examination of defendants' witness, Tommy Davis, and in the direct examination of a prosecution witness, Virginia Moncrief. It is argued that the district attorney, in cross-examining Davis, inferred that defendants' counsel had payed the witness for his testimony, by asking Davis whether he had told Mr. Cunningham and Virginia Moncrief that Mr. Peckinpah had given him $20; that Mr. Cunningham was not then called as a witness; and that when Virginia Moncrief was on the stand the corresponding question was not asked of her until forced by defendants' counsel.

Virginia Moncrief was called in an attempt to impeach the testimony given by

Tommy Davis. She testified that on July 8, she had a conversation with Davis with reference to this case and that Davis told her: that he had recently taken a trip to Los Angeles, staying at the best hotels which had cost him nothing; that the cafe did not pay his $20 back and "I am going to get on the side that is giving me my money"; and that "If there was enough money involved that, to him, faces could change a lot in four months." During her testimony defense counsel asked the district attorney if he was not going to question the witness as to what was said about him paying the witness. The district attorney said that he did not intend to imply that counsel had paid any witness, that he did not believe that he had, but that he believed that the witness Davis had so stated and wanted to show that he was not telling the truth. In response to the district attorney's question the witness then stated that Davis had told her that he had been in counsel's office but did not tell her that he received $20 there. Defense counsel then asked the district attorney to explain why he had asked such a question. The district attorney gave his explanation of what he had attempted to do, stating that he had acted in good faith and that he had not intended to imply anything against counsel. The judge then cautioned both attorneys, stated that he thought both had acted in good faith and suggested that the matter be dropped, which was done. There is nothing to indicate intentional misconduct, and we are unable to see either prejudice or reversible error in this incident.

[4] It is next contended that the district attorney injected his personal opinion by attacking the credibility of the alibi witness Blum, and by stating facts not in evidence. While arguing on the effect of the alibi evidence the district attorney said "This good, substantial citizen that we have. I don't know what happened out there but I wouldn't take Goody Blum's word for it." A little later he said: "And where do you think they split up the loot? Out at Goody's. Out there at Goody Blum's. That is where they were, that is where they took off from." These statements were made in an argument in which the district attorney pointed out from the evidence good reasons why he would not take Blum's word for what occurred. The latter statement was really a question with the suggested answer that the evidence indicated the loot was divided out there. Two witnesses had testified that the defendants were at Blum's place about 2:30 a. m. and the district attorney was arguing that they must have divided the loot there, got rid of the jewelry, put one revolver in a suitcase, and removed the two-tone jacket and put it in the car. This was a legitimate argument and, when taken with the context, no expression of personal opinion or statement of facts outside of the evidence appears to have been made. Moreover, no assignment of misconduct or request that the jury be admonished to disregard the statements were made.

The final assignment of misconduct is that the district attorney appealed to the passion and prejudice of the jury in his closing argument. In various places in his argument the district attorney made the following remarks:

"This defendant, or defendants, who did it were gamblers themselves, bookies; and so the stripes on the defendants here are not to be confused by anything that counsel may say about other people."

"These gangsters come down here and hold up places, they think this is a cow town and that these hicks around Fresno cannot catch up with them but they are not silly enough to run around with cigarette lighters and rings and fountain pens in their pockets."

"He said you couldn't break a dog of sucking eggs. Neither can you break an ex-convict from sucking eggs, don't forget that."

"* * * and we were perfectly satisfied that you are twelve good citizens of Fresno County that won't stand the kind of gangsters that we are getting into Fresno County; and Fresno County is a place to live * * *. I think it should be a decent place to live. We don't need Hollywood and Denver gangsters in here to help us."

"I want you to decide as members of the jury and as a representative group of the

people of Fresno County and of the City of Fresno as to whether or not you are going to allow this type of gangsters to come in here to Fresno County and flaunt the laws and hold up people, I don't care who they are. That is the question you have to decide and when you have decided that in your own mind and satisfied your own consciences that you are doing the right thing don't hesitate to do it because it's you, ladies and gentlemen of the jury, that will finally determine whether Fresno County is to be a clean place to live or whether we are going to import from Denver, Hollywood, Los Angeles and Chicago the lousy kind of gangsters that they have in the country."

[5, 6] The first remark was intended merely to caution the jury not to be confused because the victims of the robbery were engaged in gambling. The reference to "sucking eggs" and "an ex-convict" was in reply to an illustration made by defense counsel, and they had themselves brought out the fact that one of the defendants was an ex-convict. Neither misconduct nor prejudice appears with respect to these remarks.

[7] The other remarks, in referring to the defendants as gangsters, to gangsters in general, and to protecting Fresno County as a place in which to live, were unnecessary and ill-advised. While this must be conceded, it does not necessarily follow that the remarks were sufficiently prejudicial, under the circumstances here appearing, to justify a reversal. As has been frequently remarked, it is difficult to understand why district attorneys persist in making remarks of this kind in spite of frequent cautioning, and even rebukes, of the reviewing courts. However, the real issue is as to whether the remarks made have prevented the defendants from having a fair trial, and not as to whether the district attorney deserves to be punished by setting aside the conviction.

Conceding that these remarks should not have been made there was evidence that these defendants had been in Fresno less than two days; that they had known each other for two years and had been together in Denver and other places; that one was a professional gambler; that one was an ex-convict; and that while jewelry and other personal property were taken from victims of the robbery such articles were not found on the defendants an hour or two later. The word "gangster" is a comparatively new word, not appearing in the older dictionaries. The more recent editions of Webster define it as "A member of a gang of roughs, thieves or the like." The evidence indicates that the persons who committed this robbery came fairly close to fitting the description contained in this definition. While a reference to gangsters in general was made the appeal made to the jury was to not allow persons of this type to come in and flaunt the laws and hold up people. While the jury was, in effect, told that a responsibility rested on them in keeping Fresno County a clean place in which to live they were urged to act only in the event they were fully satisfied that a conviction was the right thing.

While in no way approving the particular remarks here made, we are far from convinced that any miscarriage of justice occurred or that these remarks prevented the defendants from having a fair trial. Under the evidence shown by this record it cannot reasonably be supposed that the result would have been different had the defendants been referred to as "gentlemen" instead of gangsters, or that the reference to gangsters in general or the protection of Fresno County had any influence or effect in causing the jury to disbelieve the defendants' alibi evidence. It would be unreasonable to assume that the jury might have believed the alibi evidence had they not been affected by passion and prejudice. The jury was instructed three times that it must be governed solely by the evidence and the law, and that it must not be influenced by passion or prejudice. Moreover, these remarks were not assigned at the time as misconduct and no request was made that the jury be instructed to disregard them.

The final contention, and the only one aside from misconduct, is that the court erred in submitting verdict forms providing "only for the guilt of the defendants," and that the verdict as accepted did not represent the true verdict of all the jurors.

At the conclusion of his instructions the court instructed the jury that each defendant might be found guilty of robbery in the first degree, or guilty of robbery in the second degree, or not guilty. He then ordered the clerk to hand the jury forms of verdict which had been prepared. This was done and there is nothing in the record to indicate that the forms given the jury were not those described by the judge.

The case was given the jury at 3:44 p. m. At 5:44 p. m. they reported that they were unable to agree and were again sent out. At 10:22 p. m. they returned and the foreman announced that they had agreed upon "a verdict." The court ordered "the verdict" handed to the clerk. The clerk then read two verdicts, one finding Pedrotti guilty of robbery in the first degree and one finding Brancato guilty of robbery in the first degree. The clerk then asked "Is that your verdict" and the jurors responded in the affirmative. The jury was then polled at the request of defense counsel. Each juror responded that this was his or her verdict with the exception of the eleventh juror, who replied: "Please, I would rather not answer that question." The court asked her what she had said and she replied: "I don't like to answer that question." The court then told the jury to retire for further deliberation.

The jury returned in 20 minutes and the foreman annouced that it had agreed upon a verdict. The clerk then read a verdict which was one finding Pedrotti guilty of robbery in the first degree. The clerk then asked the jurors if that was their verdict, and all responded in the affirmative. Defendants' counsel then inquired whether this was the same verdict which had been previously signed by the foreman. The jurors responded in the affirmative, and the foreman said: "That is the same one. We took another vote." Defendants' counsel then objected on the ground that the verdict had not been signed since the vote was taken. After the court inquired as to just what was objected to defense counsel, in effect, withdrew the objection. The court then replied that if anything was wrong he wanted it corrected at that time, and stated that he would ask the clerk to prepare new "verdicts" and let the jury go out and "sign it" if they agreed upon it. He then asked if there would be any objection "to just simply cut off the bottem of those sheets and put the date on and let them take them." Defense counsel said there would be no objection to this and the court ordered this done. The clerk's minutes show that the parties stipulated that the lower portion of the form of the verdict containing the signature of the foreman and the date might be removed by the clerk and another date and the word "Foreman" inserted. This was done, the changed forms were handed to the jury, which was again sent out at 10:50 p. m. The jury returned at 11:00 p. m. and announced that it had agreed upon verdicts. They were handed to the clerk who read the two verdicts, one finding Pedrotti guilty and the other finding Brancato guilty, as before. After reading each of these verdicts the clerk asked the jurors if that was their verdict and the jurors responded in the affirmative. The court then asked if it was desired to have the jury polled and defense counsel requested that this be done. Each juror was then asked "Is that your verdict?" and each juror, including the eleventh juror, responded "Yes" or "It is". Defense counsel then asked permission to interrogate Juror No. 11 as to whether this was her true verdict, and permission was refused. Defense counsel then asked that the jury be polled again, which request was refused. The verdicts were then recorded, after which the clerk again read each verdict and after each was read asked the jurors "Is that your verdict?", and in each instance the jurors responded in the affirmative.

[8] There is no merit to the contention that the court failed to submit forms of verdict other than those of guilty. The jury had also been given "not guilty" forms and the subsequent proceedings involved only the furnishing of new forms for guilty verdicts, which was done in a way consented to by the defendants. There is no question that the matter was fully understood by every one and the "not guilty" forms originally furnished were never withdrawn from the consideration of the jury.

While the eleventh juror first made an equivocal reply after having once agreed to the verdict, the jury was sent out twice subsequently and her approval of the verdict was then expressed several times. No error appears in refusing to permit defense counsel to attempt to impeach this juror's verdict as already returned and several times confirmed in open court.

The judgment and order are affirmed.

GRIFFIN J., concurs.




83 Cal.App.2d 685

**CHAPMAN v. MASON et al.**

**Civ. 16007.**

District Court of Appeal, Second District, Division 1, California.

Feb. 17, 1948.

**1. Automobiles ⇐206**

Contributory negligence of motorcyclist could not be predicated on his failure to assume that driver of truck from opposite direction would violate basic speed law and make a left turn in front of oncoming traffic without giving required signal. Vehicle Code, §§ 544, 551.

**2. Appeal and error ⇐1008(1)**

Trial court's finding of ultimate facts as to proximate cause of motorcycle passenger's injury in collision with automobile was binding on appellate court where trial court's conclusion was not unreasonable.

**3. Negligence ⇐122(1)**

In personal injury action, presumption created by proof of plaintiff's failure to comply with statute or ordinance relieves defendant from burden of proving that plaintiff failed to act as reasonably prudent man, and to establish plaintiff's contributory negligence defendant need prove only that such violation of statute proximately caused accident.

**4. Negligence ⇐122(1)**

In personal injury action, where defendant relies on contributory negligence, evidence of plaintiff's violation of applicable statute casts burden on plaintiff to go forward with evidence justifying or excusing such violation.

**5. Appeal and error ⇐1008(1)**

Where motorcyclist, traveling in right-hand lane beside automobile, slackened speed at intersection but proceeded on green light until automobile was suddenly stopped, whereupon motorcyclist applied brakes but too late to avoid collision with truck making left turn against oncoming traffic without giving required signal, whether violation of statute regulating passing on right side was excusable or constituted contributory negligence barring recovery against owner and driver of truck for injuries sustained by motorcycle passenger was a question for trial court. Vehicle Code, §§ 529, 544, 551.

Appeal from Superior Court, Los Angeles County; C. A. Paulsen, Judge.

Action by Johnnie Alice Chapman against Floyd Mason and another for personal injuries sustained in a collision between a motorcycle on which plaintiff was riding and a truck owned by named defendant. Judgment for plaintiff, and named defendant appeals.

Judgment affirmed.

Richard A. Haley, of Los Angeles, for appellants.

DeForrest Home, of Los Angeles, for respondent.

BARTLETT, Justice pro tem.

This is an action brought by respondent for personal injuries resulting from a collision between a motorcycle operated by her husband, Wayne Chapman, and a truck owned by appellant, Floyd Mason, which was then being driven by defendant Julie Robarge with the owner's consent. The case was tried without a jury, and at its conclusion the court found "That it is true that at the time and place of said accident,

said defendant, Julie Robarge, drove and operated said truck in a careless and negligent manner without giving the signal of her intention to make a left turn as required by law, and by making a left turn in front of oncoming traffic at a time when other traffic, including the vehicle upon which the plaintiff was riding, was approaching from the opposite direction so close to said intersection as to constitute an immediate hazard, and it is further true that said accident, together with the resulting injuries sustained by plaintiff, were the proximate result of negligence and carelessness on the part of said defendant, Julie Robarge, and the manner in which she operated said truck at the time and place of said accident." The court further found "That it is not true that plaintiff or her husband, the driver of the motorcycle upon which she was riding at the time of the accident, were guilty of negligence, and it is not true that any negligence on the part of plaintiff or her said husband caused or in any manner contributed to the happening of the aforesaid accident."

Judgment rendered was in favor of respondent and against the defendant Julie Robarge for $6,475 and against the appellant, Floyd Mason, for $5,000. The single ground urged by appellant for reversal of this judgment is that respondent's husband, Wayne Chapman, was guilty of contributory negligence as a matter of law.

Respondent was riding on a motorcycle operated by Wayne Chapman; it was traveling west in the lane nearest the curb on Florence Boulevard near its intersection with Avalon Boulevard in the City of Los Angeles. As it approached the intersection the front wheel on the motorcycle was about even with the right rear wheel of an automobile which was traveling to its left. The view of Wayne Chapman of traffic coming from the left was thereby obstructed. As he entered the intersection he reduced his speed from 20 miles per hour to from 10 to 15 miles per hour. The traffic signals were set green for east-and-west traffic before and as he entered the intersection.

Defendant, Julie Robarge, the truck driver, on her way to purchase cigarettes with the truck owner's consent, was traveling east on Florence Boulevard at a speed of approximately 40 miles per hour and without giving any signal of her intention to do so, turned left in front of the eastbound traffic. The driver of the automobile to the left of plaintiff drove a few feet into the intersection, saw the truck, "slammed on her brakes" and came to a sudden stop, missing the truck by only 3 feet. Immediately upon the stopping of this car, Wayne Chapman applied the brakes on the motorcycle before the collision occurred.

The only conflict in the testimony is as to the speed of the truck. Wayne Chapman testified it was traveling in the intersection at 40 miles per hour. Two disinterested witnesses also testified. One of them, Pauline Calhoun, a passenger in the car immediately to respondent's left, said the truck was going from 35 to 40 miles per hour, and the other, Leroy Clapp, a pedestrian, testified the truck speed was "thirty something" miles per hour.

Defendant Julie Robarge testified her speed was 5 to 10 miles per hour. She did not deny that she failed to make any signal for a left turn, and said that she did not see the motorcycle before the collision.

We have carefully examined the cases cited in appellant's opening brief; no closing brief was filed by him. None of the cases which he contends support his argument that the conduct of respondent's husband constituted contributory negligence as a matter of law approach a factual situation such as we have here. Furthermore, in each of those cases there is positive evidence of a violation of law by the plaintiff himself.

[1] It is obvious from the testimony that when defendant Julie Robarge started her left turn the motorcycle was entering the intersection, constituted an immediate hazard and had the right of way. A claim of contributory negligence cannot be predicated on a failure by Wayne Chapman to assume that the truck driver would violate the basic speed law and also the provisions of Sections 544 and 551 of the Vehicle Code. Olsen v. J. J. Jacobs Motor Co., 99 Cal.App. 423, 278 P. 1051; Moreno v. Los Angeles Transfer Co., 44 Cal.App. 551, 186 P. 800;

Flores v. Fitzgerald, 204 Cal. 374, 268 P. 369.

A contention made by appellant is that it was negligence as a matter of law on Wayne Chapman's part to enter an intersection when his view was obstructed and that he violated the following portion of Section 529 of the Vehicle Code: "The driver of a motor vehicle may overtake and pass to the right of another vehicle only under the following conditions: * * * Upon a city street with unobstructed pavement of sufficient width for two or more lines of vehicles in each direction. * * * The driver of a motor vehicle may overtake and pass another vehicle upon the right only under conditions permitting such movement in safety. * * *"

Respondent's husband, as stated before, was traveling in the lane nearest the curb. Before nearing the intersection he was traveling at the rate of 20 miles per hour but slowed down to about 10 miles per hour as he was about to enter it. Traffic signals were green before he got to the intersection and as he entered it. At that time his view was obstructed as the motorcycle's front wheel was opposite the right rear wheel of the automobile to his left, but it is evident he made no attempt to pass it. When the automobile had gone a few feet into the intersection, its brakes were applied with great force so that it came to a sudden stop. Thereupon the operator of the motorcycle immediately applied his brakes but was unable to stop before passing the automobile to his left which had just missed being hit by appellant's truck by a scant 3 feet, and collided with this truck.

Respondent quotes language from the decision in Havens v. Loebel, 103 Cal.App. 209, 284 P. 676, to the effect that where a driver's view is obstructed, it is contributory negligence as a matter of law to fail to take unusual precautions and to slacken speed. It is a perfectly tenable theory that the foregoing facts show that the driver did take such precautions. He drove carefully in the lane nearest the curb, slackened his speed materially at the intersection, at no time attempted to pass the car which obstructed his view, and by immediate application of his brakes when that car stopped, did all in his power to avoid an accident.

[2] As we cannot say that the trial court reached an unreasonable conclusion, we are bound by its finding of ultimate facts which determines the proximate cause of plaintiff's injury.

[3, 4] As to appellant's contention that Wayne Chapman violated Section 529 of the Vehicle Code, there is a rule, now settled law in this state, which is set forth in Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, at page 592, 177 P.2d 279, 285, as follows: "The presumption created by proof of the failure to comply with a statute or ordinance relieves a defendant from the burden of proving that the plaintiff failed to act as a reasonably prudent man. All that the defendant need prove to establish contributory negligence is that plaintiff's violation of the statute in question proximately caused the accident. The burden cast upon the defendant where such violation is relied upon, is therefore more easily established than a failure to act as would a reasonably prudent man under similar circumstances. If there was a violation of the applicable statute, the burden of going forward is then cast upon the plaintiff, if the defendant is relying upon contributory negligence, to present evidence justifying an excuse for violation. If the jury does not believe that the evidence is sufficient to excuse violation, it must find for the defendant."

[5] An examination of the testimony in this case would indicate that Chapman's act in passing the car on its right was almost an involuntary one. Here again it is for the trial court and not this tribunal to determine whether or not his conduct was excusable.

Judgment is affirmed.

DORAN, Acting P. J., and WHITE, J., concur.

83 Cal.App.2d 579

**MERCHANTS FINANCE CORPORATION v. KUCHEL, Controller (SAN LUIS OBISPO COUNTY, Intervener).**

Civ. 7408.

Sac. 5852.

District Court of Appeal, Third District, California.

Feb. 9, 1948.

**1. Taxation ⇐739**

Although policy of law is to use revenues of Redemption Tax Fund for primary purpose of restoring tax-deeded property to the rolls and for all other purposes incident to administration and classification of tax-deeded property, particular funds derived by the state from rents, issues or profits, while title is vested in the state, are not a trust fund for the exclusive benefit of the former owner. Revenue and Taxation Code, § 3661.

**2. Taxation ⇐695, 778**

Rights of former owner with respect of tax-deeded property after property had been deeded to the state are purely statutory.

**3. Taxation ⇐695, 778**

Upon execution of deed of property to state for delinquent taxes, property owner forfeits all rights in property except the privilege of redeeming it at any time before state disposes of it. Revenue and Taxation Code, §§ 3520, 3707.

**4. Taxation ⇐778, 784**

Deed of property executed to the state for delinquent taxes, while it conveys to the state absolute title to the property, is subject to specified prior liens and encumbrances which are not destroyed by the deed. Revenue and Taxation Code, § 3520.

**5. Taxation ⇐739**

Under statute providing that State Controller has exclusive power to receive, not only rent derived from leased property, to which state has title by reason of deed executed for delinquent taxes, but also has exclusive power to receive all proceeds arising in any manner from the property, Controller would be entitled to receive damages from injuries sustained to buildings and improvements by careless or wrongful acts of the lessee. Revenue and Taxation Code, § 3651.

**6. Taxation ⇐695, 725, 778**

State's title to property sold for delinquent taxes is absolute, but subject to defeasance, should former owner exercise his privilege of redemption. Revenue and Taxation Code, §§ 3520, 3707.

**7. Taxation ⇐679(3), 695, 725, 778, 784**

After original sale for taxes and before deed to state has been executed, state has merely an inchoate title, leaving equitable title in owner, but after deed to state has been executed, title to property in the state becomes absolute, subject to prior existing liens, to be defeated only by redemption. Revenue and Taxation Code, §§ 3520, 3707.

**8. Taxation ⇐739**

State Controller was authorized to rent land sold to state for nonpayment of taxes to the United States Government. Revenue and Taxation Code, § 3651.

**9. Taxation ⇐679(5), 699**

State Controller would be authorized to sell tax-deeded property in Distressed Assessment District with written approval of the County Tax Collector and upon termination of tax sale, right of redemption would automatically become final, but until property has been sold by the state in the manner provided by statute, previous owner would have a right to redeem it. Revenue and Taxation Code, §§ 133, 3494, 3520, 3707.

**10. Taxation ⇐739**

State is entitled to rents, issues and profits derived from tax-deeded property, while it holds title thereto, and an accounting therefor may be enforced against the owner, after his redemption of the property, for such funds collected and retained by him. Revenue and Taxation Code, § 3651.

**11. Taxation ⇐739**

State is entitled to damages collected by State Controller for injuries to buildings and improvements while state holds title thereto by reason of deed executed because of nonpayment of taxes. Revenue and Taxation Code, § 3651.

**12. Taxation ⇐739**

The word "may" in statute providing that State Controller may authorize repairs necessary to preserve improvements on tax-deeded property is not mandatory. Revenue and Taxation Code, § 3655.

See Words and Phrases, Permanent Edition, for all other definitions of "May".

**13. Taxation ⇐739**

Plaintiff was not entitled to require the State Controller to retain and apply amount collected from the United States Government as lessee as damages for injuries to buildings and improvements on land formerly belonging to the plaintiff in a distressed assessment district and tax-deeded to the state for delinquent taxes where plaintiff had not redeemed the property since the right to have the buildings and improvements restored to their former condition would not accrue until redemption. Revenue and Taxation Code, §§ 133, 3441, 3494, 3651, 3655, 3707.

---

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Suit by Merchants Finance Corporation, a corporation, against Thomas H. Kuchel, as Controller of the State of California, for a mandatory injunction requiring defendant to retain and apply amount collected from the United States Government as damages for injury to buildings and improvements on land formerly belonging to plaintiff in a Distressed Assessment District in San Luis Obispo County wherein County of San Luis Obispo intervened. From an adverse judgment, plaintiff appeals.

Affirmed.

John D. Den-Dulk and Eugene K. Sturgis, both of Oakland, for appellant.

Fred N. Howser, Atty. Gen., and E. G. Benard, Deputy Atty. Gen., Herbert C. Grundell, Dist. Atty., and L. E. Somogyi, Deputy Dist. Atty., both of San Luis Obispo, for respondent.

THOMPSON, Justice.

This is an appeal from a judgment rendered pursuant to an order sustaining a demurrer to the complaint without leave to amend the pleading. The suit is for a mandatory injunction to require the State Controller to retain and apply $28,000, collected from the United States Government as damages for injury to the buildings and improvements on the land formerly belonging to plaintiff in a "Distressed Assessment District," in San Luis Obispo County. It is claimed the state holds this sum in trust for the owners of the property, to be applied only to restoring the buildings and improvements to the condition existing at the time of a lease which was executed to the government. Prior to the lease the property was deeded to the state on sale for delinquent taxes. More than five years have elapsed since the state acquired title to the land. The time for redemption was extended by statute. Plaintiff has not redeemed the property. No notice terminating the right to redeem has been served.

The complaint alleges that plaintiff owns 351 acres of land in a "Distressed Assessment District" under Section 133 of the Revenue and Taxation Code, in San Luis Obispo County, upon which there were valuable buildings and improvements; that "long prior to the 1st day of June, 1942," the property was sold and deeded to the state for delinquent taxes; that on the last mentioned date the State Controller leased the property, under the provisions of Division 1, Part 6, of the Revenue and Taxation Code, to the United States Government, which lease is attached to the complaint and marked "Exhibit A"; that said lease was terminated July 31, 1946; that during the Government's tenure the improvements "were substantially destroyed"; that a survey and appraisement of the damages sustained were made; that by agreement between the lessor and the lessee compensation for said damages, in the sum of $28,000 was paid by the Government to the State Controller, pursuant to Section 3655 of said Code, on August 13, 1946, and placed in the "Tax-Deeded Land Rental Trust Fund" in the State Treasury, a portion of which sum the Controller threatens to remit to the County Treasurer of San Luis Obispo County pursuant to Section 3659 of said code, unless restrained from so doing. The complaint prays for a man-

datory injunction to prevent payment of said damages to the County Treasurer, and to require the State Controller to expend said money only for repairing and restoring the buildings and improvements to the condition they were in at the time of the lease. A temporary restraining order was made. By leave of court, the County of San Luis Obispo filed a complaint in intervention in said cause, together with a demurrer to said complaint. At the same time the State Controller also filed a demurrer to said complaint of plaintiff. The defendant's demurrer was sustained without leave to amend the pleading.

[1, 2] There is no doubt that the policy of the law is to use the revenues of the Redemption Tax Fund for "the *primary* purpose of restoring tax-deeded property to the rolls and for *all other purposes incident to the administration and classification of tax-deeded property.*" Revenue and Taxation Code, sec. 3661. But that may not be construed to mean that the particular funds derived by the state from rents, issues or profits, while the title is vested in the state, shall be deemed to be a trust fund for the exclusive benefit of the former owner. The rights of the former owner, after the property had been deeded to the state, are purely statutory. Sutter-Yuba Investment Co. v. Waste, 21 Cal.2d 781, 785, 136 P.2d 11; Lachmund v. Johnson, 47 Cal.App.2d 377, 117 P.2d 920.

[3, 4] There is a conflict of authorities in other jurisdictions regarding the nature of the title which is acquired by the deed to the state for delinquent taxes. Some authorities hold that the state thereby acquires only an inchoate title, which may subsequently become absolute by failure of the owner to redeem the property as provided by statute. 147 A.L.R. 1123, note. But, in California, a different rule now prevails. It is now definitely determined in this state that upon execution of the deed to the state for delinquent taxes, the property owner forfeits all rights in the property except the privilege of redeeming it at any time before the state disposes of it. Mercury Herald Co. v. Moore, 22 Cal. 2d 269, 273, 138 P.2d 673, 147 A.L.R. 1111; People v. Maxfield, 30 Cal.2d 485, 183 P.2d 897. Of course the deed to the state, while it conveys to the state the *absolute title* to the property, is subject to certain specified prior liens and encumbrances which are not destroyed by the deed. Revenue and Taxation Code, sec. 3520; Conley v. Hawley, 2 Cal.2d 23, 38 P.2d 408. In the Mercury Herald Company case, supra [22 Cal.2d 269, 138 P.2d 675], it is said: "It is also contended that the right to redeem after the property has been deeded to the state but before it has been sold by the state is a property right, and that the legislation in question deprives the property owner of that right without due process of law. This contention takes no account of the distinction between the absolute right to redeem within the fixed period of five years from the date of sale to the state, and the conditional right to redeem once the property has been deeded to the state if the state does not sell the property. The deed to the state upon the expiration of the five-year period conveyed *absolute title to the property free of any incumbrance except liens for certain taxes.* Pol.Code, sec. 3787; Revenue & Taxation Code, sec. 3520. Upon execution of the deed the property owner forfeited all rights in the property except the privilege of redeeming it at any time before the state disposed of it. (Citing authorities.)" (Italics added.)

In the Maxfield case, supra, a complaint was filed by the state to recover from the owner, after his redemption of the property, rents, issues and profits accruing while the state held title to the property, but which were collected and appropriated by the owner after redemption. Like the present case, a demurrer to the complaint was sustained without leave to amend the pleading. In that case the Supreme Court quoted Section 3651 of the Revenue and Taxation Code, which reads: "After the recording of the deed to the State, the State has exclusive power through the Controller to rent tax-deeded property and to receive all proceeds arising *in any manner from the property* except proceeds from a transaction terminating the right of redemption, if the right of redemption has not been terminated, or from a sale of a parcel of tax-deeded property."

[5] It will be observed that the foregoing statute provides that the Controller has exclusive power to receive, not only the rent derived from leased property, to which the state has title, but also "all proceeds arising in any manner from the property." We think that language covers damages received by the Controller from injury sustained to buildings and improvements by the careless or wrongful acts of the lessee.

[6] The court further states in the Maxfield decision [30 Cal.2d 485, 183 P.2d 898], that: "The deed to the state, executed pursuant to the statutory requirements, conveys absolute title, free of all encumbrances, except certain specified liens. Sec. 3520, Revenue and Taxation Code. It is not the same title as that of a private purchaser, because the purpose of the conveyance is not the acquisition of the property but the collection of the taxes. Anglo Cal. Nat. Bank v. Leland, 9 Cal.2d 347, 353, 70 P.2d 937. However, the only difference between the state's title and that of a private purchaser is the privilege of redemption. 'Upon execution of the deed (to the State) the property owner forfeited all rights in the property except the privilege of redeeming it at any time before the state disposed of it.' Mercury Herald Co. v. Moore, 22 Cal.2d 269, 273, 138 P.2d 673, 675, 147 A.L.R. 1111. *The state's title is absolute, but subject to defeasance should the former owner exercise his privilege of redemption.* * * *" (Italics added.)

[7] It is not necessary to discuss the cases cited by the appellant in support of its contention that the deed to the state conveyed to it only an inchoate title, leaving the equitable title in the owner until the property was finally sold by the state for the taxes. The language of some earlier cases may leave that impression. But it seems clear from the latest decisions of our Supreme Court, that situation exists only after the original sale for taxes and before the deed to the state has been executed. 24 Cal.Jur. 332, sec. 308. That is evidently what the court meant by the quotation in appellant's opening brief from the Mercury Herald Company case, supra. At least, the preceding cases from which we have quoted now leave no doubt that after the deed to the state has been executed, title in the state becomes absolute, subject to prior existing liens, to be defeated only by redemption.

[8, 9] The State Controller was authorized to rent the land to the United States Government. Rev. and Tax.Code, sec. 3651. A lease from year to year was executed June 1, 1942, for the annual rental of $937.50. The lease was terminated by consent July 31, 1946. August 13, 1946, by agreement, the Controller was paid $28,000 "as damages to said improvements," under Section 3441 of that code. Pursuant to Section 3659 said amount of damages was placed by the Controller in the "Tax-Deeded Land Rental Trust Fund," to be apportioned and distributed to the proper taxing agency or agencies in accordance with the three succeeding sections of that code. Plaintiff's right of redemption has not been exercised. Since the property is located in a Distressed Assessment District, as defined in Section 133 of the same code, the authority to terminate the right of redemption was prohibited until "after January 1, 1947." Sec. 3571.3. That authority to terminate the right of redemption was further extended in 1945 until the 91st day after the final adjournment of the 57th Regular Session of the Legislature, which was September 19, 1947. Stats. of 1945, p. 1384, ch. 700. But in 1947, Sections 3495, 3511.3, 3511.4, 3511.5 and Sections 3571 to 3578, inclusive, relating to the extension of the right to redeem, and the method of effecting the same, were repealed. Stats. of 1947, p. 1616, ch. 606. The repeal of those sections leaves in effect Sections 3494 and 3707 of that code. Section 3494 authorizes sale of the property by the state in a "Distressed Assessment District" pursuant to Chapter 8, with the written approval of the county tax collector. Federated Income Properties, Inc., v. State of California, 82 Cal.App.2d 893, 187 P.2d 460. Section 3707 provides that, "If not previously terminated, on completion of any sale under this chapter the right of redemption is terminated." We conclude that the State Controller is now authorized to sell the property, with the written approval of the County Tax Col-

lector of San Luis Obispo, and that, upon the termination of that sale, the right of redemption will automatically become final. We assume that until the property has been sold by the state in the manner provided by statute, the plaintiff would have a right to redeem it. It has not done so.

[10, 11] After a deed to tax-delinquent property has been conveyed to the state, the absolute title thereto remains in the state, as we have previously stated, subject only to such rights as would follow the former owner's redemption of the property. Certainly the owner may not claim rents, issues, profits or damages which have accrued while the state holds title to the land, until he has first redeemed the property. As the Maxfield case, supra, clearly holds, the state is entitled to the rents, issues and profits derived from the tax-deeded property, while it holds title thereto, and an accounting therefor may be enforced against the owner, after his redemption of the property, for such funds collected and retained by him. We think the same rule applies to damages collected by the State Controller for injury to buildings or improvements while the state holds title.

There appears to be merit in appellant's contention that the owner is entitled to have the property restored with the buildings and improvements in substantially the same condition existing at the time of the lease, if and when he redeems the property. But that question is not involved in this case since the appellant has failed to redeem the property. We therefore refrain from determining that question.

[12, 13] The appellant asserts that the reason it has not redeemed the property is that it is "impossible for the plaintiff at this time to pay the tax," because the property is situated in a Distressed Assessment District, and that all parcels within that district are burdened with a bonded indebtedness under Section 41 of the Acquisition and Improvement Act of 1925, which is referred to as the "Mattoon Act." Stats. of 1925, p. 849, ch. 419, at page 890. But, since the owner forfeited his title for nonpayment of taxes, and the title was therefore conveyed to the state, if there is a remedy to require buildings and improvements to be restored to the condition existing at the time of the lease, that right does not accrue until after redemption of the property. We have no assurance that appellant can or will ever redeem the property. The State Controller *may* authorize "repairs necessary to preserve improvements on the property," (Sec. 3655, Rev. and Tax.Code) but that is not mandatory. It is apparent that the restoring of damaged buildings would not inure to the benefit of the owner if he fails to redeem the property.

The complaint fails to state a cause of action. The order sustaining the demurrer to the complaint was properly sustained. The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.






83 Cal.App.2d 303

**LEONI v. DELANY.**

**Civ. 13154.**

District Court of Appeal, First District, Division 2, California.

Feb. 16, 1948.

Hearing Denied March 18, 1948.

Appeal from Superior Court, City and County of San Francisco; Melvyn I. Cronin, Judge.

On rehearing.

Rehearing denied.

Prior opinion 188 P.2d 765.

Phillip Barnett and R. L. Dreyfus, both of San Francisco, for plaintiff.

James A. Himmel, of San Francisco, for defendant.

JONES, Justice pro tem.

The petition for a rehearing fails to recognize that the essence of the claim in this case is the rendition of personal services. The plaintiff has sued to recover for these services in two counts. In the first count $5,000 is sought to be recovered upon the ground that this amount was expressly agreed to be paid; the second count is for the reasonable value of said services in

whatever amount the proof might show such value to be. The jury was instructed with respect to both express and implied contracts, and brought in a verdict for $4,000. This is less than the alleged agreed price and is what the jury found the services to be reasonably worth under the second count.

A rehearing is denied.

NOURSE, P. J., concurs.

GOODELL, J., votes for a rehearing.

Hearing denied; SHENK and EDMONDS, JJ., dissenting.




83 Cal.App.2d 701

**PEOPLE v. GRAZIANO et al.**

**Cr. 4150.**

District Court of Appeal, Second District, Division 1, California.

Feb. 18, 1948.

**1. Criminal law ⇐1159(2)**

On appeal from conviction, court will not determine weight of evidence, but will decide only whether, on face of evidence, sufficient facts could not have been found to warrant inference of guilt.

**2. Criminal law ⇐562**

Conviction must be based on facts established by legal and competent evidence or inferences drawn from proven facts.

**3. Criminal law ⇐260(11)**

Where there is no evidence or evidence is so weak as to constitute no evidence, defendant's guilt is law question, and finding of guilt will be set aside.

**4. Burglary ⇐41(1)**

Evidence was insufficient to warrant conviction of second-degree burglary.

**5. Criminal law ⇐260(11)**

Where evidence raises at most mere suspicion of defendant's guilt, trial court's decision, finding defendant guilty, will be reversed on appeal.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

James Graziano and Frank A. Serio pleaded guilty, and John Francis Maesten was convicted, of second-degree burglary, and defendant Maesten appeals.

Reversed and remanded.

Kenneth B. Hughes, of Inglewood, for appellant.

Fred N. Howser, Atty Gen., and John F. Hassler, Deputy Atty. Gen., for respondent.

BARTLETT, Justice pro tem.

By the information in this case, appellant and James Graziano and Frank A. Serio were jointly accused of committing the crime of burglary, a felony, in that they, on the 22nd day of December, 1946, wilfully entered the store and room of Ben Millman and Eugene Malone in San Pedro with the intent to commit a theft. The defendants James Graziano and Frank A. Serio pleaded guilty to the crime of burglary in the second degree. At the time of the trial the appellant waived trial by jury and the case was submitted to the court upon the transcript of the testimony given at the preliminary hearing of the case. After the reading of this transcript the people rested and then Maesten testified in his own behalf. The court found the appellant guilty of burglary of the second degree.

Resolving the facts most favorably to the decision of the court, the record discloses the following: The witness Millman stated that he operated a market at 398 West Sixth in San Pedro; that he had a partner named Malone and that they operated the store on the date claimed in the information; that they closed business at 6 o'clock in the evening and that he had authorized no person to enter the store after closing hours on December 21. He stated that he was not acquainted with and had never seen the appellant Maesten; that he discovered after December 22 the store had been entered through a broken skylight over the men's lavatory. The witness Malone stated that he was a partner and would testify in the same manner as Millman had.

The witness Rockmaker testified that he was the lessee of the vegetable department at this address; that on the 21st of December he closed the premises before he left at about 6:30 p. m.; that he was the last one to leave the store and that he had authorized no one to enter the premises.

Michael Bartolotta testified that he was a bartender and was acquainted with the defendant. That about 10:30 or 11 p. m. Graziano and appellant entered his bar and had a few drinks. Maesten asked to borrow his car and the witness lent him the car and gave him the keys. He did not get the car back until four days later at the police department. He stated that appellant told him they had a couple of girls and they wanted to borrow his car for a little while.

The next witness was T. E. King, who testified that he was a police officer of the City of Los Angeles and that at about five minutes after two a. m. on December 22 he had a conversation with appellant whom he found standing at the northwest corner of Sixth and Mesa streets which is on the other side of the street from the store in question. He asked appellant what he was doing there and appellant told him that he had a boat there and that he was waiting for two friends to come down and that they were going to work over the motor on the boat. At that time the appellant showed him six cards, one of which was a temporary pass of the Consolidated Steel Corporation issued to Capt. L. C. Hirsch and representing Coastal Nomad. All of the other cards were made out to Hirsch with the exception of one made out to L. C. Hirsen, and in regard to that card he was told it was just an error in being made up.

The appellant was released and the witness later returned to the scene about 2:40 a. m. He went to the vicinity of Sixth and Nelson streets which is about 150 or 200 feet from where he had seen the appellant Maesten. He did not find the appellant Maesten in that vicinity upon his second call. He found two men in the market and arrested Serio and Graziano. He further testified that he went up on the roof of the building at 398 West Sixth Street and noticed the skylight was broken over the restroom.

Officer King testified to conversations which he had with Serio and Graziano. These statements by the other two defendants in no way connected appellant with the crime.

In the course of the officer's search he found Serio's overcoat and hat in the car belonging to Bartolotta. This car was found around the corner from the market. The officer then checked the doors on the building in front and did not find any open. The next witness was also a police officer, H. J. Darcey. Officer Darcey testified that he was the one who arrested the appellant at about 6:30 p. m. at the Cecil Hotel in Los Angeles. At the time of the arrest the appellant had the six cards referred to in Officer King's testimony in his billfold. He asked him where he got the cards and appellant told him they belonged to a friend of his. He stated that he came down to San Pedro with the defendants Serio and Graziano, that he borowed a car from a bartender and that the three of them came to San Pedro and went to the 22nd Street landing to try to locate a boat belonging to Captain Hirsch who was his employer. He got out of the automobile to make this search for the boat and when he came back the other two men were gone. He further stated, the officer testified, that he walked back to the place he had left the automobile and located the car and was waiting there by it for the other two men to appear when he was stopped by a police officer to whom he showed the identifications belonging to Hirsch. He stated he had not seen either Serio or Graziano after they had left him at the pier. The officer then asked appellant whether he had been in the market that night and he said that he had not. The officer further stated that appellant told him that earlier that evening they had been at a drinking party at about 10 p. m. on Witmer Street in Los Angeles.

After the people rested, appellant was called to the witness stand and testified that he had come to Long Beach with Graziano and Serio on December 22; that they had borrowed a car to go to San Pedro; and that he got off at the 22nd Street docks to look for a boat and when he came back he could not find Serio or

Graziano. He stated further that he did have Hirsch's identification in his pocket and that it was his boat that he was going to; that he was acquainted with Captain Hirsch and had permission to go on the boat; that he then started to look for Serio and Graziano and was met by an officer; that he was searched by the officers and they took out his wallet, found Captain Hirsch's identification papers in it; that he did not see the other two defendants after that and had no knowledge that they were going to enter any store and commit burglary and that he did not help them in any way.

The cross-examination was very brief; in fact he was only asked two questions. In spite of the fact that the only time he had been seen that night was thirty-five minutes before the burglary at a point across the street and 150 to 200 feet away from the premises which had been entered in the rear through the skylight, he was asked as to whether he was acting as a lookout; he said he was not. To impeach his testimony he was then asked if he ever had been convicted of a felony and after a considerable colloquy with the court he stated that he had. That constitutes all of the evidence in the case. It is the appellant's contention that this evidence does not prove the offense charged in the information and that the judgment of the court is contrary to the law and to the evidence.

[1-3] The respondent contends that the judgment should be upheld on the rule clearly set forth in People v. Newland, 15 Cal.2d 678, 104 P.2d 778, 779, as follows: "* * * The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt'."

That is also the holding in the other cases cited in respondent's brief. There is no doubt of the correctness of this rule. The decision must be based upon facts established by legal and competent evidence or by inferences drawn from proven facts. It is also uniformly held that where there is no evidence, or the evidence is so weak as to constitute no evidence at all, the question becomes one of law and a finding of guilt will be set aside. This is the effect of the decision of People v. Braun, 14 Cal.2d 1, 92 P.2d 402, People v. Farrington, 213 Cal 459, 2 P.2d 814, and also the cases cited in respondent's brief.

[4] Here we have just such a case. There is no conflict in the evidence nor is there anything improbable in the testimony of any witness. There is no evidence in the record of any connection on the part of the defendant with the burglary nor are there any proven facts from which such an inference can be drawn. The most that can be done is to raise a mere suspicion. It was not claimed at the trial nor was there any evidence to the effect that any conspiracy existed between these three men. The last time defendant was seen with either of the other two was three hours before in Los Angeles at Bartolotta's bar. Testimony of the statements of the other two defendants taken in the absence of defendant in no way implicated him. At the time the officers saw appellant that night it was at a position where no reasonable inference could be drawn that he was acting as a lookout. In fact his position 150 to 200 feet away, in front of a place which was entered from the rear, shows that he was in a spot where he could not have been of any possible aid to them had he desired to be. When the officers returned thirty-five minutes later and found the men in the store, appellant was not seen nor had any warning been given. He did display identification papers which were not his own; they were those of his employer, Capt. L. C. Hirsch, who was master of a merchant ship during the war. His connection with Capt. Hirsch and his activities in San Pedro were not questioned by the prosecution. He stated, among other things that the Hirsch boat was docked at the 22nd Street pier and that the other two men left him there and he did not see them again. These were the statements testified to by Officer Darcey as having been made to him by appellant on the day the burglary was committed.

The record disclosed that while appellant was testifying, Capt. Hirsch was in the

courtroom but was not called to the witness stand to rebut any of his statements.

[5] In cases such as this, where the evidence at the most raises a mere suspicion, the courts have not hesitated to reverse the decision of the trial court. Both in People v. Davis, 210 Cal. 540, 293 P. 32, and People v. Kempley, 205 Cal. 441, 271 P. 478, the court had before it the question oi whether or not the testimony of an accomplice was sufficiently corroborated. The Supreme Court held in each case that it was not. In each of these cases if the testimony of the accomplice were stricken from the record the evidence remaining would still raise a stronger suspicion of defendant's guilt than does the testimony in the instant case.

In People v. Draper, 69 Cal.App.2d 781, 160 P.2d 80, the facts are succinctly stated in paragraph 1 of the syllabus as follows: "A verdict finding one defendant guilty of burglary was not sustained by evidence that prior to the crime he was riding in an automobile with his codefendants, that he had an opportunity to participate in the commission of the crime, that he was found near the scene of the crime shortly after the burglary, that he ran when approached by police officers, and that he was not a truthful witness." The facts are remarkably similar to the facts in this case, except that here appellant did not flee, and not only is there no contention that his testimony was untrue but it stands uncontradicted in the record.

Another burglary case where the evidence was held to be insufficient is People v. Tempomgko, 134 Cal.App. 209, 25 P.2d 245. As a further example of such holding by the court, we have People v. Casillas, 60 Cal.App.2d 785, 141 P.2d 768, 772, where the defendant was charged with rape and incest but the testimony by the prosecuting witness was held to be apparently so false or improbable as to be incredible and the court held that in such a case there was no substantial evidence to support the verdict of guilt. In that case the court used this language: "Before we could affirm the judgments of conviction under the state of the record before us in this case, we would be compelled to completely emasculate the doctrine of reasonable doubt, * * *." That statement is equally applicable to the record before us here. To deprive a man of his liberty upon mere suspicion and upon such a flimsy showing as is contained in this record, would result in a miscarriage of justice.

The judgment is reversed and the cause remanded.

DORAN, Acting P. J., and WHITE, J., concur.






83 Cal.App.2d 654

## YOUNG v. BARKER et al.

## RODRIGUES v. YOUNG.

Civ. 16063.

District Court of Appeal, Second District, Division 2, California.

Feb. 11, 1948.

Rehearing Denied March 2, 1948.

Hearing Denied April 1, 1948.

1. Judgment ⇐145(3)

Bare allegation that summons and complaint were not served on defendant in action for judgment on an account against defendant without averment of facts showing that defendant had a meritorious defense to action is insufficient to state a cause of action to set aside default judgment.

2. Execution ⇐251(1)

Inadequacy of price alone is not a sufficient ground for vacating execution sale but is a circumstance to be considered in connection with other circumstances which together may constitute sufficient ground for vacating sale.

3. Execution ⇐251(1)

Great inadequacy of price requires only slight circumstances of unfairness in the conduct of the party benefited by execution sale to raise the presumption of fraud for which the execution sale will be vacated.

**4. Execution ⇐254**

Evidence that creditor purchased realty at execution sale after default judgment, at price so inadequate as to shock the conscience, delays occurring after entry of judgment in taking action to collect the debt, failure to give notice to debtor of the proceedings, and other conduct of creditor, established an intent to defraud debtor so as to permit her to discharge judgment and have execution sale and deed to the creditor vacated. Code Civ.Proc. § 707.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by E. M. Young against Vergie Barker and others, for ejectment and damages wherein Vergie Rodrigues cross-complained to quiet title and to set aside a marshal's deed to plaintiff and to cancel marshal's certificate of sale. From an adverse interlocutory judgment and final judgment, plaintiff appeals.

Judgments affirmed.

Roy A. Linn and Roy C. Kaiser, both of Los Angeles, for appellant.

Joseph A. Ball, of Long Beach, for respondent.

WILSON, Justice.

As the facts in this case unfold there will appear a program, well prepared and almost successful, whereby plaintiff hoped to acquire a valuable property for a paltry sum by following the forms of law but in defiance of the elemental rules of equity and without a simulacrum of justice.

Plaintiff purchased a number of accounts receivable from a bankrupt estate, among them an account against defendant amounting to $72. On September 11, 1941, plaintiff filed an action on the account in the municipal court of Long Beach. An affidavit was filed by Roy C. Kaiser, plaintiff's attorney, stating that he had served a copy of the summons and complaint on defendant on September 18 in Long Beach. A default judgment for principal, interest, costs and attorney's fees, amounting to $113.68, was entered against defendant on October 14, 1941. No proceedings to collect the judgment by supplementary proceedings, execution or otherwise were taken until December 10, 1942, when plaintiff's attorney obtained a writ of execution and delivered it to the marshal of the municipal court of Los Angeles for levy and the same was levied on the property which is the subject of this action—a house and lot at No. 6469 Orizaba Street in Long Beach. The marshal conducted a sale of the property in the city of Los Angeles on January 5, 1943, at which it was sold to plaintiff who, through her attorney Roy C. Kaiser, was the sole bidder. She bid the amount of the judgment and costs. There was no competitive bidding.

The marshal's certificate of sale to plaintiff was issued on January 5, 1943. His deed was issued on January 13, 1944, but was not recorded in the office of the County Recorder until November 21, 1944.

This action for ejectment and damages was commenced on July 26, 1945. The complaint alleges that plaintiff purchased the property at the marshal's sale on January 5, 1943, and received the deed as above stated; that since the date of the marshal's deed plaintiff had been deprived of the rents and the reasonable value of the use of the property to her damage in the sum of $900, and that she would be further damaged in the sum of $50 per month, the reasonable rental value of the property after the commencement of the action, for which amounts and the restitution of the property plaintiff prayed judgment.

Defendant answered denying the allegations of the complaint and at the same time filed a cross-complaint to quiet her title to the property and to set aside the judgment of the municipal court and the marshal's deed and to cancel the certificate of sale. She alleged that summons and complaint were never served upon her; that she had had no knowledge of the judgment, execution or other proceedings until April 16, 1945; that the actions of plaintiff were fraudulent and that she conducted the proceedings with a design to take undue advantage of defendant and to deprive the latter of her property.

The court found that summons and complaint in the municipal court action were never served on defendant; that the debt

on which the judgment was based had been incurred by defendant, that she asserted no defense, and that she was ready, able and willing to pay the indebtedness; that the levy of the execution was not made as required by law; that no notice was posted upon the property; that defendant did not reside on the property at the time the levy was made and received no notice thereof; that from and after the rendition of the municipal court judgment plaintiff knew or had means of knowledge of the whereabouts of defendant and of the fact that defendant owned the property, was receiving rentals from tenants therein, and was making payments on an incumbrance on the property, but nevertheless plaintiff failed to give actual notice to defendant of the execution; that defendant had no actual knowledge of the time and place of the sale or that any sale had taken place until about April 16, 1945.

An interlocutory judgment was rendered adjudging that if defendant, within 30 days after entry of the judgment paid to the clerk of the superior court for the benefit of plaintiff the amount of the municipal court judgment, with interest and accrued costs, the judgment should be deemed paid and satisfied and the execution sale and the deed given pursuant thereto should be vacated and set aside, but that if defendant should fail to deposit such amount then plaintiff should be entitled to the relief sought by her complaint. Thereafter a final judgment was entered adjudging that the amount required by the interlocutory judgment had been deposited with the court, that thereby the municipal court judgment became fully satisfied and discharged, and that the execution sale, the marshal's certificate of sale and deed were vacated and set aside. Plaintiff has appealed from both the interlocutory and the final judgment. Since the final judgment must be affirmed we need not consider whether an appeal lies from the interlocutory judgment.

[1] The bare allegation that the summons and complaint were not served on defendant without the averment of facts showing that she had a meritorious defense to the action in the municipal court is insufficient to state a cause of action. Lee v. Colquhoun, 175 Cal. 16, 164 P. 894; Bell v. Thompson, 147 Cal. 689, 693, 82 P. 327; Matson v. John Batto & Sons, 173 Cal. 800, 161 P. 1144. If this were the extent of defendant's allegation of error plaintiff would have been entitled to judgment, but she does not rest with this one charge of irregularity. She alleges a course of conduct by plaintiff and her attorney from the entry of the default judgment in the municipal court to the commencement of the instant action that unmistakably indicates, as found by the court, a fraudulent purpose on their part and manifests a carefully planned and executed scheme to deprive defendant of a valuable property for approximately four per cent of the amount of her equity.

The finding that the summons and complaint were not served on defendant is sustained by the evidence of at least five witnesses who testified, aided by circumstantial evidence, that she was at Delano, in Kern County, on the day the service is alleged to have been made on her in Long Beach. The other facts alleged in defendant's cross-complaint and found by the court to be true are undisputed. For 14 months after the entry of the default judgment plaintiff failed to take any action to collect it. She then had a writ of execution issued. At that time the judgment was final and the time had expired within which defendant could have made a motion to set it aside. The writ of execution was delivered to the marshal of Los Angeles with instructions to levy on and sell the property. No explanation has been forthcoming as to why the writ was delivered to the marshal of Los Angeles, some 20 miles distant from Long Beach, instead of the marshal of the latter city in which the property is situated. The deputy marshal left a copy of the writ with the tenant but did not post it on the property. Mr. Kaiser testified that before having the writ issued he talked with the tenant who resided on the property and from the information thus obtained he eventually ascertained defendant's address to be 2354 Chestnut Street, Long Beach. Notwithstanding this knowledge, and the knowledge that the tenant was paying rent to defendant, no demand was made for payment of the judg-

ment, no notice was given to defendant of the sale or of the existence of the judgment, and no demand was made on defendant or on her tenant for the rents after the marshal's sale. If plaintiff had desired merely to collect the debt, and not to acquire the property unfairly, she could have obtained the rents from the property (Code Civ.Proc. sec. 707) which in four or five months would have satisfied the judgment.

The marshal's deed was recorded in November, 1944, 22 months after the sale had taken place, and still no notice was given to defendant of any of the proceedings. There was an incumbrance on the property on which the sum of $2,127.08 remained unpaid in January, 1943, the date of the marshal's sale. Plaintiff permitted defendant, while unaware of the condition of her title, to make monthly payments on the incumbrance until April, 1945, reducing the amount owing to $1,551.18 when she first learned of the sale. During that time defendant paid all taxes, insurance and other expenses accruing on the property. Plaintiff paid none.

[2] In Odell v. Cox, 151 Cal. 70, at pages 73, 74, 90 P. 194, there was an inadequacy of consideration, which alone is not a sufficient ground for vacating the execution sale; but, said the court, inadequacy of price is a circumstance to be considered in connection with other circumstances which together will be a ground for vacating the sale. In the Odell case as in the instant case the judgment debtor had no knowledge of the issuance of the execution or of the sale and although a writ of execution was levied in the manner authorized by law the method of its levy was such that the owner did not know and could not learn of the levy except from information given him by the opposing party or casually by some one who knew the facts. In view of the defendant's financial circumstances and of the appeal from the judgment he had no reason to believe that his property would be sold. To the same effect are the cases of Winbigler v. Sherman, 175 Cal. 270, 165 P. 943, and Hyman v. Stern, 61 Cal.App. 656, 215 P. 911. In Graffam v. Burgess, 117 U.S. 180, 192, 6 S.Ct. 686, 692, 29 L.Ed. 839, 843, it is said that if the inadequacy is so gross as to shock the conscience (it is so in the instant case), or if, in addition to the gross inadequacy, the purchaser has been unfair or has taken undue advantage, or if the owner of the property has been misled or surprised, the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property from the sale. "Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud." In Schroeder v. Young, 161 U.S. 334, 338, 16 S.Ct. 512, 513, 40 L.Ed. 721, 724, it is said that while mere inadequacy of price may not be sufficient in itself to warrant the setting aside of a judicial sale "courts are not slow to seize upon other circumstances impeaching the fairness of the transaction as a cause for vacating it." Further that such gross inadequacy as to shock the conscience, irregularities attending the sale, where the sale was conducted in such manner that the full value of the property could not be realized, if bidders had been kept away, if undue advantage had been taken to the prejudice of the owner, or if he had been lulled into false security, the sale may be set aside and the owner may be permitted to redeem. In the Schroeder case, as in the instant case, the levy was made under the specific direction of plaintiff's attorney, who was the sole bidder at the sale and the only person present excepting the officer conducting the sale.

Since the facts in the instant case are so similar to those in the cases referred to, further citations are unnecessary.

The cases cited by plaintiff are easily distinguishable from the case at bar. In Rauer v. Hertweck, 175 Cal. 278, at page 283, 165 P. 946, 949, it appears that while the judgment debtor had no notice of the sale he did know that a judgment had been rendered against him and he "must be deemed to have known that his property might be levied on at any time." He failed to pay the judgment and took no steps to protect his property until the time for redemption had passed. The loss, said the court, could more properly be attributed to his own neglect than to any unfairness of the judgment debtor. The court said

that the case presented none of the peculiar circumstances of oppression or inequitable conduct that were found in the Odell and Winbigler cases, supra, to justify relief from a sale made for an inadequate price. Plaintiff cites cases in which a single defect has been held not to invalidate a sale, such as Rauer v. Hertweck, supra, in which personal notice of sale was not given to the judgment debtor, and Hamilton v. Carpenter, 52 Cal.App.2d 447, 126 P.2d 395, where a notice of foreclosure sale was not posted on the property as required by law. These were held to be insufficient grounds for setting aside the sales. No cases have been cited by plaintiff, and we believe none can be found, in which a sale has been sustained where, although plaintiff and her attorney at all times knew the address of the defendant, which was in the city in which the action was filed and the property was located, knowledge of the entry of judgment, the sale and all other proceedings have been so meticulously concealed from a defendant as in this case.

[3] The court's findings, with which we are constrained to concur, are that all the delays occurring after the entry of judgment in the municipal court, the acts of plaintiff and her attorney, and their failure to give notice to defendant of any of the proceedings, were with the intent on their part to deceive, defraud and take undue advantage of her. Such findings are fully sustained by the evidence and the inferences reasonably to be drawn therefrom.

[4] Plaintiff would not be satisfied with a judgment confirming her title to the property, for a $3,500 equity in which she paid less than $200. Supplementing her vermicular process in her effort to obtain it she has the effrontery to allege in her complaint that defendant had held possession of the property "against the will and without the consent of plaintiff" (she never demanded possession) and that "plaintiff has been deprived of the rents and reasonable value of the use of said property" to her damage at the rate of $50 per month from the date of the marshal's deed. She asks the court to give her not only a judgment for possession of the premises but a personal judgment against defendant for $900 and for $50 per month from the filing of the action to the entry of judgment. If any proof were needed, in addition to that which we have related, to establish plaintiff's malevolent and baleful intent it is supplied by the foregoing allegations and prayer for judgment.

Judgments affirmed.

MOORE, P. J., and McCOMB, J., concur.




83 Cal.App.2d 339

**In re O'DAY et al.**

**Cr. 4169–4172.**

**District Court of Appeal, Second District, Division 1, California.**

**Jan. 23, 1948.**

**1. Infants ⇐16**

Proceedings of the juvenile court are not punitive in nature nor are the minors to be deemed adverse parties. Welfare and Institutions Code, § 736.

**2. Infants ⇐16**

Under statute permitting a minor to be made a ward of the juvenile court, where the ward has not been accused of crime and the change in custody involves purely a matter of discretion on part of the court, neither necessity nor occasion exists for advice of an attorney in relation thereof, and no rights of the ward in this connection are violated by refusal to permit counsel to intervene. Welfare and Institutions Code, §§ 700(b), 736.

**3. Infants ⇐16**

In proceedings to adjudge minors wards of the juvenile court, where there was evidence that home surroundings were not conducive to best interests of the children, orders removing the custody of minor children from that of their natural parents and making them wards of the juvenile court were not an abuse of discretion. Welfare and Institutions Code, §§ 700(b), 736.

**4. Infants ⇐16**

In proceeding to remove minor children from custody of their parents and make them wards of juvenile court, where best interests of children were protected and record failed to show that any attorney sought to be present or was prevented from showing any evidence on behalf of the minors, no rights of the wards were violated by failure of the court to provide counsel. Welfare and Institutions Code, § 700(b), 736.

---

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Proceedings in the matters of Patsy Jane O'Day, Marion O'Day, Thelma O'Day and Carol Francis O'Day, persons under the age of 21 years, to determine custody. From orders determining them to be wards of the juvenile court, the juveniles appeal.

Orders affirmed.

Eugene V. McPherson, of Los Angeles, for appellants.

Fred N. Howser, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

DORAN, Acting Presiding Justice.

The present appeal is denominated one "from the findings of the Court that each of these juveniles were delinquents and from the orders of the Court finding them to be wards of the Juvenile Court". It is to be noted, however, that although appellants were determined to be wards of the court, there was no finding that any of the minors were juvenile delinquents.

On December 17, 1946, petitions signed by a police officer were filed, alleging that the appellants were under 21 years of age, and were persons having "no parent or guardian or guardian actually exercising such proper parental control", in the language of subdivision (b) of Section 700 of the Welfare and Institutions Code, governing Juvenile Court procedure. These petitions alleged, among other things, that the four girls "have been living in the home of the parents and at the present time the father is under arrest on a charge of violation of 288, P.C. having been accused by Patsy Jane, age 14, Marion, age 12, and Thelma Jean, age 11 of committing lewd and lascivious acts upon their persons. Carol Francis has not been molested sexually but her life has been threatened upon several occasions by her father and all four of these little girls have been threatened with great bodily harm by the father if they reported any of his activities to the authorities".

The petitions were heard before a referee on December 26, 1946, January 9, 16, 30, 1947, and February 6, 1947; the referee's findings and recommendations were approved and on February 6, 1947, the judge declared appellants to be wards of the Juvenile Court, and committed each child to a probation officer to remain in Juvenile Hall until no longer needed as a witness against the father. Thereafter, further hearings were held; on April 17, 1947 it was ordered that the minors remain in custody of the probation officer in the home of the mother. On June 16, 1947, after the father had been convicted, however, the judge found that the welfare of each minor required that custody be taken from the mother, that Patsy be placed in the Convent of the Good Shepherd, and that the other minors should remain in Juvenile Hall pending suitable placement. The same legal points are involved in all four cases; evidence was taken together, and appellants' brief treats the four cases as one.

According to the appellants' brief, the main contention on this appeal is that appellants were denied "the right to have counsel". In this connection reference is made to the stenographic transcript of a hearing before the Juvenile Court held on June 2, 1947, which discloses the following:

"Court: Now, let me ask you something, Mr. McPherson, do you represent these four children?

"Atty. McPherson: Yes, I do.

"Q. And you are associated with Mrs. Gladys Root? A. Yes, I am, sure.

"Q. And Mrs. Gladys Root represents the father of these four children? A. That's right.

"Q. And also, Mrs. Gladys Root represents the father in a motion which is set for hearing tomorrow before Judge Gates in Department 46 of the Superior Court, a motion whereby she is applying for a modification of the sentence hereinbefore pronounced? A. A motion to rehear probation.

"Q. Now on what possible theory, Mr. McPherson, do you claim the legal right to represent these four girls? A. I claim I have the legal right to represent because there isn't any conflict of legal interest between these girls and their father.

* * * * * *

"Q. There very definitely is a conflict now, and you know it. A. I don't know it.

"Q. Well, for your information, so as to get the record entirely straight, these four girls * * * appeared in this Court on December 17, at which time there were petitions filed alleging, among other things, that their father had committed lewd and lascivious acts on their persons. * * * Subsequently, * * * December 30, I believe, Mrs. O'Day brought the four children back to Juvenile Court and made the statement * * * that some of the relatives of her husband had attempted to contact these girls. She did not feel she could safely keep them at home and asked the Juvenile Court to keep them here at Juvenile Hall. Subsequently * * * (they) were made wards of the Juvenile Court.

* * * * * *

"Q. And that evidence (the girls' testimony at preliminary examination) was submitted to Judge Gates and based on that evidence Judge Gates found the defendant guilty. What took place after that when you and Mrs. Root stepped in the case is a matter of record. You now appear for their father. A. I appear for the girls.

"Q. Well, Mrs. Root appears for the father and you're the same as Mrs. Root. A. Well, probably so.

"Q. Well, now on what possible theory can you represent these four girls. A. At the present time, at this present stage, there is no conflict of interest between what Mr. O'Day says happened and what these children say happened.

"Q. As far as the Juvenile Court is concerned there is. A. You're the one that has to decide it. We should decide it for the best interests of the children."

The attorney's contention that there was no present conflict of interest between the father and the girls is predicated upon the fact that subsequent to the father's conviction and sentence to San Quentin, according to testimony of Mrs. O'Day, "the children saw how serious they made it, and they came to me and said it was not all true, and said at that time they wanted to change their story, but said they were afraid to do so." Thereafter, the mother testified that "I took it upon myself to see an attorney", and thereafter the motion for rehearing of the father's application for probation was made. According to findings made by Referee Margaret P. Pratt following a hearing held on April 24, 1947 at which the children were present, "each one denies under oath that the father had ever molested them. They now state that they had talked about such things with a 'Mexican girl' (who) * * * told them she was angry with her father because he had punished her, and that she was going to accuse him of misconduct".

In reference to the alleged denial of the right to counsel, appellants cite In re Rider, 50 Cal.App. 797, 195 P. 965, 966, and In re Tahbel, 46 Cal.App. 755, 189 P. 804. As pointed out in respondent's brief, however, neither case is comparable to the present situation. In the Rider case the minor was confined in Juvenile Hall awaiting trial on a felony charge, and the court held that the child was entitled to consult privately with counsel "to the end that thereby she may prepare for her defense." In the Tahbel case the minor was held in Juvenile Hall for refusal to answer alleged incriminating questions, and it was held that the constitutional privilege against self-incrimination was applicable and hence that the confinement was not justified. In the instant case there was no criminal charge against the four girls, nor was the confinement because of any refusal to testify. There was not even an adjudication of delinquency, and the minors were simply ad-

judged wards of the Juvenile Court for their own protection.

[1] The entire juvenile court procedure is, indeed, designed to protect children who are the innocent victims of improper home influences. The proceedings are not punitive in nature, nor are the minors to be deemed adverse parties. Section 736 of the Welfare and Institutions Code provides that "An order adjudging a person to be a ward of the juvenile court shall not be deemed to be a conviction of crime". It may also be noted that this Code contains no provision for the representation of minors by attorneys at law.

[2] In the case of In re McDermott, 77 Cal.App. 109, 112, 246 P. 89, 90, a minor had been adjudged a ward of the court but allowed to remain with the parents; four years later, while the minor was still a ward, an order was made for the child's removal and placement in a juvenile home. The father then retained an attorney who sought to consult with the minor in reference to the change in custody. On refusal of this permission a writ of habeas corpus was sought to compel the authorities to permit the conference between attorney and client. In the appellate court it was held that where the ward had not been accused of crime and the change in custody involved "purely a matter of judgment or discretion" on the part of the Juvenile Court, "neither necessity nor occasion exists for the advice of an attorney in relation thereof", and therefore no rights of the ward in this connection had been violated.

[3] Based on the foregoing, the same may be said in the instant case. As already noted, several hearings in Juvenile Court had been held, at some of which the minors' attorney had been present, and under oath the girls had made conflicting statements as to the father's conduct. The mother was apparently aiding the father in seeking probation after the latter's conviction for molesting the children. As suggested in respondent's brief, "If the father had molested them, then the Court was entirely justified in keeping the children free from any possible contact with the father". In any event there is evidence that the home atmosphere surrounding these wards was not conducive to their best interests, and there is no showing of any abuse of discretion in reference to the matter of custody.

[4] The record nowhere indicates that the attorney sought to present or was prevented from offering any evidence on behalf of the minors. Nor does it appear that the best interests of these children was not adequately protected at all points in the proceeding. Likewise, there is nothing to show that consultation between the minors and the attorney was denied after the referee's attention had been called to the complaint that such a conference at Juvenile Hall had previously been denied. The appellants' other contentions are untenable.

The orders appealed from are therefore affirmed.

WHITE, J., concurs.

YORK, P. J., did not participate.




83 Cal.App.2d 681

## In re KURT'S ESTATE.

Civ. 13461.

District Court of Appeal, First District, Division 2, California.

Feb. 17, 1948.

**1. Courts ⇐200½**

Superior court, sitting in probate, is without jurisdiction to try title to property as between representative of estate and strangers thereto.

**2. Courts ⇐200½**

Superior court, sitting in probate, has jurisdiction to determine validity of claim of title to property by representative of estate in his individual capacity on settlement of final accounts.

**3. Husband and wife ⇐273(1)**

Surviving husband's interest in community property vests in him without ad-

ministration, even where wife's will disposes of the other one-half.

**4. Courts ⇐200½**

Surviving husband, by asserting that certain property was community property, was not claiming in privity with deceased wife's estate but adversely to it, and, hence, his claim could not be litigated by superior court, sitting in probate, in a proceeding to determine heirship.

**5. Courts ⇐200½**

Surviving husband's claim that real property was separate property passing to him on termination of joint tenancy by wife's death was a claim adverse to wife's estate, and, hence, determination of that question was beyond jurisdiction of superior court sitting in probate.

---

Appeal from Superior Court, Alameda County; Ezra W. Decoto, Judge.

Proceeding in the matter of the estate of Anna Kurt, also known as Anna Mohr Kurt, wherein the executor filed its final account and petition for distribution, and alleged that property on hand for distribution was separate property of decedent. John G. Kurt, as surviving husband, filed his objections to petition for distribution and a petition for determination of heirship asking for determination that all the property included in the inventory was community property. From decree determining that all of the property included in the inventory was community property and ordering one-half of such property immediately delivered to the surviving husband, the surviving husband and the surviving sister, Meta Mohr, cross-appeal.

Decree reversed.

David D. Oliphant, Jr., of Oakland (Hillyer & Hillyer and Curtis Hillyer, all of San Diego, Cal., of counsel), for appellant.

H. Raymond Hall, of Oakland, for respondent.

DOOLING, Justice.

Anna Kurt died testate on December 6, 1942 and Bank of America National Trust and Savings Association was appointed executor of her will. By the terms of her will she left certain shares of stock standing in her name to her sister Meta Mohr and to certain other persons and made Meta Mohr the residuary beneficiary of one-half of the residue of her estate. Certain real property was held in joint tenancy by decedent and her husband John G. Kurt at the time of her death.

The executor filed its final account and petition for distribution, listing the personal property but no real property, and alleged that the property on hand for distribution was the separate property of the decedent. Thereupon the surviving husband filed his objections to the petition for distribution and a petition for determination of heirship asking for a determination that all of the property included in the inventory was community property. The probate court so determined and ordered one-half of such property immediately delivered to the surviving husband.

From this decree cross-appeals have been taken by the surviving husband John G. Kurt and the surviving sister Meta Mohr. The appellant Kurt contends that the personal property was acquired prior to 1923, when the law was first enacted giving the wife testamentary power over one-half the community property, and for that reason he should take all of it free of the attempted testamentary disposition of his wife. The appellant Mohr argues that the evidence on the hearing developed that the real property held in joint tenancy was in fact the community property of the spouses and that the probate court should have so determined and should have decreed that one-half thereof was subject to the testamentary disposition of the wife.

This claim of the appellant Mohr is countered by the assertion of the surviving husband that the probate court has no jurisdiction to determine a claim of title adverse to the estate, citing Estate of Abdallah, 80 Cal.App.2d 634, 182 P.2d 596, where many of the earlier cases are collected and discussed. Apparently counsel for the surviving husband does not realize the full import of this argument nor the fact that it is a two-edged sword which lops off jurisdiction of his claim to the personal property

asserted against the estate equally with that of the estate's claim to a share of the real property asserted against him.

[1, 2] The basic rule and its recognized exception are set out in Bauer v. Bauer, 201 Cal. 267, 271, 256 P. 820, 821:

"It is undoubtedly the rule that the superior court, sitting in probate, is without jurisdiction to try the question of title to property as between a representative of the estate and strangers to the estate. Ex parte Casey, 71 Cal. 269, 12 P. 118; Estate of Haas, 97 Cal. 232, 31 P. 893, 32 P. 327. This is necessarily so, for the reason that either the person initiating the attack or the person resisting the attack is lacking in privity to the probate proceedings.

"It has, however, been held that when the title to property is claimed by a representative of an estate in his individual capacity the superior court, sitting in probate, is vested with the jurisdiction of determining the validity of such claim upon the settlement of the final accounts of such representative." See Wilkerson v. Seib, 20 Cal. 2d 556, 563, 127 P.2d 904; McCarthy v. Superior Court, 64 Cal.App.2d 468, 149 P. 2d 55; Estate of Escolle, 134 Cal.App. 473, 25 P.2d 860.

[3] Here the surviving husband is not the personal representative and any claim that he is making is adverse to the estate and not in privity with it. It has always been and still is the rule that the surviving husband's interest in the community property vests in him without administration.

This was true before the 1923 enactment giving the wife testamentary power over one-half the community property. Estate of Klumpke, 167 Cal. 415, 419, 420, 139 P. 1062. Since 1923 it is still true even where the wife's will disposes of one-half the community property. The other one-half goes to the husband without administration. Makeig v. United Security Bk. & T. Co., 112 Cal.App. 138, 145, 296 P. 673.

[4] Since the community interest of the husband does not pass to him through the probate proceedings, by asserting the claim that property is community property the husband is not claiming in privity with the estate but adversely to it. If so his claim cannot be litigated in a proceeding to determine heirship. Estate of King, 199 Cal. 113, 117, 118, 248 P. 519. It is said in Estate of Klumpke, supra, 167 Cal. at page 421 page 1064 of 139 P.: "A surviving husband claiming that certain property was community property up to the time of the death of his wife is thereby asserting a claim of title adverse to that of the estate of his wife, which cannot be determined by the court in probate."

The only cases where the husband's claim against the wife's estate that property was community has been held to be within the probate court's jurisdiction are cases where the husband was the personal representative, thus bringing the case within the exception mentioned in Bauer v. Bauer, supra, 201 Cal. 267, 256 P. 820, and the decisions go expressly on that ground. Estate of Kelpsch, 203 Cal. 613, 616, 617, 265 P. 214; Estate of Helm, 6 Cal.App.2d 752, 754, 755, 45 P.2d 250.

[5] As to the husband's claim that the real property is separate property passing to him on termination of joint tenancy by the wife's death, the determination of that question is of course equally beyond the jurisdiction of the probate court. Estate of Klumpke, supra, 167 Cal. at page 418, 139 P. 1062.

Cases dealing with a surviving wife are not in point. A different situation exists where the husband dies leaving the wife surviving. The community property in that case is subject to administration (Prob. Code, sec. 202) and both before and since 1923 the wife's share of community property comes to her through the probate court, so that her claim is in privity with the estate and can be litigated therein. In re Burdick, 112 Cal. 387, 44 P. 734; Colden v. Costello, 50 Cal.App.2d 363, 122 P.2d 959.

The decree appealed from, being outside the jurisdiction of the probate court, is reversed, each party to bear his own costs of appeal.

NOURSE, P. J., and GOODELL, J., concur.

## CALIFORNIA TRUST CO. v. BENNETT.*

Civ. 15958.

District Court of Appeal, Second District, Division 3, California.

Feb. 9, 1948.

Hearing Granted April 1, 1948.

**1. Joint tenancy ⇐3**

A corenter agreement of bank safety deposit box giving either husband or wife right of access and providing that upon death of either survivor should be the sole renter of box with exclusive right of access thereto and possession of contents did not create an estate in joint tenancy in contents of box but merely gave survivor access to the box and possession of contents without affecting title to contents.

**2. Evidence ⇐450(4), 461(1)**

Where corenter agreement of bank safety deposit box between husband and wife giving survivor exclusive right of access to box and contents was not ambiguous on its face and no mistake was put in issue by pleadings and validity of agreement was not in dispute, agreement would be considered as containing all terms agreed upon by parties and parol evidence that wife intended to create a joint tenancy of her separate money in the box was inadmissible. Code Civ.Proc. § 1856.

**3. Evidence ⇐384**

The parol evidence rule is not a rule of evidence but is a rule of substantive law.

**4. Evidence ⇐441(1)**

The "parol evidence rule" excludes evidence of conversations and negotiations preceding or contemporaneous with the execution of the writing. Code Civ.Proc. § 1856.

See Words and Phrases, Permanent Edition, for all other definitions of "Parol Evidence Rule".

**5. Trial ⇐105(5)**

If parol evidence of conversations or negotiations preceding or contemporaneous with the execution of a writing is admitted without objection it must be ignored. Code Civ.Proc. § 1856.

* Subsequent opinion 204 P.2d 324.

**6. Joint tenancy ⇐1**

California frowns upon estates in joint tenancy. Civ.Code, §§ 683, 686.

**7. Joint tenancy ⇐3**

An estate in joint tenancy in personal property may rest in parol.

**8. Joint tenancy ⇐1**

For the creation of an "estate in joint tenancy" the unities of interest, title, time, and possession must be present, and the absence of any one of the unities is fatal to creation of an estate in joint tenancy. Civ. Code, §§ 683, 686.

See Words and Phrases, Permanent Edition, for all other definitions of "Estate in Joint Tenancy".

**9. Joint tenancy ⇐1**

By the "unity of interest" necessary for creation of an estate in joint tenancy is meant that the estate of each tenant must be alike. Civ.Code, §§ 683, 686.

See Words and Phrases, Permanent Edition, for all other definitions of "Unity of Interest".

**10. Joint tenancy ⇐1**

By the "unity of title" necessary for creation of an estate in joint tenancy is meant that the estate of each tenant must have been created by the same act. Civ. Code, §§ 683, 686.

See Words and Phrases, Permanent Edition, for all other definitions of "Unity of Title".

**11. Joint tenancy ⇐1**

By the "unity of time" necessary for creation of an estate in joint tenancy is meant that the estates of the tenants must have vested at one and the same period. Civ.Code, §§ 683, 686.

See Words and Phrases, Permanent Edition, for all other definitions of "Unity of Time".

**12. Joint tenancy ⇐1**

By the "unity of possession" necessary for creation of an estate in joint tenancy is meant that each tenant must be seised per my et per tout, by the half, or moiety, and by the whole, that is, each of them

has the entire possession. Civ.Code, §§ 683, 686.

See Words and Phrases, Permanent Edition, for all other definitions of "Unity of Possession".

**13. Joint tenancy ⇐3**

To create a joint tenancy there must be some operative words declaring the intention to create. Civ.Code, §§ 683, 686.

**14. Gifts ⇐18(2), 62(3)**

To effect either a gift inter vivos or a gift causa mortis, the donor must divest himself completely of control and dominion over the property, and if transfer of dominion or control is postponed to the death of the donor, there is no more than an unexecuted and unenforceable promise to make a gift.

**15. Husband and wife ⇐49¾(6)**

Where, after wife had deposited her separate money in bank safety deposit box, wife and husband executed a corenter agreement covering the deposit box, evidence at most showed that when wife obtained the corenter agreement from bank she indicated a testamentary intent that husband should have title to money after her death and did not establish that wife had expressed a purpose to make a gift in joint tenancy taking effect in præsenti. Civ.Code, §§ 683, 686.

**16. Gifts ⇐11, 57**

In order that a gift inter vivos or causa mortis be made, title must pass to the donee at the time the gift is made.

**17. Gifts ⇐59**

A "gift causa mortis" must be made in contemplation, fear or peril of death. Civ. Code, § 1149.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift Causa Mortis".

**18. Gifts ⇐22, 62(6)**

The delivery of property, the subject of a gift, may be constructive or symbolical.

**19. Husband and wife ⇐49¾(6)**

Where wife deposited her separate money in bank safety deposit box and husband and wife subsequently executed a corenter agreement covering the box, evidence established that delivery of key to husband by wife was for sole purpose of giving husband access to box and was not a constructive or symbolical delivery of the contents of the box as an element in making a gift of money in box by wife to husband in joint tenancy.

---

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by California Trust Company, a corporation, as executor of the will of Charlotte Bennett, deceased, against John Bennett, for money had and received. From a judgment for defendant, plaintiff appeals.

Judgment reversed.

Lindstrom and Bartlett, of Los Angeles, for appellant.

Marshall & Farnham, of Long Beach, for respondent.

VALLÉE, Justice pro tem.

Appeal by plaintiff from a judgment for defendant in an action for money had and received.

Charlotte Bennett, deceased, rented a safe deposit box at Security-First National Bank of Los Angeles, referred to as "bank," on August 14, 1945. She deposited $7,950 in currency therein. The money was her separate property. On August 27, 1945, Charlotte Bennett and her husband, John Bennett, respondent-defendant, signed and delivered to the bank, a corenter agreement covering the same box. The pertinent provisions of the agreement are these:

"Co-Rents Agreement (Survivor To Have Exclusive Right Of Access)

"Date Deposit Box No. 1586

Date Aug 27 '45

"Security-First National Bank of Los Angeles: Seventh & Grand Branch.

"The undersigned hereby rent the above numbered safe deposit box subject to conditions and regulations printed on the reverse of the current and any subsequent rental receipt issued to us, to which we agree.

"We jointly and severally agree with you and with each other that: 1. Right of access to said box shall be had and surrender of same may be made by either of us without consent of or notice to the other. * * * 4. Upon the death of either of us, the survivor is and shall for every purpose be the sole renter of said box, with the exclusive right of access thereto and possession of the contents thereof. * * * We hereby acknowledge delivery to us of the current rental receipt and of two keys to said safe deposit box."

Charlotte Bennett died December 1, 1945, leaving John Bennett surviving her. John did not open the box, nor was he present when it was opened, until after the death of Charlotte. He did not pay any of the bank's rental charge for the box. He never discussed the contents of the box with his wife. He did not know what was in the box until December 7, 1945, when he removed the $7,950. Upon the death of Charlotte this money was the sole content of the box.

Appellant, as executor of the will of Charlotte, sued John Bennett to recover the $7,950. The genuineness and due execution of the co-renter agreement was admitted by the answer. Respondent, in his answer, alleged that by the agreement he was vested with the right, title and ownership of the money. At the trial, over the objection of appellant, the court received parol evidence offered by respondent for the purpose of proving that Charlotte intended to and did create a joint tenancy in the $7,950 by the execution of the co-renter agreement. The trial court found that prior to the making of the agreement the money was the separate property of Charlotte; that the contents of the box at the time of her death consisted only of the $7,950, and was held by her and respondent as joint tenants with right of survivorship; that on December 7, 1945, as surviving joint tenant, respondent secured possession of the money, and that upon his wife's death he became the owner thereof. Judgment was for respondent.

[1] Appellant's first assignment of error is that the co-renter agreement did not create an estate in joint tenancy and that the trial court erred in ignoring the parol evidence rule. This assignment is well taken. A co-renter agreement, containing a provision identical with article 4 of the foregoing agreement, was before the court in Security–First Nat. Bank v. Stack, 32 Cal.App.2d 586, 90 P.2d 337. It was there held that the terms of the agreement merely gave the survivor access to the box and possession of the contents; that title to the contents of the box was not affected. To the same effect, Estate of Dean, 68 Cal. App.2d 86, 92, 155 P.2d 901. The co-renter agreement did not create an estate in joint tenancy in the contents of the box.

[2-5] There is no ambiguity on the face of the agreement. No mistake or imperfection in the agreement was put in issue by the pleadings. The validity of the agreement was not in dispute. It must, therefore, be considered as containing all of the terms agreed upon by the parties; and there can be no evidence of the terms agreed to, other than the contents of the writing. Code Civ.Proc., sec. 1856. The parol evidence rule is not a rule of evidence. It is one of substantive law. It excludes evidence of conversations and negotiations preceding or contemporaneous with the execution of the writing. If such evidence is admitted without objection, it must be ignored. It has no legal force. The writing becomes a single and final memorial of the understanding of the parties. It "becomes the contract of the parties." Estate of Gaines, 15 Cal.2d 255, 264, 265, 100 P.2d 1055, 1060; Nourse v. Kovacevich, 42 Cal.App.2d 769, 771, 109 P.2d 999; O'Melia v. Adkins, 73 Cal.App.2d 143, 148, 166 P.2d 298; Lifton v. Harshman, 80 Cal.App.2d 422, 432, 182 P.2d 222. It was directly decided in Estate of Gaines, supra, that parol evidence is not admissible and may not be considered to determine the legal effect of an unambiguous co-renter agreement of a safe deposit box.

Although respondent does not make the point with clarity and does not comply with the Rules on Appeal (Rule 15, 22 Cal. 2d 12), it seems to be his claim that aside from the co-renter agreement an oral estate in joint tenancy was created between the

parties. The only evidence which has any bearing on the question, as set forth by respondent, is this: When Charlotte obtained the co-renter agreement from the bank, the clerk in the safe deposit box department asked her "if she wanted the survivor to have the contents of the box if she should pass away," and Charlotte "said that is what she wanted"; the clerk asked Charlotte "at the time she rented the box if she wished anyone else to have access to it, and she said she did. I asked her the relationship and she said it was her husband"; Charlotte and John had a joint tenancy account; because Charlotte's sister wanted her son to have a similar amount Charlotte must have had the same thing in mind for her husband; at the time John signed the agreement Charlotte gave him a key to the box; when Charlotte asked John to sign the agreement, she said "if anything happened to her she wished me to have the contents of the box but named no contents or nothing referring to what was in it or should be in it. She naturally had to tell me something when she asked me to sit down and sign a paper."

[6-13] "A joint interest is one owned by two or more persons in equal shares, by a title created by a single * * * transfer, when expressly declared in the * * * transfer to be a joint tenancy, of by transfer from a sole owner to himself and others, * * * when expressly declared in the transfer to be a joint tenancy * * *." Civil Code, sec. 683. "Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, * * * or unless declared in its creation to be a joint interest, as provided in section six hundred and eighty-three, or unless acquired as community property." Civil Code, sec. 686. Estates in joint tenancy are frowned upon in this State. Reiss v. Reiss, 45 Cal.App.2d 740, 747, 114 P.2d 718. An estate in joint tenancy in personal property may rest in parol. Young v. Young, 126 Cal.App. 306, 310, 14 P.2d 580. For the creation of an estate in joint tenancy, four unities are required, namely, unity of interest, unity of title, unity of time, unity of possession. Each of these four elements must be present and an absence of any one of them is fatal to the creation of an estate in joint tenancy. Siberell v. Siberell, 214 Cal. 767, 771, 7 P. 2d 1003; McDonald v. Morley, 15 Cal.2d 409, 412, 101 P.2d 690, 129 A.L.R. 810. Joint tenants must have one and the same interest accruing by one and the same transfer commencing at one and the same time and held by one and the same undivided possession. 2 Bl.Com., Chase's Ed. 180. By unity of interest is meant that the estate of each tenant must be alike. By unity of title is meant that the estate of each must have been created by the same act. By unity of time is meant that the estates of the tenants must have vested at one and the same period. By unity of possession is meant that each must be seised per my et per tout, by the half, or moiety, and by the whole, i. e. each of them has the entire possession. Ibid, 181, 182. The doctrine of survivorship arises from these unities. To create a joint tenancy there must be some operative words declaring the intention to create. Dalton v. Keers, 213 Cal. 204, 207, 2 P.2d 355; Estate of Hittell, 141 Cal. 432, 435, 75 P. 53.

The court in Re Finley, 103 Cal.App. 694, 284 P. 941, after quoting from Bowen v. May, 12 Cal. 348, to the effect that in order to constitute a joint tenancy in lands such estate must be declared in the conveyance itself, applied the principles we have stated, saying, 103 Cal.App. at page 697, 284 P. at page 942: "We have been unable to find an instance where this declaration has ever been questioned or disputed. In fact, in Denigan v. San Francisco Savings Union, 127 Cal. 142, 59 Pac. 390, 391, 78 Am.St.Rep. 35, it is affirmed in substance. There the contest revolved around an account in the defendant bank 'in the name of "Francis and Ellen Denigan, payable to either."' The court, after referring to the section we have quoted, said: 'The money deposited by Ellen was up to that time her separate property, and it cannot be said that she then acquired any interest therein; and, if it could be assumed that by reason of the form in which the deposit was made Francis acquired any interest therein, it was acquired at a different time and by

a different title from that of Ellen. There was no declaration that the money should be held in joint tenancy, and the words, "payable to either," placed in the account, take away the claim of a joint interest.' So here, in so far as the money is concerned, there was no transference of title from the appellant to her husband, or vice versa, nor was there a declaration that the fund should thereafter be held by them as a joint tenancy." See Robinson v. Mutual Sav. Bank, 7 Cal.App. 642, 647, 95 P. 533; Lynam v. Vorwerk, 13 Cal.App. 507, 110 P. 355; Estate of Dean, 68 Cal.App.2d 86, 94, 155 P.2d 901. Civil Code section 683 requires an express declaration to create an estate in joint tenancy. In the evidence here there was no declaration, express or implied, that the contents of the box should thereafter be held by Charlotte and John in joint tenancy. There were no operative words indicating an intention to create an estate in joint tenancy. Unity of interest is lacking. No estate was created in John. He was merely given access and right of possession. Unity of title is absent. Charlotte had title. There was no transfer of any title to John. The most that can be said of the parol evidence is that she indicated a testamentary intent that John should have title upon her death. Unity of time is absent. Estates in Charlotte and John did not vest at one and the same period. Unity of possession did not exist in the sense required for an estate in joint tenancy. Each was not seised by the moiety and by the whole. It is significant that after Mrs. Bennett had explained her purpose and wishes to the clerk the latter furnished her the card which provided that the survivor would have the exclusive right of access and possession of the contents, and not a card which would, upon due execution, create a joint tenancy. An estate in joint tenancy in the contents of the box was not created by the parol evidence. Sears v. Rule, 27 Cal.2d 131, 142, 163 P.2d 443, cited by respondent is not helpful. The court there held that evidence is admissible to show that a husband and wife who took property apparently as joint tenants actually intended it to be community property and that property may be converted to community property by oral agreement. Here there is no evidence of any agreement to transfer title from Charlotte to Charlotte and John as joint tenants.

[14, 15] Without expressly making the the point, respondent suggests that the evidence recited, together with the signing of the co-renter agreement and the delivery of a key to the box by Charlotte to John at the time of the signing of the agreement, was sufficient to constitute a gift by Charlotte to John in joint tenancy of the money in the box. The evidence is not sufficient to establish a gift inter vivos or a gift causa mortis. To effect either, the donor must divest himself completely of control and dominion over the property. To accomplish either, delivery of the property given must be absolute. Mutual Ben. Life Ins. Co. v. Clark, 81 Cal.App. 546, 550, 254 P. 306.

[16, 17] If transfer of dominion or control is postponed to the death of the donor there is no more than an unexecuted and unenforceable promise to make a gift. Beebe v. Coffin, 153 Cal. 174, 177, 94 P. 766; Mutual Ben. Life Ins. Co. v. Clark, supra. In order that a gift inter vivos or causa mortis be made, title must pass to the donee at the time the gift is made. Stout v. McNab, 157 Cal. 356, 360, 107 P. 1005. A gift causa mortis must be "made in contemplation, fear, or peril of death." Civil code, sec. 1149. As we have said, the evidence does no more than indicate an intention upon the part of Charlotte that upon her death John should have the contents of the box. The language said to have been used by Charlotte was not the expression of a purpose to make a gift in joint tenancy taking effect in praesenti. Yates v. Dundas, 80 Cal.App.2d 468, 182 P.2d 305.

[18, 19] Respondent urges that the delivery of property, the subject of a gift, may be constructive or symbolical. This is true. He then says that Charlotte delivered the key to the box to him; that such constituted symbolical delivery of the contents of the box and effected a gift in joint tenancy, citing Estate of Escolle, 134 Cal. App. 473, 25 P.2d 860. Delivery of the key was made at the time the co-renter agreement was signed. The effect of the delivery of the key must be considered in connec-

tion with the agreement which gave John access to the box but did not give him title to its contents. Delivery of the key was for the sole purpose of giving John access to the box and was not a constructive or symbolical delivery of the contents of the box as an element in making a gift. In the Escolle case, the donor, in her last illness, expressly stated that she was making a gift of stock in a safe deposit box. She did it in writing and delivered the key to the box. Later the same day she said she had made a gift of the stock and "if I don't die, I want my stock back." As all of the other essential elements of a gift causa mortis were present, it was held that delivery of the key to the box constituted symbolical delivery of the stock in the box and that a gift was effected. The case is not in point here. In that case there was an express gift in praesenti. Here there is no evidence of an intent to make a gift in praesenti. Charlotte wanted John to have the contents of the box only "if anything happened to her." In the present case there is no evidence that Charlotte was in contemplation, fear, or peril of death. The only evidence on the subject is to the contrary. To us the only possible construction of the evidence is that Charlotte did not intend, by the language she used in connection with the execution of the co-renter agreement, to effect a present transfer of title to the money in the box. There is no evidence sufficient to establish a gift in joint tenancy.

The record indicates that respondent's theory in the trial court was that the co-renter agreement, construed in the light of the parol evidence, created an estate in joint tenancy. The implied contentions that the parol evidence established an oral agreement to create such an estate in joint tenancy, and that it also proved a gift, appear to be after-thoughts made for the first time on appeal. The finding that on the death of Charlotte Bennett the contents of the safety deposit box were held by her and respondent as joint tenants with right of survivorship, is without support in the evidence.

Judgment reversed.

SHINN, Acting P. J., and WOOD, J., concur.

83 Cal.App.2d 608

## STERN v. STERN.

Civ. 3817.

District Court of Appeal, Fourth District, California.

Feb. 9, 1948.

Rehearing Denied March 8, 1948.

Hearing Denied April 1, 1948.

**1. Judges ⇐51(1)**

Act of presiding judge of Superior Court containing two departments against whom a disqualifying affidavit was filed by defendant in divorce suit, in assigning the case for trial before the other department of Court without an agreement of the parties for the transfer, was not improper. Code Civ.Proc. § 170, subd 5; Rules of the Superior Court, rules 8, 21; Const. art. 6, § 7.

**2. Judges ⇐51(1)**

Assignment by presiding judge of Superior Court, against whom affidavit of disqualification had been filed, of hearing on motion for new trial in divorce suit to department of another judge of the Superior Court who was the only judge remaining who was not disqualified was not improper. Code Civ.Proc. § 170, subd. 5; Rules of the Superior Court, rules 13, 19, subd. 4.

**3. Divorce ⇐145**

In divorce action, where defendant's counsel withdrew or abandoned his application for a continuance and elected to rest on question of jurisdiction of the court to act, defendant could not claim abuse of discretion on the part of the court in not continuing the matter to a subsequent date.

Appeal from Superior Court, Riverside County; William D. Dehy, Russell S. Waite, and O. K. Morton, Judges.

Action by William Stern against Amelia S. Stern for divorce on ground of cruelty, wherein the defendant filed a cross-complaint seeking a decree of separate maintenance and second amended cross-complaint seeking a divorce. From an adverse judgment and orders, the defendant appeals.

Judgment and orders affirmed.

Maurice Rose, of Los Angeles, for appellant.

Thompson & Colegate, of Riverside, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent was married to defendant and appellant on March 24, 1942. They were separated on March 18, 1946. On April 11, 1946, plaintiff commenced this action for divorce on the ground of cruelty. Defendant appeared through her attorneys, Jerry Giesler, Esq., Meyer M. Willner, Esq., and Messrs. Best, Best & Babbert. Thereafter, an amended complaint was filed. Defendant answered and by way of cross-complaint sought a decree of separate maintenance. (Later, in a second amended cross-complaint, she sought a divorce.) Among other relief, she asked that the community property be divided. She then alleged that plaintiff's age was 63; (he had been suffering from a severe illness requiring over 21 major surgeries, and was retiring in Palm Springs for his health); that his net worth was in excess of $150,000, and that he had a monthly income from *his* properties in excess of $800 and insurance annuities in excess of $360 per month. Plaintiff alleged that there was no community property acquired during the four years they were living together as husband and wife. In July, 1946, the case was at issue and in October, 1946, was set for trial for February 4, 1947, before the Honorable O. K. Morton, Judge. On January 28, 1947, a motion was made by defendant's counsel for an order permitting them to withdraw from the case due to disagreement between defendant and her counsel. In support of that motion an affidavit was filed by Mr. Best reciting that negotiations were pending for a settlement; that until January 24, 1947, he was of the opinion that the case would be settled and not tried; that prior thereto he notified defendant that if the case was not settled and it became necessary to try it her then counsel would not be able to conduct the trial thereof; that affiant and her other counsel have not been able to agree as to the "conduct of the trial". A copy of the affidavit and motion were mailed to defendant on January 28, 1947. On the same day Mr. Best filed a notice of motion for a continuance, accompanied by an affidavit of Mrs. Stern, reciting that on February 3, 1947, the defendant would move for a continuance of the trial due to the fact that her counsel had withdrawn; that she had arranged to employ other counsel and that there was not sufficient time for said counsel to prepare for trial. On January 28, 1947, another such motion was filed by attorney Best seeking a continuance of the trial for the claimed reason that the instant attorney employed by defendant had withdrawn as her counsel and that she "had arranged to employ other counsel". This application was opposed by plaintiff. On February 3, 1947, the day previous to the date originally set for the trial, the motions were argued. The original attorneys for defendant were permitted to withdraw from the case. The motion for continuance was continued to February 4, 1947, for further hearing.

Attorney Carl Davis appeared and stated that he would appear for his firm and represent the defendant at that time. On February 4, 1947, on the day of trial, Mr. Davis moved for permission to withdraw from the case, which motion was granted and the trial of the case was ordered for 2 p. m. on that day. Defendant appeared in the afternoon with another attorney, Mr. Briskin, who moved the court for a continuance until March 6, 1947. The motion was granted. On February 28, 1947, plaintiff and defendant appeared with their respective counsel before Honorable Russell S. Waite, Judge of department 1. It was there stipulated that the cause "may be heard forthwith, and without further notice." Plaintiff offered no evidence. Defendant and cross-complainant was sworn and examined. The court then noted in its minutes that defendant did not desire to proceed with the hearing, and an entry was made ordering that the case remain set for trial on March 6, 1947, in department 2. On February 28, 1947, defendant filed a substitution of attorneys, substituting Maurice Rose, Esq. in the place and stead of Mr. Briskin, and also filed a dismissal of defendant's second amended cross-complaint. Defendant filed an action in Los Angeles County on March 3, 1947, between

the same parties and asked for a rescission of the property settlement agreement she had signed. She then filed, on March 5, 1947, a motion to dismiss the entire action based on the ground that plaintiff failed to prove any case on February 8, 1947, in support of his complaint and that he had, on that occasion, "declared" a dismissal thereof. She noticed this motion to be heard on March 10, 1947, as well as a motion to stay or continue the trial of the Riverside County action until that action was determined, or until she was prepared for trial. These motions were denied on *March 10, 1947,* by Judge Waite, after Judge Dehy had granted the divorce.

On March 5, 1947, defendant also filed an objection to going to trial before Judge Morton, upon the ground that he was disqualified under section 170, subdivision 5 of the Code of Civil Procedure. A voluminous affidavit in support of the claimed disqualification was filed by defendant. On March 6, 1947, Judge Morton transferred the case to another department presided over by Hon. William D. Dehy, who had been and was then sitting in said county by appointment of the Judicial Council. Counsel for defendant then challenged Judge Dehy's qualifications to proceed at the trial on the claimed ground that Judge Morton had no power or jurisdiction to assign the case to Judge Dehy, under section 170 of the Code of Civil Procedure. He ordered the case to proceed. Mr. Rose refused to partake in the trial. Evidence was produced by plaintiff. Defendant produced no evidence. The court found that no community property had been acquired by the parties during their marriage; that the property standing in plaintiff's name was his separate property. It found acts of cruelty were inflicted on plaintiff by defendant, denied defendant any relief and granted a divorce to plaintiff. A decree was entered accordingly. On March 24, 1947, defendant filed a motion for new trial. It was set for hearing on May 1, 1947, before Judge Dehy by Judge Waite. Defendant filed another voluminous affidavit in support of the motion for new trial. On March 24, 1947, defendant filed a bias and prejudice affidavit against Judge Dehy. His written denial thereof was apparently not filed until after the date of its verification, which was on April 18, 1947, more than five days after the filing of the affidavit of prejudice. On April 14, 1947, defendant filed a motion to vacate the findings and the interlocutory decree and objected to the hearing of such motions by Judge Dehy. On April 17, 1947, Judge Waite ordered that said motions be heard on May 1, 1947, in department 2, before Judge Dehy. On April 25, 1947, the County Clerk notified the chairman of the State Judicial Council of the fact that the written objections to any further hearings before Judge Dehy had been filed and that the judge failed to deny his disqualifications to act within five days and that the parties had not agreed upon a judge to determine the matter of Judge Dehy's disqualifications. Mr. Rose wrote the county clerk that he would not be present on May 1st, because he was busy in court in Los Angeles, and further that his client objected to any hearing before Judge Dehy; that he did not ask for any adjournment; that "as an observer" he "would have made no motion"; that "therefore my absence will make no difference"; and on April 28, 1947, the clerk of the judicial council directed by letter that the question of Judge Dehy's disqualifications be heard before Judge Morton. Judge Morton, after writing his reasons, graciously declined and suggested the name of Judge Waite. On May 8, 1947, about the time defendant filed her notice of appeal, there was filed an assignment of Judge Waite to hear and determine Judge Dehy's claimed disqualifications. On May 1, 1947, plaintiff and his counsel appeared in Judge Morton's court (department 2). Defendant was present without counsel. Plaintiff moved to transfer the pending matters to Judge Waite's court. Judge Morton, as presiding judge of the several courts, held that since the hearing was noticed "before Judge William D. Dehy", and was so assigned by Judge Waite, the matter was not properly before him for determination; that a motion for new trial must be heard and determined by the judge who presided at the trial except in case of the inability of such judge or in case of his absence from the county wherein the trial was had; that since Judge Dehy was then holding court in that county on that day, he refused to

make any further order in reference thereto. The court then requested the bailiff to "assist" defendant in finding the department in which Judge Dehy was holding court. The minutes of Judge Dehy's department show that on May 1, 1947, at 10 a.m. plaintiff and his counsel were present and defendant was present without counsel. Plaintiff moved that the cause be transferred to department 1 for hearing before Judge Waite, due to the fact that Judge Dehy was disqualified because he failed to file his written denial of his claimed disqualifications within five days. The motion was granted.

In department 1, before Judge Waite, with the same parties present, plaintiff moved that court for an order denying the motions of defendant for a new trial and to vacate findings and the interlocutory judgment of divorce. Defendant's motions were denied. Defendant now appeals from (1) the interlocutory judgment of divorce. (2) From the order of Judge Waite denying defendant's motion for new trial and the motion to vacate the findings and judgment. She also seeks to review the following orders: (a) Minute order of Judge Morton of March 6, 1947, assigning the case to Judge Dehy, without the agreement thereto of the parties, after the filing of a disqualification affidavit against Judge Morton on March 5, 1947. (b) The minute orders of Judge Waite made on April 11, 1947, and on April 17, 1947, setting the motions for hearing and requesting Judge Dehy to sit and act in department 2 on May 1, 1947, and to then and there hear defendant's motion for a new trial. (c) The order of May 1, 1947, by Judge Morton requesting the bailiff "to assist" defendant in finding department 2. (d) The order made on May 6, 1947, by Judge Dehy, transferring the said motions to Judge Waite's department.

[1] As to the question arising under review of the order lettered (a) in reference to the assignment of the action, on March 6, 1947, by Judge Morton, who was also denominated presiding judge, to the department then presided over by Judge Dehy, who had been previously assigned to sit in that county in extra sessions, after a disqualifying affidavit had been filed on March 5, 1947, against Judge Morton, it appears that it has been partially answered in the case of People v. Hickman, 204 Cal. 470, 480, 268 P. 909, 913, 270 P. 1117. With but one exception the case is factually similar in reference to the claim that Judge Dehy was without jurisdiction to try the cause. It was there stated that: "When this cause came on for trial, objection was made to proceeding before the judge who had taken and entered the pleas, upon the ground that he was biased and prejudiced against the defendant. The judge filed a denial of bias or prejudice, but, upon the ground that he desired to avoid arresting the trial by a protracted hearing with reference to his qualifications, and in order that the cause might be heard and determined with the least possible delay, consented to retire from the case. The presiding judge *thereupon* made and caused to be entered an order that the trial proceed before another judge of the superior court, then sitting in the Los Angeles court under assignment by the chairman of the judicial council. The procedure followed was in strict accord with the terms of the constitutional provision, supra, and with section 170 of the Code of Civil Procedure." (Italics ours.)

In the instant case a disqualifying affidavit had been filed against the so-called presiding judge. In that case there had not been such an affidavit filed against the presiding judge. Had Judge Morton been the one and only judge presiding in that county when the affiadavit of prejudice was filed as to him and he failed to answer it within the five days, under section 170 subdivision 5 of the Code of Civil Procedure, the *action* could then only be heard by a judge not disqualified, who may be agreed upon by the parties, or in the event of their failure to agree, by one appointed by the chairman of the judicial council. But under the proviso in that same paragraph, when there are two or more judges of the same court, as here, one of whom is disqualified, the action or proceeding may be transferred to a judge who is not disqualified. The act does not designate which judge should execute the transfer or make the assignment. In the Hickman case the presiding judge made the assignment or transfer. In the in-

stant case the so-called presiding judge was also the trial judge who was about to proceed with the trial of the action.

Defendant's counsel argues that, under the last paragraph of that subdivision, since defendant did not agree upon the judge to which the case could be assigned, Judge Morton, either as the presiding judge or as trial judge, had no power to assign the case to Judge Dehy; that only the chairman of the Judicial Council could, under the circumstances, assign the case for trial before another judge and therefore no judgment rendered by Judge Dehy was valid. There is language in Rosenfield v. Vosper, 70 Cal. App.2d 217, 223, 160 P.2d 842, supporting defendant's contention. However, the statement there made was not necessary to the decision in that case and is opposed to the holding in People v. Hickman, supra, which is to the effect that the presiding judge may order that the trial proceed before another judge, where there are two or more judges of the same Superior Court.

While it is clear that a disqualified judge may not assign or designate a particular judge to *hear and determine the question of his disqualification,* it does appear from the proviso that the *case* may be assigned to another department for trial.

Article VI, section 7 of the Constitution provides: "The judges of each superior court in which there are more than two judges sitting, shall choose, from their own number, a presiding judge, who may be removed as such at their pleasure. Subject to the regulations of the judicial council, he shall distribute the business of the court among the judges, and prescribe the order of business."

Rule VIII of the Rules of the Judicial Council pertaining to the Superior Courts (213 Cal. lxxxv) provides that "In all counties having a Presiding Judge, cases shall be set for trial under the supervision of the Presiding Judge. In all other counties, cases shall be set for trial under the supervision of the judge or judges thereof." See, also, Rule XXI.

In Riverside County the legislature has created only two departments of the Superior Court, in which case it seems logical that under the circumstances where a disqualifying affidavit is filed against the trial judge, and to avoid possible delay in determining the question of his disqualification, he consents to retire from the case, he should be permitted to immediately assign the action to another department and before a judge who is not disqualified. Therefore, there was no prejudicial error committed in the assignment, by Judge Morton, of this action for trial before another department of the Superior Court of that county and before a judge then duly assigned by the chairman of the Judicial Council to so act. People v. Hickman, supra; Petition of Los Angeles Trust Company, 158 Cal. 603, 608, 112 P. 56; White v. Superior Court, 110 Cal. 60, 66, 42 P. 480. As indicative of the legislative intent in this respect, see, also, Sec. 170.5 of the Code of Civil Procedure (held unconstitutional for certain reasons there indicated in Austin v. Lambert, 11 Cal.2d 73, 77 P.2d 849, 115 A.L.R. 849.)

[2] The same conclusion, that there was no prejudicial error committed, must be reached in respect to the asignment by Judge Dehy of the hearing on the motion for new trial to Judge Waite's department, which judge was the one and only judge remaining who was not disqualified. Mathias v. DeLucchi, 21 Cal.App.2d 718, 69 P.2d 1005. See, also, Rule XIII of the Rules of the Superior Court, supra.

Judge Waite had jurisdiction to hear and determine the motions transferred to his court and the transfer of the cause to his department by Judge Dehy, under the circumstances, rather than a transfer by a presiding judge, did not prejudice defendant's rights. Petition of Los Angeles Trust Co., supra; Bradley v. Van Nostrand, 189 Cal. 457, 208 P. 690; Rule XIX, subdivision 4, supra.

Since the evidence supporting plaintiff's allegation in his complaint as to extreme cruelty is quite substantial, the remaining questions will be considered in connection with defendant's claim of error in reference to the ruling of the court in refusing to grant defendant further continuances.

As formerly noted, on October 7, 1946, the original trial date was regularly fixed for February 4, 1947 (nearly four months after issues were joined and the case was

set for trial). Defendant, through her first set of attorneys, was negotiating as to the terms and amount that plaintiff would offer defendant by way of settlement of her claims. From a letter to her from her attorneys it appears that at least 30 days prior to the trial date defendant was informed that if she did not accept the offer made by plaintiff these particular attorneys would not act as her trial lawyers and it would be necessary to obtain some other lawyers if she elected to go to trial. At least 30 days prior to the trial date Mr. Best notified counsel for plaintiff that if defendant did not accept the offer he would withdraw from the case. Counsel for plaintiff signed an affidavit opposing any continuance and further alleged that on January 24, 1947, Attorney Davis came to his office, with defendant's papers, which he believed Mr. Best had turned over to him, and stated that he had been retained by Mrs. Stern; that he told Mr. Davis that he could not consent to any continuance and explained as a reason that the case had been pending for many months, had been set for trial for a long time and that certain Illinois property was involved; that he was ready for trial and had subpoenaed many witnesses from out of the county. Defendant's motion for continuance was made on February 3, 1947. The trial court continued the motion until February 4, 1947, at 10 a.m., the date set for the trial of the action. Attorney Davis then withdrew from the case and a continuance was granted until 2 p.m. Mr. Briskin then appeared as defendant's attorney and the case was continued for trial to March 6, 1947, in department 2. The proceedings of February 28, 1947, in department 1, where counsel stipulated that the case might then be heard without further notice as a default matter based upon the cross-complaint indicate that defendant, through someone's advice, other than Mr. Briskin, intended to lead counsel for plaintiff into a trap by having him dismiss plaintiff's complaint and then in the middle of her testimony dismiss her cross-complaint, leaving no action pending against either party. However, the record shows that counsel for plaintiff did not dismiss plaintiff's cause of action. He merely announced: "At this time the plaintiff does not now offer any evidence in support of the complaint". Mr. Briskin gracefully withdrew from the case and Mr. Rose, who was seated in the court room, was substituted in his stead. Mrs. Stern stated to the court from the witness stand: "I want to tell you, Mr. Rose came here to defend me". No ruling was made as to defendant's personal request to dismiss the cross-complaint. The trial court announced, in open court, and ordered that the case remain on the trial calendar of department 2 for March 6th. It was at that time Mr. Thompson announced that this is "the eighth attorney that has represented Mrs. Stern" and "this is the third time, in the middle of a proceeding, one attorney has withdrawn and somebody else has stepped into the case. * * * This matter cannot continue indefinitely, or it will exhaust the entire bar of the State of California."

There is evidence that Mr. Rose had been previously consulted by Mrs. Stern. Up to this point, surely, defendant could not complain of the trial court's rulings in reference to a continuance. On the trial date no request for continuance was made. Judge Morton, in department 2, against whom a disqualifying affidavit had been filed, apparently admitted his disqualifications and assigned the case to department 3, Judge Dehy's department. The question of the validity of this assignment has been heretofore covered.

Mr. Rose then appeared in department 3 before Judge Dehy. He had previously dismissed defendant's cross-complaint. He then objected to "any further proceedings" and asked for a continuance of 30 days because he "believed this matter would come up before Judge Morton" and since he filed an affidavit of prejudice against him, he did not believe the case would be heard until his disqualification was determined by some judge assigned by the Chairman of the Judicial Council. The trial court was then requested by defendant's counsel to read affidavits in support of a motion for continuance, which motion was to be heard on March 10, 1947. The judge, at his request, continued the case until 2 p.m. "to look over the files and go through them". The judge then addressed Mr. Rose and stated that he was denying his application for continuance. Mr. Rose then replied to the court:

"The application (for continuance) was withdrawn. I said I would not participate on the ground the court is without jurisdiction."

It rather clearly appears from the record that counsel for defendant was therefore relying solely on his claim that Judge Dehy had no jurisdiction to try the action on the ground that Judge Morton had assigned the action to that department for trial after a disqualifying affidavit had been filed against him and that he abandoned his application for a continuance on the grounds specified in his affidavit. Mr. Rose remained in the courtroom throughout the hearing as an "onlooker".

The question of Judge Dehy's jurisdiction to hear said cause has heretofore been decided against defendant's claim. While the trial court might have been fully justified in granting a continuance under the facts related if that question were properly before him, it definitely appears that counsel withdrew or abandoned his application for a continuance and elected to rest his point on the question of *jurisdiction* of the court to act. Under these circumstances, and in view of the showing made under the affidavits submitted, it cannot be said that Judge Dehy had no *jurisdiction* to proceed or that he abused his discretion in proceeding with the hearing at that time.

[3] Judge Waite, on April 11th, according to his affidavit, fixed May 1st as the time, and department 2 as the place, and named Judge Dehy to hear and determine the motion for new trial and motion to set aside the interlocutory decree at the personal request and suggestion of defendant herself. He stated also that at the time she remarked that she was requested by her attorney, Mr. Rose, to contact the court for that purpose; that he (Judge Waite) told her Judge Morton had declared himself to be disqualified and that was the reason he was setting the matter for hearing. Defendant filed an affidavit refuting, to some extent, these statements of Judge Waite. Mr. Rose had notice of the time and place of hearing of said motions. Instead of appearing at that time and place and asking for a continuance, he apparently relied solely on his belief that Judge Dehy had no legal right to assign the hearing on the motions to the one and only remaining judge in that county who was not disqualified. (We have disposed of this question adversely to defendant.) In his letter Mr. Rose specifically states he intended to be in Judge Dehy's court on May 1st only "as an observer"; that since his client objected to any hearing before Judge Dehy, *"I do not ask for any adjournment.* (Italics ours.) * * * As an observer I would have made no motion". Defendant's counsel, therefore, again relying solely on his belief that Judge Dehy had no right or jurisdiction to transfer the hearings on the motion to the only remaining judge in that county not disqualified, should not now be allowed to claim prejudicial error and abuse of discretion on the part of the court in not continuing the matter to a subsequent date.

Judgment and orders affirmed.

BARNARD, P. J., concurs.




83 Cal.App.2d 689

**SMITH v. CANTLAY & TANXOLA, Inc., et al.**

**Civ. No. 3818.**

District Court of Appeal, Fourth District, California.

Feb. 17, 1948.

**1. Automobiles ⇐245(13, 60)**

Under evidence that driver of automobile in which guest was riding was on the right half of the highway and driving in a careful manner when driver of defendant's truck and trailer crossed over the highway and stopped in the path of the automobile when visibility was impaired by a fog, questions of negligence of defendant's driver and proximate cause were properly submitted to the jury.

**2. Automobiles ⇐245(88)**

Contributory negligence of guest in automobile which collided with a truck

which crossed over to the wrong side of the highway on a foggy morning in failing to make any comment to the driver with respect to weather conditions and condition of the highway was properly submitted to the jury.

---

Appeal from Superior Court, San Bernardino County; Archie D. Mitchell, Judge.

Action by George W. Smith against Cantlay & Tanxola, Inc., and another for injury allegedly sustained in a collision between an automobile in which plaintiff was riding as a guest, and a truck. From an adverse judgment, defendants appeal.

Affirmed.

Shaw, Davis & Roberts, of Riverside, for appellants.

Wm. K. Lindsay, of Los Angeles, for respondent.

GRIFFIN, Justice.

Action for damages for injury from collision of an automobile and a tank truck with trailer. Plaintiff Smith and his fellow serviceman, Walton, were stationed near Barstow. About 7:30 a. m. on May 8, 1945, they secured a ride from San Bernardino with Lieutenant Dillon, who was driving his automobile from that city to Victorville on Highway 66, which highway runs in a general easterly and westerly direction. Near the Cajon Pass the Dillon car ran into the tank truck and trailer which had been proceeding towards San Bernardino. This truck was owned by defendant corporation and was being driven by its driver, defendant Marcum.

Marcum testified that he left Barstow for San Bernardino in the early morning of May 8, 1945; that it was a very foggy morning and visibility varied between 10 and 75 feet; that he was following another truck or trailer driven by one Hasha; that as he reached the summit, where there was a cafe, he discovered that two other trucks with trailers were parked on the north side of the highway; that there was no additional room for him to park so he pulled his truck and trailer south across the highway and parked off of and parallel with it and about 10 feet to the south thereof in a space in front of the cafe; that he went in and ate and waited for the fog to raise; that there was no improvement in that condition; that he left the cafe with Hasha, got into his truck, turned on the lights, sounded his horn, placed his truck in low gear and "took off"; that he pulled across the highway to the north at a 45 degree angle; that at about the time the truck reached the center line of the highway he stopped his truck because he heard, but did not see, a car coming from his left traveling toward Victorville; that he could not form any estimate of its speed but believed the motor was being accelerated.

The east-bound car in which plaintiff was riding struck defendant's truck near its left front wheel. Plaintiff's head was thrown through the windshield of the Dillon car and there were multiple injuries to plaintiff, the most serious of which was a permanent foot and knee fracture.

Plaintiff testified that both headlights and fog lights were burning on the Dillon car; that it was proceeding about two or three feet south of the center lane and about 20 to 25 miles per hour; that the weather was cold and the windows were up; that the windshield wipers were working; that suddenly plaintiff saw headlights directly in front of him "pointed off at sort of an angle" and about 50 feet away in the lane of traffic occupied by the Dillon car; that no warning sound had been heard; that plaintiff immediately "hollered" to Dillon "look out"; that immediately the brakes were applied and he felt the car making a slight swerve. This evidence was corroborated by Mr. Walton, the other passenger in the Dillon car. Dillon was not present to testify.

Hasha testified that he and Marcum came out of the cafe together; that due to the fog, visibility was only about 25 to 30 feet; that he walked across the highway to his truck; that he could not see Marcum's truck from there but heard him start the motor and heard the horn sound; that soon thereafter he heard the brakes being applied on the Marcum truck and then a crash; that thereafter he noticed no lights burning on the Dillon car; that he looked at the wreck and noticed the headlight

switch on the Dillon car was not on, but did not examine the switch as to the fog lights.

Upon this evidence the jury returned a verdict for $10,000 for plaintiff. Defendants appeal from the judgment and raise no question as to the amount of the verdict, rulings of the court or instructions given. Two contentions are presented on this appeal: (1) that the sole proximate cause of the collision was the result of the negligence of Lieutenant Dillon, and that the defendants were free from negligence; and (2) that plaintiff was guilty of contributory negligence as a matter of law.

As to the first contention it is argued that, under the evidence, Lieutenant Dillon was violating section 510 of the Vehicle Code in reference to the basic speed law by proceeding at a rate of speed between 20 and 25 miles per hour, when his visibility of the roadway was impaired by the fog, and without proper headlights.

[1] The evidence as to whether the Dillon car was burning headlights or fog lights at the time is in conflict. From all the evidence it appears that he was driving on his right half of the highway and in a careful and prudent manner and was suddenly faced with a dangerous situation created by the act of the defendant driver in crossing over the highway and stopping in Dillon's pathway with a long truck and trailer. Under the conditions prevailing the negligence of the defendant driver was clearly established by the evidence. (Kelley v. Hodge Transportation System, 197 Cal. 598, 242 P. 76.) The question of the proximate cause of the accident and injury was left to the jury to determine under proper instruction and it found against defendants on this question. The evidence fully supports its findings.

[2] The second argument has less merit. The claimed contributory negligence of plaintiff is predicated upon the theory that plaintiff assumed the risk involved by riding with Lieutenant Dillon, who kept the windows of his car up and who drove at the speed indicated without plaintiff making any comment with respect to the weather conditions and the possibility of danger at the top of the pass, since plaintiff was familiar with the condition of the highway at that point. This question of plaintiff's claimed negligence was purely a question of fact for the jury.

Judgment affirmed.

BARNARD, P. J., concurs.




## LA PORTE v. HOUSTON et al. *

Civ. 16165.

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1948.

Hearing Granted April 19, 1948.

**1. Automobiles ⇐242(2)**

Where automobile brakes had been set and gear lever placed in neutral, but as garage mechanic tested motor automobile lurched forward striking owner and such phenomenon occurs so infrequently that it has never been witnessed by the majority of mechanics, the res ipsa loquitur doctrine was not applicable.

**2. Automobiles ⇐216**

Where automobile lurched forward striking automobile owner while garage mechanic was testing motor, in taking his stand in front of the automobile the owner assumed the risk of its jumping toward him.

**3. Negligence ⇐121(2)**

Where knowledge of the danger of a situation is as accessible to plaintiff as to defendant, the res ipsa loquitur doctrine is not applicable.

**4. Negligence ⇐105**

If plaintiff has knowledge or means of knowledge of existence of a danger, or if the danger is obvious, he assumes such danger when he places himself in a position where it might strike.

**5. Automobiles ⇐246(58)**

In action by automobile owner for injuries sustained when automobile lurched

* Subsequent opinion 199 P.2d 665.

forward against him while motor was being tested by garage mechanic, instruction on assumption of risk by owner was proper.

**6. Automobiles ⇐244(40), 246(57)**

In action by automobile owner for injuries sustained when his automobile lurched forward against him while motor was being adjusted by garage mechanic, evidence authorized instruction on, and sustained finding of, unavoidable accident.

---

Appeal from Superior Court, Los Angeles County; Stanley N. Barnes, Judge.

Personal injury action by C. C. LaPorte against Jack U. Houston and another. Judgment for defendants and plaintiff appeals.

Affirmed.

Charles W. Wolfe, of Los Angeles, for appellant.

Walhfred Jacobson, of Long Beach, for respondents.

MOORE, Presiding Justice.

Appellant sued for damages suffered when his own automobile at the garage of respondents lurched forward against him while it was being serviced by respondent Krussel. Judgment having been entered upon an adverse verdict he now demands a reversal upon the grounds (1) that the court refused to instruct upon the doctrine of res ipsa loquitur, and (2) erroneously instructed an appellant's assumption of risk and (3) on unavoidable accident.

Pursuant to the suggestion of a mechanic in the employ of respondents a week prior to the events here discussed, appellant drove his hydromatic Oldsmobile into the garage of respondents for the purpose of having them do their "regular tune-up job." At the time the car made its sudden leap no one was working on it except respondent Krussel. Because of such fact appellant insists that the doctrine of res ipsa loquitur applied. However, respondents contend, and produced substantial evidence to show that the conduct of the machine was so strange that they had never observed or heard of it before, and that they were therefore free from negligence in the premises. An appraisal of the two contentions and of the events that transpired prior to the unfortunate incident will be facilitated by first describing the construction of the transmission with reference to its gear shift.

The gears are shifted by moving a lever attached to the steering post. The lever is connected with a slot of four divisions, the first of which is the neutral, marked "N." When the lever stands in "N" the motor is detached and cannot transmit its power to the machinery that drives the wheels. It is so constructed that the starter will not turn unless the gear is in "N." To insure against the movement of the car in operating the starter another lever is attached to the starting pedal which the starter causes to strike the shifting lever, throwing it into neutral. Other slots are designated "drive", "low", and "reverse." Properly to park appellant's vehicle a lever on the left side of the dash board is used to set the brake and the gear lever is put in the neutral slot. By such process appellant parked his machine in the garage on a slope at a slight angle from due south, the front being about three feet from a two foot brick pillar which stood slightly to the west of the center of the vehicle. The left half of its front was clear of the pillar and the space to the left and rear of the machine was open. On parking appellant put it in neutral, disconnected the ignition, set his brakes and left it for the tune-up.

In appellant's absence respondent Krussel cleaned and reset the carburetor and on checking the parts found all in a satisfactory condition. While he gave it the treatment the brake continued set and the transmission remained in neutral, except that further to test the machine Krussel occupied the driver's seat and stepped on the accelerator. The vehicle did not move although the motor ran smoothly. An hour later Krussel was hailed by appellant, who having started the motor told Krussel there was still some trouble. The latter, having stated that he would retest and readjust the carburetor, took his screw driver to the right side and again began to adjust that device. For a minute appellant occupied the driver's seat as Krussel raced the motor.

He then took a position in front of the vehicle while Krussel continued his usual customary routine of checking and adjusting, when suddenly the pile of inanimate steel became a thing of life, leaped against both appellant and the pillar, causing the latter's injuries.

The occurrence of this strange phenomenon baffled the experts. Appellant had no knowledge of such internal condition as would have made such antic possible, inasmuch as it had never before offended by the same or similar behavior. Neither had either of the respondents ever contacted a motor car that shifted automatically from a neutral to a drive position and back to neutral again after it had moved forward. But because Krussel was still engaged in an attempt to adjust its inward parts appellant sought to induce the trial court to instruct the jury on the doctrine of res ipsa loquitur.

That the jump of the car was not because of Krussel's racing the motor is established by the fact that appellant had raced it even faster only a moment before the accident. Appellant had driven the car for three years without having witnessed the phenomenon or known of its possibility. Mr. Krussel had been a motor mechanic for over 20 years yet he never suspected the possibility of such an incident. The witness Paden, although he had been schooled by General Motors, makers of the Oldsmobile, had never known of such an occurrence. The witness Richardson, an Oldsmobile expert, assistant service manager of an Oldsmobile agency, testified on behalf of appellant that he had known of some instances where an Oldsmobile moved forward on application of gas, with the gear shift in neutral and brakes not set; that it is not normal for that make of car to give such a demonstration; that he did not know the cause but gave a theoretical exposition of how it might occur when the motor when accelerated is thrown to the right, creating a strain on the shift lever mechanism and throttle.

[1] The jury and the trial court did not regard this testimony of such character as to warrant the finding that respondents should reasonably have anticipated the lurch. In fact Richardson testified that no one can tell in advance when an Oldsmobile will do this—"not more than one car in a thousand." It was not the kind of an occurrence which is contemplated by the doctrine of res ipsa loquitur and which "does not ordinarily occur in the absence of negligence." In fact the evidence is overwhelming that the phenomenon occurs so infrequently that it may be classified as one that had never been witnessed by the majority of mechanics. It was not caused by an agency or instrumentality within the exclusive control of respondents. Having brakes set and the gear lever in neutral as the mechanic tested the motor answered every requirement of reasonable caution. If there was a potential peril within the machinery of the automobile wholly unknown to respondents which could not have been discovered by ordinary care then it was not within their control, exclusive or otherwise. Their control of it was possible only if they had knowledge of its existence or reasonable cause to suspect it. It follows that since reasonable care was exercised by respondents in testing the motor and since the lurch was not caused by an agency or instrumentality within their exclusive control the doctrine of res ipsa loquitur was not applicable. Sutera v. Palmieri, 79 Cal.App.2d 359, 363, 180 P.2d 414.

The authorities cited by appellant do not reach such a situation as is found in the instant case. Lincoln v. Quick, 133 Cal.App. 433, holds at page 437, 24 P.2d 245, at page 247, that the doctrine of res ipsa loquitur applies "only where the plaintiff does not know what caused the accident and negligence may be presumed from the fact that an accident occurred, in view of the general circumstances." John v. B. B. McGinnis Co., Inc., 37 Cal.App.2d 176, 99 P.2d 323, and Cooper v. Quandt, 105 Cal. App. 506, 288 P. 79, both disclose facts that present ideal illustrations for the correct application of the doctrine. Miss John fell through a trap door in McGinnis' store. The Quandts admitted that one of their employees had dropped the plank that caused plaintiffs' injury. Keller v. Pacific Telephone & Telegraph Co., 2 Cal.App.2d 513, at page 525, 38 P.2d 182, at page 187, holds that the doctrine is applicable only in

the absence of "actual knowledge of just how an accident occurs. * * * The very hypothesis of the doctrine is that the plaintiff has no knowledge of just what caused the accident, and that, since the instrumentality by means of which the accident occurred is solely within the control of the defendant, negligence will be inferred upon proof of a prima facie case, in the absence of an adequate explanation of the part of the defendant exempting him from liability." The evidence of respondents as to the cause of the accident in the instant case is sufficiently adequate to exculpate them from a finding of negligence. In Meyer v. Tobin, 214 Cal. 135, 4 P.2d 542, 543, plaintiff repaired the concrete mixer of defendant and followed it to observe the results of his handicraft. As the machine proceeded along the street the container suddenly fell upon plaintiff. Defendant introduced testimony to the effect that there were four ways in which the container might fall and that neither was the cause of the accident. But he did not sustain his burden by proof that had "some tendency to show that the accident occurred without the negligence of his employees."

[2-5] In taking his stand in front of the car appellant assumed the risk of its jumping toward him. Where knowledge of the danger of a situation is as accessible to plaintiff as to defendant, the doctrine of res ipsa loquitur is not applicable (Johnson v. Ostrom, 128 Cal.App. 38, 43, 16 P.2d 794); from which it is a fair deduction that if plaintiff has knowledge or the means of knowledge of the existence of a danger, or if the danger is obvious, he assumes such danger when he places himself in a position where it might strike. Wilmot v. Golden Gate Inv. Co., 41 Cal.App.2d 664, 668, 107 P.2d 263. Conceding that appellant did not know of the danger that his gear lever would automatically jump from the neutral slot to the drive slot, as he testified, by what mode of reasoning can he obviate the consequences of the danger of standing in front of his car parked frontwards on a declivity and undergoing a test? He was not there on the advice or suggestion of another. If either party then had means of knowledge of the peril it was appellant, who at the trial produced an expert mechanic to say that one time in a thousand the gear in a hydromatic transmission mysteriously connects with the engine, causing the standing car to leap. With such knowledge available he should have sought a place of safety out of bounds of the car's jump. By standing in front of it he assumed the dangers inherent in his own internally defective machine. To stand in front of an automobile headed down an incline while it is undergoing repairs at the hands of another may, in reckless daring or foolhardiness, be assimilated to the behavior of him who stands submissively before the "unloaded" gun pointed toward his heart. By virtue of the common knowledge which adult men possess concerning the "unexpected" incidents that inhere in devices which operate according to the laws of physics, appellant as an experienced motorist is in no position to complain that he was not directed where to stand for safety while his automobile was undergoing repairs. The instruction on the assumption of risk by appellant was not error.

[6] Finally, it is contended that appellant was prejudiced by the instruction with reference to an unavoidable accident. Respondents both testified that the usual practice was followed by Krussel in setting the emergency brake and putting the gear lever in neutral. The witness Paden testified that the usual shop practice in tuning a motor of such an Oldsmobile as that of appellant is to "set your emergency brake and when you start the car it has to be in neutral." Mr. Richardson testified that it cannot be told in advance whether an Oldsmobile will leap when accelerated. In view of the conformance of respondent Krussel's procedure with customary practice and the inability of any one to prognosticate a lurch, the event complained of was correctly found to be unavoidable.

Burke v. John E. Marshall, Inc., 42 Cal. App.2d 195, 108 P.2d 738, and Riley v. Berkeley Motors, Inc., 1 Cal.App.2d 217, 36 P.2d 398, are cited by appellant in support of his claim that such instruction was error. Neither case is pertinent since in each there was proof of defendant's negligence.

In no view of the facts at bar can negligence be attributed to respondents. McBains' California Evidence Manual, sec. 421. Even though the lurch might have been avoided by putting the gear lever in "drive" or "reverse", such is not the usual practice in parking an automobile, and if the lever had been so placed Krussel could not have tested the motor. The machine was there for a "tuning up" which was possible only with the motor disconnected.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.




83 Cal.App.2d 570

**HAGAN v. GILBERT et al.**

**Civ. 15906.**

District Court of Appeal, Second District, Division 3, California.

Feb. 9, 1948.

**1. Venue ⇐63**

Where additional statements in defendants' amended affidavit of merits in support of motion for change of venue added nothing to the legal sufficiency of original affidavit of merits and were not prejudicial to plaintiff, no notice to plaintiff of proposed amendment was required. Code Civ.Proc. § 473.

**2. Venue ⇐41**

Where proper grounds exist for transferring an action from one county to another, a defendant entitled to such transfer may not be deprived of that right because other codefendants have not been joined in seeking the transfer since it is not necessary to show in support of motion for change of venue that affidavit of merits was made on behalf of all nonresident defendants.

**3. Venue ⇐63**

The statement in amended affidavit of merits in support of motion for change of venue that a designated defendant was not "connected" with the other defendants was ineffectual and therefore no notice to plaintiff of the proposed amendment in that respect was required. Code Civ.Proc. § 473.

**4. Venue ⇐22(3)**

When a defendant resides in county where an action is commenced, that county is a proper place for trial of the action, however, if such resident defendant is not a necessary party and his residence is only ground for retaining jurisdiction in such county, a codefendant who resides in another county is entitled to have place of trial changed to county of his residence. Code Civ.Proc. § 395.

**5. Venue ⇐22(3)**

Where cause of action alleged that resident defendant sold goods to nonresident defendants for a certain sum and assigned "all causes of action" to plaintiff without alleging that any obligation on part of resident defendant was created in favor of plaintiff, no cause of action was stated against resident defendant so as to warrant retaining jurisdiction in county of such defendant's residence as against motion of nonresident defendants to change venue. Code Civ.Proc. § 395.

**6. Venue ⇐36**

Where nonresident defendant is entitled to a change of venue upon one cause of action stated in a complaint he may not be deprived of that right because plaintiff has included other causes of action in the same complaint upon which such defendant is not entitled to a change of venue. Code Civ.Proc. § 395.

**7. Venue ⇐70**

Evidence supported implied finding that alleged obligation was incurred in San Francisco, that contract was entered into in San Francisco, and that, under the venue statute, contract was deemed to be performable there in absence of special contract in writing to the contrary. Code Civ.Proc. § 395.

**8. Venue ⇐70**

Where complaint at most alleged that in Los Angeles county, defendants "were

indebted" to plaintiff, statements of one of defendants in affidavit in support of motion for change of venue indicating that contract was made and performable in San Francisco, were statements of ultimate fact rather than mere conclusions of law, and, in absence of contradictory evidence by plaintiff, a change of venue from Los Angeles to San Francisco was authorized. Code Civ.Proc. § 395.

**9. Venue ⇐65**

In a proceeding on a motion for a change of venue evidence may be presented in the form of affidavits. Code Civ.Proc. § 395.

**10. Venue ⇐70**

Where complaint was silent as to where contract sued upon was made or was to be performed, after one of defendants filed affidavit for change of venue from Los Angeles to San Francisco alleging that contract was "in fact" entered into in San Francisco, and plaintiff made general statements that sales were made in Los Angeles, f.o.b. Los Angeles, and that title passed in Los Angeles, statements were not inconsistent with conclusion that obligation was incurred in San Francisco, and court was justified in changing venue to San Francisco. Code Civ.Proc. § 395.

**11. Pleading ⇐45**

A pleader is required to frame his complaint in such a way as to make it clear that he is entitled to retain the cause in the county in which the action is commenced. Code Civ.Proc § 395.

**12. Appeal and error ⇐912**

As error is not presumed and all intendments are in favor of action of trial court, affidavits in behalf of successful party on motion for change of venue are to be deemed to establish not only facts directly stated therein but also all facts which may reasonably be inferred or presumed from the direct and positive statements. Code Civ.Proc. § 395.

**13. Appeal and error ⇐1024(1)**

A ruling of a trial court upon issues of fact raised by conflicting affidavits is entitled, upon appeal, to the same weight as a finding on conflicting evidence as to issues of fact.

**14. Appeal and error ⇐931(1)**

Where an issue of fact has been tried on affidavits, all conflicts must be resolved in favor of prevailing party and all reasonable inferences which are to be drawn must be in support of trial court's order.

---

Appeal from Superior Court, Los Angeles County; Allen W. Ashburn, Judge.

Action by J. A. Hagan, doing business as El Rey Cheese Company, against A. Gilbert and others to recover upon an assigned cause of action for goods, wares and merchandise sold to defendants and for other relief. From an order granting the motion of defendants A. Gilbert, I. M. Gilbourd, M. R. Schnall, A. Gilbert & Co., Morris Grupp, S. Lazarus, I. Lampert and A. M. Grupp for a change of venue from Los Angeles county to San Francisco county, plaintiff appeals.

Affirmed.

Abraham Gottfried, Minor Blythe, J. Paul Madsen and B. G. Sebille, all of Los Angeles, for appellant.

Edward Levin, of San Francisco, Jerome Weber, of Los Angeles, and Stern & Grupp, of San Francisco, for respondents.

WOOD, Justice.

Plaintiff appeals from the order granting a motion for change of venue from the county of Los Angeles to the City and County of San Francisco.

The complaint, which purported to allege four causes of action based on contract to recover money, named eight defendants (and several defendants under fictitious names). Seven of the named defendants filed a demurrer to the complaint, and at the same time served and filed a notice of motion for change of venue, which notice stated that the motion would be made upon the grounds that those seven defendants were residents of the city and county of San Francisco, and that the alleged contract was entered into and was to be performed in the city and county of San Francisco. The motion was supported by an affidavit of merits made by defendant Gilbert only. The motion was submitted on January 9, 1947, and came before the court

for a ruling thereon on January 17, 1947. The court at that time granted the motion, and stated in its order that, "Defendants are permitted to file 'Amended affidavit of Merits' and plaintiff is permitted to file affidavit in opposition to motion for change of venue." The amended affidavit, referred to, had been filed on January 14th, and the affidavit in opposition to the motion was filed January 17th, the day the motion was granted.

Plaintiff stated in his memorandum of authorities, filed with his affidavit in opposition to defendants' motion, that at the time the motion was submitted the court granted defendants five days in which to file authorities to show that an affidavit of merits was sufficient when made by only one of the defendants named in the complaint. Plaintiff contends that the court erred prejudicially in permitting defendant to file an amended affidavit of merits without notice to plaintiff; and that the motion should have been determined upon the original affidavit of merits.

Defendant Gilbert in his original affidavit of merits stated that he had stated the facts of the case to his attorney who had advised him that he had a good defense to the "cause" of action upon the merits; that he was at the time of commencement of the action, and at the time of making the affidavit, a resident of the City and County of San Francisco; that he had personal and direct knowledge that the other defendants were at the time of the commencement of the action, and ever since had been, residents of the City and County of San Francisco; and that "this is an action upon a contract, the place of performance of which is in the City and County of San Francisco, and not elsewhere, in that said alleged contract is an alleged obligation which was incurred in the said City and County of San Francisco, and which said alleged contract was in fact entered into in the said City and County of San Francisco, and was to be performed in its entirety in the said City and County of San Francisco." The amended affidavit of merits, also made by defendant Gilbert, included the statements contained in the original affidavit and, in addition thereto, stated that all the defendants, except Tom Stone, had stated the facts of the case to their attorney and he had advised them that they had a good defense to the alleged cause of action upon the merits; and that the defendant Tom Stone was in no way "connected" with the other defendants.

[1-3] Plaintiff contends that these additional statements in the amended affidavit were such that, under section 473 of the Code of Civil Procedure, notice of the proposed amendment should have been given to plaintiff. This contention is not sustained. Those additional statements in the amended affidavit added nothing to the legal sufficiency of the original affidavit of merits, and they were not prejudicial to plaintiff, and no notice of the proposed amendment was required. It appears that the additional statements were made in an attempt to show that the affidavit of merits was made on behalf of all the nonresident defendants. It was not necessary to make such a showing in support of the motion. If proper grounds exist for transferring an action from one county to another, a defendant entitled to such transfer may not be deprived of that right because other codefendants have not been joined in seeking the transfer. Sourbis v. Rhoads, 50 Cal. App. 98, 100, 194 P. 521. In the case of People v. Ocean Shore Railroad, Inc., 24 Cal.App.2d 420, 75 P.2d 560, which was a proceeding in eminent domain, one of 32 named defendants made a motion for a change of venue on the ground that an impartial trial could not be had in the county where the action was commenced, and the motion was granted. The appellant therein contended that the trial court erred in changing the place of trial upon application of one defendant only. In affirming the order therein granting the motion for change of venue, the reviewing court stated, 24 Cal.App.2d at page 424, 75 P.2d at page 562: "It has been repeatedly held, where the action is not brought in the proper county, any defendant, without joining his codefendants, may demand a transfer to the proper county. [Citing cases.]" It therefore appears that an affidavit of merits made by one such defendant, if otherwise sufficient, would support his motion. The statement in the affidavit that Tom Stone was not "connected" with

the other defendants was ineffectual for any purpose, and therefore no notice to plaintiff of the proposed amendment in that respect was required.

[4, 5] It is alleged in the complaint that Tom Stone is a resident of the county of Los Angeles. Plaintiff contends that the county of Los Angeles is therefore the proper place for trial of the action. When a defendant resides in the county where an action is commenced, that county is a proper place for trial of the action. Code Civ. Proc. sec. 395. If, however, such resident defendant is not a necessary party, and his residence is the only ground for retaining jurisdiction in the county where the action was commenced, a defendant who resides in another county is entitled to have the place of trial changed to the county of his residence. See Hays v. Cowles, 60 Cal.App.2d 514, 519, 141 P.2d 26. Respondents contend, in effect, that the resident defendant Tom Stone is not only not a necessary party to the action, but that he is not a proper party and no cause of action is stated against him in the third cause of action. In the third cause of action plaintiff alleged that he realleged paragraphs I and II of his first cause of action (which stated that three of the defendants [naming them] were doing business in San Francisco; that Stone resided in Los Angeles; and that defendant did not know the true names of the persons sued under fictitious names); that "prior to the commencement of this action Tom Stone sold, transferred and assigned to the plaintiff herein such balance, and all causes of action against defendants [naming the nonresident defendants];

"That during the months of June, July and August, 1946, said Tom Stone at the special instance and request of defendants [naming the nonresidents] sold and delivered to said defendants certain goods, wares and merchandise at the agreed price of Five Thousand Four Hundred and Four Dollars and Eighty-seven Cents ($5,404.87), which price was the reasonable market value thereof; that no part of said account has been paid; and that there now remains due and unpaid on said account the sum of [repeating the amount];

"That the said Tom Stone and this plaintiff have duly demanded of said defendants payment of the above alleged sum, but no part thereof has been paid."

That purported third cause of action alleged merely that Stone sold goods to the nonresident defendants for a certain sum, and assigned "all causes of action" to the plaintiff. It was not alleged therein that any obligation on the part of Stone was created in favor of plaintiff, and there was no indication therein as to the basis or theory upon which plaintiff claimed that he should recover from Stone. No cause of action was stated therein against Stone.

[6] Appellant contends, in effect, that irrespective of whether the asserted third cause of action stated a cause of action against Stone, there were three causes of action in the complaint against Stone, and that the nonresident defendants, therefore, were not entitled to a change of venue. This contention is not sustained. When a nonresident defendant is entitled to a change of venue upon one cause of action stated in a complaint, he may not be deprived of that right because plaintiff included other causes of action in the same complaint upon which such defendant is not entitled to a change of venue. See Bardwell v. Turner, 219 Cal. 228, 25 P.2d 978; Turlock Theatre Co. v. Laws, 12 Cal. 2d 573, 86 P.2d 345, 120 A.L.R. 786. In the case of Goossen v. Clifton, 75 Cal.App.2d 44, 170 P.2d 104, that rule was held to apply to causes of action based on contracts. The court therein stated, 75 Cal.App.2d at page 49, 170 P.2d at page 108:

"This brings us to the specific problem here involved—when a plaintiff joins in one complaint two causes of action based on contract, in one of which defendants are entitled to a change of venue, and in one of which they are not, what are the rights of the respective parties? Neither counsel has referred us to any case, and we have found none, involving two contract actions. This is probably because the exception providing for trying the action where the contract was entered into or to be performed, found in § 395, was added as of a relatively recent date. Prior to the amendment all contract actions, being personal in nature,

were triable in the county of defendant's residence. But although there seem to be no contract cases directly in point, there are many cases, other than contract cases, holding that if a plaintiff unites in one complaint two causes of action, in one of which the defendant has the right to have it tried in the county of his residence, in the other of which he is [sic] not, the defendant is entitled to have the cause tried in the county of his residence. * * *

"The rule is fundamental. The important right to protect is that of the defendant to have the cause tried in the county of his residence. For the plaintiff to be entitled to the exceptional right of having the cause tried in some other county, he must clearly bring himself within a statutory exception. If, by joining several causes of action, the defendant could be deprived of his right, the right would be lost in many cases. It is for that reason that the courts hold that the test is whether on any one of the causes of action the defendant is entitled to a change to the county of his residence. If there is one such cause, then defendant is entitled to the change no matter how many other causes may be set forth in which he is not entitled to the change."

Appellant contends also that the affidavits filed by defendants were insufficient, under section 395 of the Code of Civil Procedure, because they contained only conclusions of law with respect to the place where the contract was made and where it was to be performed. Section 395 of the Code of Civil Procedure provides in part as follows: "When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary."

[7-14] The evidence supported the implied findings that the alleged obligation was incurred in San Francisco, and that the contract was entered into in San Francisco. It "shall be deemed," under the provisions of said section 395, that the contract was also to be performed there (where it was incurred), since there was no special contract in writing to the contrary. There was no allegation in the complaint as to the place where the obligation was incurred or where the contract was entered into, or where it was to be performed; and there was no allegation therein, as to the circumstances of the transaction, from which those matters could be determined. In the first and fourth causes of action of the complaint it was merely alleged, as to those matters, that in Los Angeles County defendants "were indebted" to plaintiff. In the second and third causes of action there was no allegation at all concerning those matters. Both affidavits filed by defendant Gilbert stated, as above shown, that the contract was to be performed in San Francisco, in that, the alleged obligation was incurred there, and that the contract was "in fact" entered into there. Plaintiff stated in his affidavit in opposition to the motion that the "sales" upon which the action is based were made in Los Angeles; that all sales were made "f.o.b." Los Angeles, and title to the merchandise was transferred in Los Angeles; and that the money was to be paid in Los Angeles. The statements in the affidavits of defendant Gilbert regarding the place where the obligation was incurred, was entered into, and was to be performed, were statements of ultimate facts. Likewise, the statements in plaintiff's opposing affidavit, concerning that subject, to the effect that the sales were made in Los Angeles, that title passed in Los Angeles, and that the money was to be paid in Los Angeles, were statements of ultimate facts. In other words, it appears that the complaint does not allege where the contract was made or where it was to be performed; and that the statements in the affidavits of defendant Gilbert and of the plaintiff, regarding the place where the obligation was incurred, entered into, and was to be performed, are statements of ultimate facts. In a proceeding of this kind the evidence may be presented in the form of affidavits, and in this case the affidavits constituted all

the evidence. If evidentiary facts, supporting those statements of ultimate facts, had been stated, there would have been a more satisfactory basis upon which to determine the issues, presented on this motion, as to where the contract was made and was to be performed. The evidence was, as above stated, the affidavits which had been filed. The court was required to determine the issues upon that evidence and the allegations of the complaint. It does not appear whether the contract was written or oral. From the statement in the affidavit of defendant Gilbert, that the "contract was *in fact* entered into" in San Francisco (italics added), it could have been inferred, as follows: that if the contract was in writing that the parties affixed their signatures to it in San Francisco and delivered it there; or that if it was an oral contract that the parties were in San Francisco when it was made. Plaintiff had omitted to allege in his complaint, as above stated, where the contract was made or was to be performed; however, after the defendant Gilbert had filed his affidavit stating that the contract was "in fact" entered into in San Francisco, the plaintiff had an opportunity to state in his opposing affidavit the evidentiary facts, if any, from which it could be concluded that the contract was not made in San Francisco, but was made in Los Angeles. Instead of alleging such evidentiary facts in his opposing affidavit, plaintiff made the general statements, above mentioned, that sales were made in Los Angeles, that sales were f.o.b. Los Angeles, that title passed in Los Angeles, and that the money was to be paid in Los Angeles. Those general statements could be interpreted reasonably to relate to the performing of the contract, rather than the incurring of it. Even if "sales" were made in Los Angeles, and if sales were "f.o.b." Los Angeles, and if title to the merchandise passed in Los Angeles, as asserted by plaintiff, those incidents are not inconsistent with the fact, if it be a fact, that the obligation was incurred in San Francisco. As above stated, under the statute, the place where the obligation is incurred "shall be deemed" to be the place where it is to be performed, unless there is a special contract in writing to the contrary. There was no such special contract here. "'A pleader is required to frame his complaint in such a way as to make it clear that he is entitled to retain the * * * cause in the county in which the action is commenced.'" Konnoff v. Fraser, 62 Cal.App.2d 788, 792, 145 P.2d 368, 370. "[A]s error is not presumed, and all intendments are in favor of the action of the lower court, it follows that the affidavits in behalf of the successful party are to be deemed to establish not only the facts directly stated therein, but also all facts which may reasonably be *inferred* or presumed from the direct and positive statements." (Italics added.) Doak v. Bruson, 152 Cal. 17, 19, 91 P. 1001, 1002; Modine v. Modine, 123 Cal.App. 67, 69, 10 P.2d 776. In the case of Modine v. Modine, supra, the action for divorce was commenced in Fresno County, and defendant made a motion for change of venue on the ground that she resided in Alameda County. Defendant's affidavit therein in support of her motion stated that defendant resided in Alameda County at the time of the commencement of the action. Plaintiff's affidavit in opposition to the motion stated that the legal residence of defendant has at all times been in Fresno County. The court therein said (123 Cal.App. at page 69, 10 P.2d at page 777) that the only showing made by defendant as to her residence was the "bald statement" that she resided in Alameda County, and that opposed to her declaration was the "equally bald statement" in plaintiff's affidavit that her legal residence was in Fresno County. The court said further (123 Cal. App. at page 69, 10 P.2d at page 777): "In support of the trial court's order denying defendant's motion for change of place of trial, it must be assumed that the court found from the slender evidence presented that defendant's residence was not, as she declared, in Alameda county, and since there was some evidence to support such a finding it may not be disturbed." A ruling of a trial court "upon issues of fact raised by conflicting affidavits is entitled upon appeal, to the same weight as a finding on conflicting evidence as to issues of fact." Rench v. Harris, 76 Cal.App.2d 113, 118, 172 P.2d 576, 580. "[A]ll conflicts must be resolved in favor of the prevailing party * * * and all reasonable *inferences* which

are to be drawn must be in support of the trial court's order." (Italics added.) Parker Co., Inc. v. Exeter Refining Co., 26 Cal. App.2d 610, 611, 79 P.2d 1114.

It will be noticed that defendant Stone took no part in the proceeding, by opposing the motion or otherwise. No question as to his right to have the action retained for trial in Los Angeles County as against the right of the other defendants to have it transferred to the City and County of San Francisco was involved or decided.

The order is affirmed.

SHINN, Acting P. J., and VALLEE, J. pro tem., concur.




83 Cal.App.2d 586

**PEOPLE v. O'MOORE.**

**Cr. 1998.**

District Court of Appeal, Third District, California.

Feb. 9, 1948.

Hearing Denied March 8, 1948.

**1. Indictment and Information ⇐159(1)**

Under the statute permitting amendment of indictment by leave of court at any stage of proceedings for defect or insufficiency if offense charged is not changed nor substantial rights of defendant prejudiced, an amended cause need not be resubmitted to the grand jury. Pen.Code, § 1008.

**2. Indictment and Information ⇐159(1)**

Amendments authorized by the statute permitting changes in indictment by leave of court at any stage of proceedings for defect or insufficiency, if offense charged is not changed nor substantial rights of defendant prejudiced, are not confined to mere matters of form as distinguished from matters of substance. Pen.Code, § 1008.

**3. Indictment and Information ⇐159(1)**

Under the statute authorizing amendment of indictments by leave of court provided offense charged is not changed nor substantial rights of defendant prejudiced, amendments are to be liberally allowed to simplify procedure, further justice, and save indictments against defects of substance and form by further statement of offense intended to be charged. Pen.Code, § 1008.

**4. Indictment and Information ⇐159(2)**

Indictment charging violation of statute by acts causing named minors to become delinquents was properly amended prior to trial under the amendment statute to allege more particularly that defendant did "fondle, caress and otherwise commit lewd and lascivious acts upon the body" of the minors, without changing offense charged and without prejudice to defendant who knew the nature of acts relied on as proof and made no motion to continue because of the amendments. Pen.Code, § 1008; Welfare and Institutions Code, §§ 700(k), 702.

**5. Infants ⇐20**

Evidence sustained conviction for contributing to deliquency of minors. Welfare and Institutions Code, §§ 700(k), 702.

**6. Criminal law ⇐1159(2)**

Conviction will not be reversed on ground that testimony of prosecuting witness is inherently improbable, even though it may contain glaring inconsistencies and contradictions unless it is so clearly false and unbelievable that reasonable minds may not differ in that regard, or that the facts asserted are physically impossible.

**7. Criminal law ⇐260(11), 1159(2, 4)**

Credibility of witnesses and weight to be given their evidence are for jury or trial judge.

**8. Criminal law ⇐260(11), 1159(2)**

Judgment of reviewing court should not be substituted for that of jury or trial judge when there is any credible evidence to support verdict or judgment unless apparent that verdict is result of passion or prejudice.

**9. Infants ⇐20**

In prosecution for contributing to delinquency of minors, testimony of three victims who were intelligent boys 15 to 18 years old, contradictory but not physically impossible and corroborated by circum-

stances, including conduct and admissions of defendant, was for the jury. Welfare and Institutions Code, §§ 700(k), 702.

**10. Criminal law ⇐730(3)**

In prosecution for contributing to delinquency of minors, where on cross-examination defendant was improperly asked "Isn't it true you are a homo-sexual", error was not prejudicial under direction that jury disregard it entirely as improper. Welfare and Institutions Code, §§ 700(k), 702.

**11. Criminal law ⇐1037(1), 1171(3)**

In prosecution for contributing to delinquency of minors, district attorney's reference in argument, not objected to by defendant, to many immoral acts of defendant, testified to by witnesses, as indication of "the true trait of homosexuality", was not reversible under jury's finding of guilt, since if the acts were performed, the characterization was not inappropriate, and defendant waived any possible prejudicial effect. Welfare and Institutions Code, §§ 700(k), 702.

**12. Criminal law ⇐1037(1, 2)**

Alleged prejudicial misconduct by district attorney in argument is not reversible when defendant waives its effect by failure to object thereto, or to request the court to strike it out and to admonish the jury to disregard the same.

**13. Criminal law ⇐369(1)**

In the case of violation of the statute penalizing contributing to delinquency of a minor, one might succeed in leading a minor into a course of conduct described as delinquent only after repeated acts of persuasion, yet all such acts are admissible, as only one crime is committed. Welfare and Institutions Code, §§ 700(k), 702.

**14. Criminal law ⇐372(1)**

In prosecution for contributing to delinquency of minors, evidence of immoral acts committed by defendant on the minors prior or subsequent to those for which he was being tried was admissible and competent to show the uniform plan tending to cause the minors to become delinquent under the Code. Welfare and Institutions Code, §§ 700(k), 702.

**15. Criminal law ⇐824(8)**

In prosecution for contributing to delinquency of minors, burden is on defendant to request court to limit evidence of other immoral acts of defendant to those affecting the case on trial, and failure so to do is a waiver of objection to the evidence. Welfare and Institutions Code, §§ 700(k), 702.

**16. Criminal law ⇐1172(1)**

Reviewing court will not upset jury verdict for erroneous instructions unless they are misleading and prejudicial.

**17. Criminal law ⇐372(1)**

In prosecution for contributing to delinquency of a minor, evidence of immoral acts with a named minor other than the specific offense charged is competent to prove the disposition and tendency of the defendant to commit the acts charged. Welfare and Institutions Code, §§ 700(k), 702.

**18. Criminal law ⇐369(1)**

In prosecution for sexual offenses, evidence of offenses previously committed by defendant upon a person other than the complaining witness may not be received over the objection of the defendant. Welfare and Institutions Code, §§ 700(k), 702.

**19. Criminal law ⇐369(2)**

In prosecution for sexual offenses, evidence of other like offenses or acts of improper familiarity, illicit intimacy or relations between the parties, prior or subsequent to the act charged in the information relied upon by the prosecution, is admissible as corroborative evidence where they tend to show a continuous illicit relationship and to support the one specific offense for the commission of which the defendant is on trial. Welfare and Institutions Code, §§ 700(k), 702.

**20. Criminal law ⇐783(1)**

In prosecution for contributing to delinquency of minors, charge to effect that evidence of other acts with the minors prior and subsequent to acts charged in the indictment could be considered to prove "disposition and tendency" of defendant and as corroborative evidence to support the one specific offense alleged was proper

under other instructions to scan minor's testimony carefully and convict only if satisfied of guilt beyond a reasonable doubt. Welfare and Institutions Code, §§ 700 (k), 702.

**21. Criminal law ⇐508(1), 511(1)**

Under the statute requiring corroboration of the testimony of an accomplice, evidence of accomplice tending to connect defendant with the specific offense charged is competent, though it is not sufficient if it merely shows the commission of the offense or the circumstances thereof. Pen. Code, § 1111.

**22. Criminal law ⇐780(3)**

In a consolidated prosecution under indictments charging separately misdemeanors contributing to delinquency of minors, and felonies of sodomy and cunnilingus against the same minors, charge confusing rule that evidence of other immoral acts is corroborative of the specific offense constituting proof of the misdemeanors with rule that felony cannot be proved by testimony of accomplice unless corroborated was error. Welfare and Institutions Code, §§ 700(k), 702; Pen.Code, §§ 286, 288a, 1111.

**23. Criminal law ⇐935(1)**

New trial granted following convictions for felonies of sodomy and cunnilingus on ground that verdicts were unsupported by evidence as based on uncorroborated testimony of accomplices and on record showing that felony convictions resulted in double penalty for the same immoral transactions upon which a simultaneous conviction for contributing to delinquency of minors was grounded was within discretion of trial judge. Welfare and Institutions Code, §§ 700 (k), 702; Pen.Code, §§ 286, 288a, 1111.

**24. Criminal law ⇐935(1)**

Trial court can grant motion for new trial where evidence is legally sufficient, and even where only evidence is that of the prosecution.

**25. Criminal law ⇐1156(2)**

When there is reasonable doubt as to sufficiency of evidence supporting a conviction, reviewing court will not disturb order granting a new trial unless it clearly appears that trial judge abused his broad discretion.

**26. Criminal law ⇐984**

A defendant may not be twice punished for the same offense, even though he may have been properly charged and convicted under separate counts when they are dependent upon the same transaction and evidence.

---

Appeal from Superior Court, Butte County; J. O. Moncur, Judge.

Maurice M. O'Moore was convicted of contributing to the delinquency of minors, and he and the State appeal.

Judgments and orders affirmed.

J. Oscar Goldstein, P. M. Barceloux and Burton J. Goldstein, all of Chico, for O'Moore.

Fred N. Howser, Atty. Gen., and Ruth Bernfeld, Deputy Atty. Gen., for the State.

THOMPSON, Justice.

An indictment was filed in Butte County, March 15, 1946, against the defendant, charging him in three counts with contributing to the delinquency of named minors, under Section 702 of the Welfare and Institutions Code. It also contained two other counts charging him, under the provisions of Section 288a of the Penal Code, with felonies committed on the same minors. March 29th of the same year the grand jury also indicted the defendant on two counts, one of which charged him with contributing to the delinquency of another named minor, and the first count also charged him with a felony against the same minor, contrary to Section 286 of the Penal Code.

The cases were consolidated for trial. On July 16, 1946, before trial, the defendant moved to dismiss the counts in both indictments charging him with contributing to the delinquency of minors, on the ground that each such count failed to state facts sufficient to constitute a cause of action. At the same time the district attorney moved to amend said counts of the indictments, pursuant to Section 1008 of the Penal Code, to more specifically describe

the immoral acts charged to have been performed. The court granted the motion to amend said counts, which amendments were filed as hereinafter stated. Thereupon, defendant's motion to dismiss the counts was denied.

Upon conclusion of the evidence at the trial, the court advised the jury to acquit the defendant of the felony charges under Sections 286 and 288a of the Penal Code, for the lack of corroborating evidence of the offenses, but the jury found the defendant guilty on each count of both indictments. A motion for new trial was granted as to the last-mentioned three charges of felonies, and denied as to the remaining counts of contributing to the delinquency of minors. The defendant was there upon sentenced to imprisonment in the county jail in Butte County, on conviction of the misdemeanor offenses charged in counts 1, 4 and 5 of the first indictment, for the term of one year for each count, said sentences to run concurrently. And the defendant was sentenced on conviction of count 2 of the second indictment to one year of imprisonment in the same jail, to commence at the expiration of the first mentioned sentence.

From the judgments of conviction of contributing to the delinquency of minors, and from the order denying his motion for new trial the defendant has appealed. From the order granting a new trial on the felony charges the State of California has appealed. Both appeals are presented on the same record.

We shall first consider defendant's appeal. He contends that the judgments of conviction of contributing to the delinqunecy of minors are not supported by the evidence; that the court erred in permitting amendments to the indictments for the reason that the original counts failed to state public offenses, and that the causes were not resubmitted to the grand jury; that the district attorney was guilty of prejudicial misconduct, and that the court also erred in the instructions which were given to the jury.

We are of the opinion the court did not err in allowing amendments to the indictments with respect to the charges of contributing to the delinquency of minors without resubmitting them to the grand jury. In said counts the indictments charged the defendant, in the language of the statute, with violating Section 702 of the Welfare and Institutions Code by *"committing acts"* upon named minors of stated ages from fifteen to eighteen years of age, upon specified dates, which caused or tended to cause the minors to become delinquent and to bring them within subdivision (k) of Section 700 of said code. The amendments which were allowed by the court, before trial, on July 16th, under Section 1008 of the Penal Code, merely specified the alleged acts with more particularity, by adding to each count the following language: "That at the time and place aforesaid, Maurice M. O'Moore did fondle, caress, and otherwise commit lewd and lascivious acts upon the body and person of the said ——— ———."

The defendant, on April 8th, was arraigned and pleaded not guilty. Demurrers to the indictments were not filed. Defendant's motion to dismiss the indictments for failure to state public offenses was not made until July 16th, at which time the motion to amend was also made. Clearly the amendments do not change the offenses charged in the indictments. Nor do we perceive how such amendments could have prejudiced the substantial rights of the defendant. The defendant was furnished a transcript of the testimony taken before the grand jury, including his own testimony which was voluntarily given, and he knew the nature of the acts relied upon as proof of the offenses charged. No motion to continue the trial on account of the amendments, or otherwise, was made by the defendant. All issues raised by the amended indictments were thoroughly and elaborately tried. The transcript of evidence contains 1604 pages.

[1-2] Under the California statute, by leave of court, and indictment may be amended after the plea has been made, and at any stage of the proceedings, without resubmitting the cause to the grand jury, "for *any defect or insufficiency*" thereof, if the amendment does not "change the offense charged," and the "substantial rights

of the defendant" are not thereby prejudiced. Penal Code, sec. 1008; People v. Seitz, 209 Cal. 199, 202, 286 P. 697; Chrisman v. Superior Court, 59 Cal.App. 305, 210 P. 632; People v. Suter, 43 Cal.App.2d 444, 462, 111 P.2d 23; People v. Joseph, 21 Cal.App.2d 336, 69 P.2d 465; People v. Bellamy, 79 Cal.App. 160, 248 P. 1042; People v. Rippe, 32 Cal.App. 514, 163 P. 506; 42 C.J.S., Indictments and Informations, § 230b. The amendments authorized by Section 1008 of the Penal Code are not confined to mere matters of form, as distinguished from matters of substance. That section authorizes amendments "for *any defect or insufficiency.*" (Italics added.) In the Joseph case, supra, the original indictment failed to fix the venue. That omission was certainly a matter of grave importance and of substance rather than of mere form. For an allegation of venue was necessary to give the court jurisdiction of the cause. But, on motion, the indictment was permitted to be amended by alleging that the offense occurred in Fresno County. On appeal, the judgment of conviction was affirmed. The Supreme Court denied a hearing. We conclude that Section 1008 was not intended to be limited to mere unimportant matters of form. But regardless of that question, the present amendments were authorized by the statute, since they merely more particularly stated the nature of the acts relied upon in violation of the said sections of the Welfare and Institutions Code.

In support of his contention that the amendments to the indictments in this case were not authorized by statute, the defendant relies on Mitchell v. Superior Court, 76 Cal.App. 734, 245 P. 1109. That case is not authority for so holding under the circumstances of this case. The indictment was not amended in the Mitchell case. The court said, "No amendment of said indictment was sought, and no amendment was allowed." That was a petition for a writ of mandamus to compel the court to dismiss a new indictment which was presented after a demurrer to the original indictment was sustained and resubmission of the cause to the grand jury. A motion to dismiss the second indictment was then made. What the court said regarding the amendment of an indictment as to matters of "substance" of the charge is dictum, for the reason that no amendments were made or involved therein. Moreover, all that the court said in that regard is that "an omission to plead *some material element in the alleged offense*" may not be corrected by amendment under Section 1008. It said, "no [such] amendment, in the proper use of that expression, can be made, as it will affect the substantial rights of the defendant." That statement is made on the theory that if a *material element of the offense* is omitted, the indictment fails to state a public offense. In the present case a material element of the offenses of contributing to the delinquency of minors was not omitted from the original indictments. That case is therefore not in point.

Likewise, in the case of People v. Giminiani, 70 Cal.App. 195, 232 P. 993, 994, upon which the appellant relies, the question of an amendment of the information under Section 1008 of the Penal Code was not involved. The original information, unlike the one in this case, merely alleged that the defendant did "willfully and unlawfully cause, induce and encourage" the named minor to lead "an idle, dissolute, lewd, and immoral life." There was absolutley no allegation that the defendant committed any act whatever to cause the minor to lead a dissolute life. In the present case the original indictments charged that the defendant did "wilfully and wrongfully *commit acts*" in violation of Section 702 of the Welfare and Institutions Code, which caused the minors to come within the provisions of subdivision (k) of Section 700 of that code. The amendments which were allowed in this case merely more particularly described the nature of the previously alleged "acts" which contributed to the delinquency of the minors. There is a clear distinction between this case and the Giminiani case in that respect. In that case no amendments to the information were asked for or allowed. On motion of the defendant, the original action was dismissed because it was not alleged that any acts whatever had been committed. Therefore a new cause was commenced. A preliminary hearing was had, and a new information was filed. On motion of the defendant,

the new information was set aside. From that order an appeal was taken. The Appellate Court reversed that order. All that the court decided was that the dismissal of the first information was not a bar to the second proceeding, because the first information did not pretend to allege that the defendant committed *any act* which contributed to the delinquency of the minor, and that it therefore was not a bar to the second proceeding. The order dismissing the second information was therefore reversed. The court said: "The fault in the information in the first action against defendant was that it charged that the defendant did 'willfully and unlawfully cause, induce and encourage' the described person to lead and to be in danger of leading an idle, dissolute, lewd, and immoral life. But *that information did not charge the commission of any act or the omission of the performance of any duty, whereby the described result was caused.* Therefore that information did not state any criminal offense." (Italics added.)

The indictments in this case did allege that the defendant "committed acts" which led the minors to become delinquents. By the amendments allowed in this case, those alleged acts were described. That distinction between the two cases renders the Giminiani decision inapplicable to the situation in this case.

We are satisfied the amendments to the indictments in the present case did not *change the offenses* originally charged. They merely more particularly specified the means by which the alleged offenses were accomplished. In People v. Hinshaw, 194 Cal. 1, the court said at page 13, 227 P. 156, at page 161, that "the distinction must be observed between charging a different offense *and charging the same offense differently.*" In that case the defendant was charged, under Section 245 of the Penal Code, with an assault which "was likely to and did produce great bodily harm." The amended information, complained of, alleged that "the assault was made with the fists and hands upon the head and face and that the result was a fractured jaw and other grievous injuries." On appeal, it was held that change in the original pleading did not result in *a change of the offense charged* under Section 245 of an assault by means of force likely to produce great bodily injury. The judgment of conviction was affirmed.

[3] Numerous California cases hold that similar amendments and additions to informations or indictments, made pursuant to Section 1008 of the Penal Code, do not result in changing the offenses charged, or in prejudicing the rights of defendants. Liberality appears to have been countenanced in allowing such amendments under statutory provisions therefor, to simplify procedure, to further the ends of justice, and to "save indictments against defects and deficiencies *of substance and form* by amendment stating the offense intended to be charged." 42 C.J.S., Indictments and Informations, § 230b. In upholding a similar amendment of an information, the court said in People v. Miller, 34 Cal.App. 641, 168 P. 574: "It is only necessary to say in this case that the original information *purported to charge a public offense,* and that the amended information as filed, after the request of the district attorney and upon the permission of the court being given, *did not charge an offense different from that attempted to be stated in the original information. Consequently the filing of the amended complaint neither prejudiced the defendant nor contravened the provisions of section 1008 of the Penal Code.* See People v. Rippe, 32 Cal.App. 514, 163 P. 506." (Italics added.)

[4] We conclude that the amendments to the indictments which were allowed and made in this case were neither in contravention of the provisions of Section 1008 of the Penal Code, nor prejudicial to the substantial rights of the defendant.

We are of the opinion the evidence sustains the verdicts and judgment of conviction of the defendant for contributing to the delinquency of the three named minors. The circumstances of the case are unusual. The accused was ably defended by experienced attorneys. The case was tried with a jury before an able judge of recognized ability and many years of experience. The trial lasted three weeks. The transcript contains over 1600 pages of evidence. The three boys, who are implicated in the

charges of which the defendant was convicted, testified to a course of conduct indicating moral depravity on the part of appellant. They testified to repeated offenses extending over a period of several months, including sodomy and cunnilingus. The evidence is revolting. There is corroborating evidence of circumstances which appears to be difficult to reconcile on any theory other than that of the guilt of the defendant. The defendant, however, strenuously insists that he was the victim of a conspiracy of these bad boys to falsely swear to incriminating acts on his part to procure his conviction so as to save them from reform school. That defense was rejected by the jury, and by the trial judge in denying a motion for new trial on said counts of contributing to the delinquency of minors. There are certain conflicts in the evidence of the boys given before the grand jury and at the trial, which, on account of the complication involving numerous alleged offenses extending over a period of several months, may be reasonably reconciled. We assume the jury so reconciled those conflicts to their entire satisfaction.

The defendant is apparently an unmarried man of mature age. He was ordained as a minister at Napa, and immediately became the rector of a small church at Chico, where he arrived in January, 1943. There is no evidence concerning his occupation or life prior to that time, except that it appears he was known in San Francisco. Evidence as to his former residence, occupation and manner of life was excluded upon objection of the defendant that it was incompetent and irrelevant. However, two police officers testified they knew him at San Francisco for eighteen years and that his general reputation for truth, honesty and integrity was bad. Upon his arrival at Chico he occupied and lived in two adjoining rooms in an annex to the church building. One room was furnished with a couch used as a bed, together with chairs and modest equipment. The other room was fully furnished with a double bed, bureau, desk, chairs, stove for cooking meals, utensils, table and other equipment. It was used by the defendant as his office, study, bedroom, dining room and kitchen. He lived in those rooms for about two years. He took particular interest in boys, and organized a church guild having a membership of from twenty to forty boys. In the spring of 1943 he became acquainted with the three boys who are the chief prosecuting witnesses in this case. Two of them were fifteen years of age. The other was eighteen years old. Prior to that time the boys were strangers to each other. He knew each was a ward of the juvenile court for having committed offenses of larceny of small tools, pigeons, or rabbits. One of them stole an automobile and drove to Washington. The defendant invited them to his room and encouraged their friendship. They slept with him in his room. They became members of his guild. One of them officiated as its president. Two of them joined the church and became altar boys therein. One of them sang in the choir. The probation department finally transferred the custody of two of the boys from their relatives to that of the defendant. He took two of the boys to live with him in his rooms. They alternately slept with him in his double bed, while the other occupied the couch in the adjoining room. He proposed to formally adopt those two boys, but failed to do so. He constantly associated with them, and made frequent journeys with one of the boys at a time in his automobile to other cities, including several trips to Sacramento, Marysville, Oroville and other places, where they sometimes attended moving picture plays and remained overnight in obscure rooming houses or hotels. There is evidence that he thus visited with one of the boys at Marysville four times, at Sacramento three times, and at least once in each of the cities of Oroville, Red Bluff and San Francisco. At Sacramento they remained overnight at a rooming house in the lower part of the city, which was frequented by Negroes. A Negress showed them to their room. The defendant registered at Marysville and at some other rooming houses or hotels under a false name as "Jack Williams and Son." He admitted that fact. Regarding that false registration, this colloquy occurred:

"Q. How did you register? A. I didn't give my own name.

"Q. You what? A. I didn't give my own name.

"Q. Why not? A. I don't know. * * * I looked upon him as my son.

"Q. Why did you do this? A. Why did I sign it?

"Q. Yes. A. I really couldn't give you an explanation, I realize it was a mistake."

The explanation that he registered in that manner because he intended to adopt the boy, and looked upon him as his son, might account for adding to his registration the word "Son." But that would not account for falsely signing the fictitious name of "Jack Williams." Nor would it account for registering in obscure rooming houses or hotels.

To rebut defendant's denial that he was ever in the Sullivan Hotel or that he stayed with one of the boys at Oroville on a specified night, Henry Kloss, a bartender who lived at the Sullivan Hotel, testified that he saw and recognized the defendant at his place of business about that date, and that he then consumed six or seven drinks of "whiskey or brandy."

In February, 1946, two of the boys stole an automobile and drove to Los Angeles, where they were arrested, and for the first time told the officers of that city of defendant's immoral relations with them. That fact was communicated to the Butte county officers. The defendant was told of their arrest. He immediately interviewed the sheriff and probation officers of Butte county, asking for leave to go to Los Angeles to return the boys, and when that was refused, he urged the probation officers not to permit anyone to talk with the boys until he had first seen them. Mrs. Bernice Hamilton, deputy probation officer, testified that the defendant called their office about that matter four or five times, and that "He asked me that when the boys were picked up for me not to talk to them but to get in touch with him immediately and he would do the talking." Having learned of the boys' accusations against the defendant, his request was refused. When the boys were returned an investigation by the grand jury followed, and the defendant was indicted, as we have previously stated.

There was much evidence favorable to the defendant. We have not attempted to recite that evidence, but merely to outline such as tends to support the judgment. The characters of the boys who are implicated in a succession of alleged offenses are not exemplary. Upon a careful reading of their testimony we are impressed with the truthfulness of the main essential features of their stories, but we do not assume the right to pass upon the credibility of the witnesses or the weight of their evidence. That was the province of the jury and of the trial judge. As a whole, their evidence appears to be consistent.

[5] We concede there are some discrepancies in the evidence. One of the chief conflicts of evidence of one of the boys, relied upon by the appellant, is a discrepancy between a statement made before the grand jury and his evidence at the trial with respect to how he was clothed on the first occasion when he charged the defendant with immoral acts committed in the bed. He told the grand jury that he went to bed clothed in a shirt and underwear, and that the defendant not only committed lewd and lascivious acts upon him, but also that he attempted to commit sodomy, but did not accomplish that purpose. At the trial he testified that he then had no clothing on at all. He told the trial jury that he had on no pajamas or clothing of any sort that night when he went to bed. On cross-examination, he admitted that what he told the grand jury in that respect was not true. He said he had changed his mind in that regard, and that his present recollection was different. When he was asked why he told the grand jury he then had on "a shirt and underwear", he replied, 'I made a mistake, I didn't have nothing on." We assume that if that were the only occasion of an alleged immoral act, or the only time when he had slept in bed with the defendant, his recollection of the manner in which he was then clothed, or whether he was clothed at all, would be very important. But in a series of alleged immoral acts covering a period of several months, that discrepancy might be reasonably explained. The witness said that the defendant did not succeed in committing sodomy. It is evident, regardless of whether or not the boy then wore underclothes, that the defendant could nevertheless have been guilty of acts tending to contribute to the

delinquency of a minor, of which he was convicted. We assume the jury reconciled that conflicting statement to its entire satisfaction. With that conclusion we may not interfere. There are some other conflicting statements upon which the appellant relies, but we think they are not of sufficient importance to justify a discussion of them. They all appear to go to the credibility of the witnesses, or to the weight of their testimony. We are persuaded the evidence supports the verdicts and judgments of conviction of the offenses of contributing to the delinquency of minors.

The appellant insists that the testimony of the boys who were implicated in the offenses of which he was convicted is inherently improbable. We think not.

[6-8] A judgment of conviction will not be reversed on the ground that the testimony of the prosecuting witness is inherently improbable, even though it may contain "glaring inconsistencies and contradictions", unless it is so clearly false and unbelievable that reasonable minds may not differ in that regard, or that the facts asserted are physically impossible. It is the sole province of the jury or the trial judge to determine the credibility of witnesses and the weight to be given to their evidence. The judgment of a reviewing court should not be substituted for that of the jury or trial judge when there is any credible evidence to support the verdict or judgment, unless it is apparent that the verdict is the result of passion or prejudice. People v. Meyers, 62 Cal.App.2d 24, 144 P.2d 60; People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758; People v. Carlson, 73 Cal.App.2d 933, 939, 167 P.2d 812; People v. Jefferson, 31 Cal.App.2d 562, 88 P.2d 238; People v. Battilana, 52 Cal.App.2d 685, 126 P.2d 923; People v. Becker, 140 Cal.App. 162, 35 P.2d 196; 8 Cal.Jur. 590, sec. 582.

In the present case the facts testified to by the prosecuting witnesses are not physically impossible. There are contradictory statements of the witnesses which, we think, may be reasonably reconciled. It was the duty of the jury to so reconcile them. The chief contention of the appellant is that the contradictory statements require this court to conclude that the entire evidence of those witnesses is false and unbelievable. We think not. Under the circumstances of this case the challenged evidence merely presents a question of credibility of witnesses and the weight to be given to their testimony. Those are questions for the jury, with whose conclusions we may not interfere. The record contains some corroborating evidence by other witnesses, including the conduct and admissions of the defendant. The evidence is not inherently improbable.

The cases of People v. Trumbo, 60 Cal.App.2d 681, 141 P.2d 225; People v. Casillas, 60 Cal.App.2d 785, 141 P.2d 768, and People v. Watrous, 7 Cal.App.2d 7, 45 P.2d 380, upon which appellant O'Moore relies, are not in conflict with the foregoing uniform rule. The judgment in the Trumbo case was reversed for failure to give to the jury a cautionary instruction, which, in view of very unsatisfactory evidence, should have been given. The court said [60 Cal.App.2d 681, 141 P.2d 228]: "Upon the record of the case * * * there can be no doubt but that an adequate cautionary instruction was vital to a proper consideration of the evidence." The support of the judgment depended almost entirely on the testimony of the seven year old prosecutrix. Her evidence indicated that she lacked understanding sufficient to give her testimony full credence. In the present case a cautionary instruction was given to the jury. In the Casillas case the defendant was convicted of rape of his fifteen year old daughter, who was pregnant. The court said that the child reluctantly testified "after being threatened with imprisonment for contempt" [60 Cal.App.2d 785, 141 P.2d 771] that the father committed rape upon her. On cross-examination, she denied that her father ever had sexual intercourse with her and explained that she had said her father was guilty because she was trying to protect a boy friend with whom she had had sexual relations, and that she thought her accusation of her father would not result in any trouble for him. On motion for new trial the judge said "the testimony * * * was entirely uncertain." The girl was the sole witness for the prosecution, except that her mother testified to her daughter's age only. That

was a flagrant case of unreliable and unconvincing evidence. The judgment was reversed. In the Watrous case, a judgment of conviction of the defendant of contributing to the delinquency of two four year old children was reversed. The children were permitted to testify over the objection that they lacked understanding to qualify them. Their extreme infancy is persuasive of their lack of understanding. No other evidence of guilt was adduced, except the testimony of their grandmother who merely related hearsay statements of the children. Their mother was not told of the alleged offenses. The court said [7Cal.App. 2d 7, 45 P.2d 383]: "When it is recalled that the only evidence tending to connect the defendant with the crime—which he at all times denied—was the testimony of the two four year old children and the testimony of the grandmother, who could only testify as to what she was told, it is obvious that the capacity of the children as witnesses is vital."

[9] We think the judgments in the preceding cases were properly reversed. The facts of those cases were in no wise comparable to those of the present case in which there is persuasive evidence of the three victims, who were intelligent boys fifteen to eighteen years of age, and also other corroborating circumstances, in support of the judgments.

[10] There is no merit in appellant's charge that the district attorney was guilty of prejudicial misconduct in his cross-examination of the defendant. The defendant had testified that he was ordained as a minister at Napa in 1943, and that he took charge of the Chico church that same year. There are 167 pages of his examination in chief. On cross-examination he was asked where he had lived prior to the time he went to Chico, whether he had not previously lived at Napa and formerly at a designated address on Taylor Street in San Francisco, and what business he was engaged in before he became a minister. To each of those questions defendant's objections were sustained. Upon further cross-examination as to his alleged immoral conduct toward the prosecuting witnesses, all of which he strenuously denied, the district attorney asked him: "Father O'Moore, you know what homosexuality is?" to which he replied "Yes." He was then asked "Isn't it true you are a homo-sexual?" An objection to the last question was promptly sustained, and the jury was directed to disregard it. The court said, "I will sustain it, the question is improper and the Jury is directed to disregard it entirely." After the ruling of the court, defendant's attorney said, "In view of the witness having been asked that, I will request him to answer the question," to which the defendant replied, "Before God and man, no." In view of the definite instruction to the jury to disregard that challenged question, we conclude that it was not prejudicial or reversible error.

[11, 12] Nor does the district attorney's reference in his argument to the jury to the many immoral acts of the defendant, testified to by the prosecuting witnesses, as an indication that they were "the true trait of homosexuality,"constitute prejudicial or reversible error. If the numerous abhorrent acts related in the evidence were performed, as the district attorney and the jury evidently believed they were, they strongly indicate that a person guilty of such conduct would be a moral pervert who might appropriately be characterized as possessing "traits of homosexuality." Moreover that statement was not assigned as prejudicial or erroneous, and the court was not asked to strike it from the record or to instruct the jury to disregard it. It has been frequently held that such alleged prejudicial misconduct is not reversible error when the defendant fails to object thereto, or to request the court to strike it out and to admonish the jury to disregard the same. People v. Routh, 182 Cal. 561, 567, 189 P. 436; 8 Cal.Jur. 508, sec. 521. Any possible prejudicial effect of the statement of counsel was waived by failure to assign it as error and to ask the court to instruct the jury to disregard it. People v. Hunter, 49 Cal.App.2d 243, 250, 121 P.2d 529.

Finally, the appellant O'Moore contends that the court erred in giving to the jury one instruction with relation to the purpose for which evidence of prior or subse-

quent immoral acts of the defendant upon the minors who are involved in the charges of contributing to their delinquency, other than the specific ones included in the indictments, may be considered by the jury. It is asserted the challenged instruction erroneously told the jury that such other offenses could be considered "as corroboration" of the specific offenses charged, regardless of whether the prior or subsequent acts were committed upon the witness so testifying or upon other victims not named in the indictments. In support of that claim the appellant cites and relies upon People v. Peete, 28 Cal.2d 306, 169 P.2d 924; People v. Asavis, 22 Cal.App.2d 492, 71 P.2d 307; People v. Huston, 45 Cal.App. 2d 596, 114 P.2d 607; and People v. Smittcamp, 70 Cal.App.2d 741, 161 P.2d 983.

We are of the opinion the instruction complained of is not subject to that criticism, and that it is therefore not prejudicial. It appears to be a correct statement of the law under the circumstances of this case. The giving of that instruction is not reversible error. The jury was very fully and fairly instructed upon all essential issues, and we think the jury could not have been misled by that instruction. The cases relied upon by appellant are readily distinguishable from the facts of the present case.

[13-15] In this case four separate charges of contributing to the delinquency of three different named minors were tried at the same time. The immoral acts were frequently repeated over a period of several months. The conduct of the defendant was a succession of immoral acts perpetrated pursuant to a uniform plan, all of which, combined, tended to "cause or encourage" the minors to "come within the provisions" of Section 700 of the Welfare and Institutions Code, and to become delinquent. As stated in the text of 8 Cal.Jur., section 168, page 62, supported by California authorities, "In the case of the crime of contributing to dependency of a minor, one might succeed in leading a minor into a course of conduct described as dependent only after *repeated acts of persuasion,* yet all such acts are admissible *as only one crime is committed.*" (Italics added.) The evidence of other acts committed in this case was competent and admissible as applying to the particular charge regarding which the witnesses testified. If the evidence was not in fact limited to that particular case, the defendant may not complain, since the burden was on him to ask the court to so limit that evidence, and having failed to do so, he waived that objection. People v. Carmean, 23 Cal.App. 396, 399, 138 P. 117; 8 Cal.Jur. 311, sec. 363.

The instruction complained of reads as follows: "Testimony has been introduced by the prosecution in this case tending to prove other acts of the defendant with said minors prior and subsequent to the acts charged in the indictments relied upon for conviction. This evidence is introduced for the purpose of attempting to prove the *disposition and tendency of the defendant to commit the acts charged.* This evidence is not introduced to prove the distinct offense but as corroborative evidence *to support the one specific offense for which the defendant is being tried.* In any event, the defendant can be convicted, if at all, only for the offense with which he is charged and is now on trial." (Italics added.)

The jury was elsewhere clearly told that each count was a separate charge and that the defendant must be acquitted of such charge unless the jury was satisfied from the evidence of defendant's guilt thereof beyond a reasonable doubt. Not only was evidence of other immoral acts upon the same boys mentioned in the indictments clearly and properly applied by the charge of the court, but, apparently, on the court's own initiative, the jury was warned that it must "carefully scan the testimony of the said minors" and "view same with caution." That instruction reads: "In the prosecution of the offenses such as those involved in these cases and where it appears as in the cases herein where no persons are present at the times charged as being the times when the offenses were alleged to have been committed, except the minors involved and the defendant, from the nature of the cases the said minors and the defendant are usually the only witnesses to the acts complained of and as *such charges are easily*

*made and difficult to disprove. Therefore, it is the duty of the jury in these cases to carefully scan the testimony of the said minors and to view same with caution.*" (Italics added.)

[16] In the challenged instruction the court carefully distinguished the misdemeanor charges from the felonies by a second paragraph added to each of the instructions previously quoted. We do not perceive how the jury could possibly have been misled by the instruction complained of. It is not the province of a reviewing court to upset the verdict of a jury for erroneous instructions unless they are misleading and prejudicial, which we believe the charge in this case was not.

[17, 18] It will be observed the court clearly instructed the jury that the evidence of immoral acts with a named minor, other than the specific offense charged "is introduced *for the purpose of attempting to prove the disposition and tendency of the defendant to commit the acts charged.*" That is the uniformly recognized ground upon which such evidence is received as competent. People v. Koller, 142 Cal. 621, 76 P. 500; People v. Koosistra, 58 Cal.App. 277, 208 P. 316; People v. Oliver, 29 Cal. App. 576, 156 P. 1005; People v. Smithle, 51 Cal.App.2d 693, 125 P.2d 553; People v. Bell, 96 Cal.App. 503, 274 P. 393; 8 Cal. Jur. 74, sec. 176; Underhill's Criminal Evidence, 4th Ed., p. 341, sec. 186. Of course it is true that evidence of offenses previously committed by the defendant upon a person, *other than the complaining witness,* may not be received over the objection of the defendant. People v. Huston, supra. No such objection was made in this case.

[19] The court further said in the challenged instruction that this evidence was introduced *"as corroborative evidence to support the one specific offense for which the defendant is being tried."* We think that is a correct statement of the law. In this case there is evidence of other corroborating circumstances tending to show defendant's plan and practice of subjecting the minors to repeated immoral acts, including the specific ones charged in the indictments, which would lead them to become delinquent. In People v. Smittcamp, supra, upon which the appellant relies, such evidence was held to be competent. The court there said [70 Cal.App.2d 741, 161 P.2d 986]: "By a long line of authorities it is now established as the law in this state that, in prosecution for sexual offenses, evidence of other like offenses or acts of improper familiarity, illicit intimacy or relations between the parties, prior or subsequent to the act charged in the information relied upon by the prosecution, *is admissible as corroborative evidence where they tend to show a continuous illicit relationship.*"

The court further said that: "As we have indicated herein, evidence of 'other acts' to prove that the parties are adulterously, incestuously or lasciviously inclined *is admitted only as corroborative evidence tending to support the one specific offense for the commission of which the defendant is on trial.*" (Italics added.)

The last italicized portion of the foregoing quotation is exactly what the court told the jury in this case. In the present case the court said that such evidence of other immoral acts could be considered to show defendant's disposition and tendency, and as corroboration in support of the *"specific offense* [of contributing to the delinquency of minors] *for which the defendant is being tried.*" The court specifically distinguished those offenses from the felony charges.

In the Smittcamp case, the defendant was convicted of two counts of an information charging him with the offense prohibited by Section 288 of the Penal Code. The judgment was reversed on appeal. The criticised instruction declared that testimony of other offenses, "is received and admitted in evidence to prove *the adulterous disposition* of the defendant, and as having a tendency to render it more probable that the act of sexual intercourse charged and relied on in the information was committed, and for no other purposes." We may concede that the mere "adulterous disposition of the defendant" might not be competent evidence to consider upon a charge of a specific sexual crime. But that is not the purport of the challenged instruction in this case. The court did not say that the mere immoral

disposition of the defendant could be considered in determining his guilt. It specifically said evidence of other similar offenses were received for the purpose of showing his "disposition and tendency *to commit the acts charged.*" That distinguishes the two instructions under consideration. The instruction complained of is neither erroneous nor prejudicial.

In the Asavis case, supra, relied upon by appellant O'Moore, the defendant was convicted of lewd conduct under Section 288 of the Penal Code on a female child under the age of fourteen years. The judgment was reversed because evidence was received over the objection of the defendant that he had previously committed a similar offense upon *another child* three or four years before the offense occurred for which he was being tried. The court merely determined that the admission of evidence of a prior offense upon *another person* was prejudicially erroneous, under the circumstances of that case. It has no application to the facts of this case. In the Huston case, supra, defendant was likewise convicted of lewd conduct upon a twelve year old child. The judgment was reversed for the same reason that the previously cited case was overruled. The court held that "evidence that defendant has perpetrated similar acts with a person or persons *other than the prosecuting witnesses,*" which was received "over objection", constituted prejudicial error.

Unlike the present case, the foregoing cases were reversed for prejudicial rulings of the courts admitting evidence, over the objections of the defendants, of offenses upon persons other than those named in the informations. The evidence in those cases of other prior offenses upon different individuals had no bearing on the causes being tried, and it was prejudicial. Those cases were properly reversed. They are not authorities which would support a reversal of the present convictions.

[20] We conclude that the judgments of conviction of the misdemeanors charged in this case are supported by the evidence, and that there was no prejudicial error in the challenged instruction or in the admission of evidence.

We will now consider the separate appeal of the State from the order granting a new trial upon the three charges of felonies under Sections 286 and 288a of the Penal Code of which the defendant was also convicted.

The defendant was charged in counts 2 and 3 of the first indictment with the crimes of cunnilingus upon one of the same boys who was also implicated in misdemeanor charges. He was also charged in count one of the second indictment with the crime of sodomy upon a different boy who was also implicated in the misdemeanor charge in that same indictment. The court instructed the jury pursuant to Section 1111 of the Penal Code, that it could not convict the defendant of said felonies upon the uncorroborated testimony of the named boys who were accomplices in their participation in said crimes. Finally, the court charged the jury with respect to those three felonies, that: "It is the opinion of this court that there is no corroboration of the testimony of the minor persons named in said counts as required under the law of this state. I therefore advise you to acquit the defendant upon the felony charges alleged in said counts of the said indictments."

But the jury disregarded the instruction and found the defendant guilty of said felonies.

The court, we think, erroneously further instructed the jury that: "As to the felonies charged * * * in which the minors involved are accessories, * * * the rules which have been given to you in these instructions *concerning the corroboration of the testimony of the accomplices necessary for a conviction, concerning such evidence of other acts, apply in the same manner and to the same extent as is required for the testimony of accomplices* * * *." (Italics added.)

[21, 22] Evidence corroborating the testimony of an accomplice is competent if it *tends to connect the defendant* with the specific offense with which he is charged. It is not sufficient if it merely shows the commission of the offense or the circumstances thereof. Penal Code, sec. 1111. Evidence of other offenses committed by the defendant upon the same person involved

in the crime of which he is charged is competent for a very different purpose, and without the same limitations which apply to the mere corroboration of the testimony of an accomplice. It is competent, if not too remote, to show the plan, scheme, disposition or tendency of the defendant to commit the offense *with which he is charged.* The last-quoted instruction was therefore erroneous. It applied only to the felony charges. But that error was corrected by granting a new trial as to the convictions of the felonies.

The court granted the new trial as to the felonies on the ground that the verdicts and judgments were not supported by the evidence and that they were contrary to law. We think the new trial was properly granted. We are convinced there was no abuse of discretion in granting it, under the circumstances of this case. The trial judge has a broad discretion in granting or denying such motions, with which we may not interfere. The Attorney General points out certain circumstances and argues persuasively that the record contains some competent corroborating evidence. But the lack of corroboration was not the only reason assigned for granting the new trial.

[23-25] We are unable to say that the court abused its discretion in granting a new trial on the felony convictions. The trial judge was best qualified to determine the question of the sufficiency of the evidence to support those charges. When there is a reasonable doubt in that regard, we may not substitute our judgment for that of the trial judge. In the case of People v. Sarazzawski, 27 Cal.2d 7, at page 16, 161 P.2d 934, at page 939, the Supreme Court said: "A trial court can grant a motion for new trial where the evidence is legally sufficient and even where the only evidence is that of the prosecution." In that case the court further states the established rule that a reviewing court will not disturb an order granting a new trial "unless it clearly appears that he abused such broad discretion."

[26] Moreover, it appears that, in spite of the court's advice to the jury to acquit the defendant of the felony charges, he was found guilty, notwithstanding the fact that at least one or two of the felonies involved the same acts and transactions upon which he was convicted of misdemeanors. As to such charges, his conviction of the felonies would result in double penalties for the same offenses, which is prohibited by law. It has been definitely held in recent decisions that a defendant may not be twice punished for the same offense, even though he may have been properly charged and convicted under separate counts when they are dependent upon the same transaction and evidence. People v. Greer, 30 Cal.2d 589, 597, 184 P.2d 512; People v. Esposti, 82 Cal.App.2d 76, 185 P.2d 866.

Upon a new trial of the felony charges, if one should occur, we assume that, under appropriate instructions, a double conviction for the same offenses will not occur.

The judgments of conviction on the misdemeanors of contributing to the delinquency of minors and the order denying a new trial thereof are affirmed. The order granting a new trial on the felonies charged in counts two and three of the first indictment, and under count one of the second indictment, is affirmed.

ADAMS, P. J., and PEEK, J., concur.

83 Cal.App.2d 807

**INGRAHAM et al. v. SMITH et al.**

**Civ. 13560.**

**District Court of Appeal, First District, Division 2, California.**

**Feb. 24, 1948.**

**1. Principal and agent ⇐23(1)**

Testimony by administratrix of decedent's estate and by attorney in fact for decedent's distributee that he had authority as such agent to execute written contract to sell realty subsequently distributed to his principal from decedent's estate was sufficient to prove the fact of agency, regardless of whether it was competent for that purpose, in absence of any objection to the admission thereof.

**2. Trial ⇐105(5)**

Incompetent evidence, including oral testimony in a case covered by the statute of frauds, if admitted without objection, is generally sufficient to support a finding.

**3. Vendor and purchaser ⇐186**

Vendor, not having repudiated agency of attorney-in-fact who executed written contract for installment sale of realty, could not assert a default because of purchasers' nonperformance, where counsel for purchasers offered to perform and attorney in fact for vendor rejected offer and informed counsel for purchasers that he was unable to convey.

**4. Appeal and error ⇐1071(1)**

Where judgment denying relief in unlawful detainer suit did not order specific performance of written contract of sale of the realty to defendants, supplementary answer and finding that alleged vendor was the owner in fee of the entire estate were not prejudicial to plaintiffs, particularly in view of counsel's stipulation of facts.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Suit in unlawful detainer by L. Ingraham, administratrix of the estate of Ira Wise, deceased, and another, against Ed. Smith and another. From an adverse judgment, plaintiffs appeal.

Judgment affirmed.

Geo. Ingraham, of Hayward, for appellants.

Arthur T. MacDonald and Wilson E. Cline, both of Oakland, for respondents.

NOURSE, Presiding Justice.

Plaintiffs sued in unlawful detainer under an oral lease. Defendants countered with a plea of possession under a written contract of sale and of the performance of all conditions on their part. Judgment followed a trial by the court decreeing that plaintiffs were not entitled to restitution, that no rent was due them, and that they were entitled to no relief. The appeal is on a settled statement.

The property came to plaintiff Crutchfield through the estates of Ira Wise and Emma Wise. Prior to distribution Crutchfield, through his attorney in fact George Ingraham executed a written contract to sell to defendants calling for payment of $500 and a balance of $1100, payable $50 a month, with the stipulation that these instalment payments should be suspended until the seller should give notice of distribution from the estate of Emma Wise. The contract of sale was executed in January, 1945. After the commencement of this action distribution to plaintiff Crutchfield was made in both estates.

[1, 2] Appellants first raise the point that there was no competent proof that George Ingraham was attorney in fact for Crutchfield. Appellant L. Ingraham and her counsel George Ingraham testified that he was such, and George Ingraham testified that he had the power to execute the contract. It does not appear that they made any objection to their own testimony. If this evidence was incompetent to prove the fact of agency it was nevertheless sufficient and is not now subject to objection. It is the general rule that incompetent evidence admitted without objection is sufficient to support a finding (Powers v. Board of Public Works, 216 Cal. 546, 552, 15 P.2d 156, and cases cited); and this includes oral testimony in a case covered by the stat-

ute of frauds. Howard v. Adams, 16 Cal. 2d. 253, 105 P.2d 971, 130 A.L.R. 1003.

[3] Appellants argue that there was no offer by respondents to pay the instalments under the written contract. There are two answers. The attorney in fact for Crutchfield (who was the only party plaintiff in interest at the time of the trial) testified that counsel for respondents offered to perform and that he rejected the offer. The same witness testified that he informed counsel for respondents that he was unable to convey. Appellant Crutchfield has at no time repudiated the agency of Ingraham and he cannot now assert a default because of respondents' non-performance.

[4] Since the judgment did not order specific performance of the contract of sale, appellants were not hurt by the supplemental answer or the finding that appellant Crutchfield was the owner in fee of the entire estate. This is the more evident because of counsel's stipulation that those facts were true.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.




83 Cal.App.2d 771

**HAMILTON v. HAMILTON et al.**

Civ. 16294.

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1948.

**1. Divorce ⇐83**

The death of a wife subsequent to entry of judgment in a divorce action deprives the superior court of all power to determine her right to a divorce.

**2. Divorce ⇐83**

Where husband died after wife obtained an interlocutory divorce decree incorporating a property settlement and ordering husband to pay a monthly sum for wife's support, the action abated, and nothing could thereafter be done with the decree unless it should be determined that provisions with respect to support money could be modified.

**3. Appeal and error ⇐151(3)**

Administratrix of deceased husband's estate not being an "aggrieved party" who was aggrieved by order dismissing an order to show cause in proceedings for modification of an interlocutory divorce decree in favor of wife, the administratrix was without right to appeal from the order.

See Words and Phrases, Permanent Edition, for all other definitions of "Aggrieved Party".

**4. Appeal and error ⇐150(1)**

Every appellant must be interested in the subject matter of the litigation, and his interest must be immediate, pecuniary and substantial, and not nominal or a remote consequence of the judgment, since it is a court's duty to decide actual controversies and not moot questions.

**5. Divorce ⇐255**

When an interlocutory divorce decree disposes of property rights of the parties, it becomes conclusive as to such property rights.

**6. Divorce ⇐83**

Where husband died after entry of interlocutory divorce decree for wife, no action could be taken in the premises prior to substitution of administratrix of husband's estate.

**7. Divorce ⇐83**

The filing in wife's divorce suit of an affidavit by attorney for administratrix of estate of deceased husband requesting a modification of interlocutory decree in favor of the wife was not sufficient to substitute the administratrix as a party defendant in the divorce action. Code Civ. Proc. § 1014.

**8. Parties ⇐62**

The appearance of an attorney in an action with which his client has no connection will not be sufficient to constitute his client a party, since such can be done only by substitution. Code Civ.Proc. § 1014.

Appeal from Superior Court, Los Angeles County; Charles Newell Carns, Judge pro tempore.

Suit for divorce by Harriet Hamilton against Walter A. Hamilton, wherein an interlocutory judgment of divorce was entered incorporating a property settlement and ordering defendant to pay $150 a month for plaintiff's support and maintenance. Thereafter the defendant died and Nathan Newby, Jr., as attorney for Martha Hamilton, administratrix of the estate of Walter A. Hamilton, deceased, filed an affidavit for an order directing plaintiff to show cause why interlocutory divorce decree should not be modified and additional orders made. From an order dismissing an order to show cause, Martha Hamilton, administratrix of the estate of Walter A. Hamilton, deceased, appeals, and the plaintiff moves to dismiss the appeal.

Appeal dismissed.

Nathan Newby, Jr., and Newby, Holder & Newby, all of Los Angeles, for appellant.

Gordon M. Snyder, of Los Angeles, for respondent.

MOORE, Presiding Justice.

The question for decision is whether this court has jurisdiction over an appeal from an order dismissing an order to show cause in re modification of an interlocutory decree of divorce, the defendant husband having deceased and no order for the substitution of his personal representative having been made, and it appearing that the order for the payment of monthly sums to the plaintiff had been made in approving a property settlement agreement.

On August 31, 1945, respondent and her husband Walter A. Hamilton executed a property settlement agreement by the terms of which the husband conveyed to respondent $6,000, a home, furniture and furnishings, automobile, jewelery, bonds and other securities and agreed to pay for her support and maintenance "the sum of $150 per month for the remainder of her life" provided that in the event respondent should remarry such obligation should immediately terminate. In September of the same year respondent filed her complaint for divorce and alleged the execution of the property settlement and prayed that it be approved. The husband filed no answer. An interlocutory judgment of divorce was entered October 30, 1945, wherein the property settlement was incorporated and was in all things approved and the defendant ordered to pay for plaintiff's support and maintenance the sum of $150 a month. All payments provided by the agreement were made to and including the first day of March, 1946. In that month Mr. Hamilton deceased.

On February 26, 1947, Nathan Newby Jr., as attorney for the administratrix of decedent's estate, filed an affidavit in the divorce action for an order directing respondent to show cause on March 20, 1947, why the interlocutory decree should not be modified and additional orders made. Such affidavit averred that since the judgment was entered conditions had materially changed in that Walter A. Hamilton had deceased and that he had made all payments "for and on account of alimony as provided for in said order." Based upon such facts the court was requested to modify the order "by terminating the alimony payment of $150 for the month of April, 1946, and for all subsequent months and all further payments of alimony be terminated and annulled."

The hearing upon the order to show cause was finally held on June 4, 1947, following which the court dismissed the application for the order to show cause as well as the order itself on the following grounds: (1) the affidavit for the order to show cause is insufficient in that it does not show that the support provisions are subject to modification under the Civil Code, section 139; (2) the right to apply for a modification under section 139 is a personal right and did not survive the death of defendant or inure to the benefit of his attorneys; (3) the interlocutory judgment having adjudicated the property rights of the parties, including the monthly payments as well as their marital status, has become final as to the property rights. The interlocutory judgment with respect to property rights having been predicated upon the property settlement of the parties is a final settlement of such property rights.

After the filing of the settled statement herein respondent filed her notice of motion to dismiss the appeal on the ground that this court is without jurisdiction to hear and determine it for the reasons (1) that the divorce action abated by the death of the defendant eleven months prior to the filing of the motion to modify the interlocutory judgment; (2) that the appeal is taken by a person who is neither an aggrieved party nor a party to the record, to wit, the administratrix of the estate of Walter A Hamilton, deceased; (3) that the modification proceeding was instituted by one of decedent's counsel who was not a party to the divorce action.

[1,2] (1) Clearly the action abated by the husband's death. In an action for divorce the death of the wife subsequent to entry of the judgment deprives the superior court of all power to review its action and to determine her right to a divorce. "The primary and substantive subject of litigation in a suit for divorce is the personal relation of the parties, and their right to the community property is but incidental thereto. If, before a decision upon that question is made, one of the parties dies, the action cannot be continued for the purpose of determining the rights of property; and, if there was originally no issue upon the subject, it cannot be revived, in case of death after judgment, for the purpose of having this question adjudicated." Kirschner v. Dietrich, 110 Cal. 502, 505, 42 P. 1064, 1065; Begbie v. Begbie, 128 Cal. 154, 60 P. 667, 49 L.R.A. 141. Mr. Hamilton having deceased eleven months prior to the filing of the application for a modification of the interlocutory decree, the action had abated. There was nothing that could be done with that decree unless it should be determined that the provisions with respect to support money could be modified, which is not possible in the instant proceeding.

[3,4] (2) The appellant is not an aggrieved party and therefore is without right to appeal. It is a fundamental rule of appellate jurisdiction that every appellant must be interested in the subject matter of the litigation, and his interest must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment. It is the function and duty of a court to decide actual controversies and not moot questions. California Pac. Title & Trust Co. v. California Mining and Dredging Syndicate, 17 Cal. App.2d 353, 355, 61 P.2d 1181; Globe Discount Co. v. Ostergard, 5 Cal.2d 673, 55 P.2d 1169; Goldtree v. Thompson, 83 Cal. 420, 23 P. 383.

Many decisions hold that an order entered after the death of a party to an action is void in the absence of the substitution of the personal representative of such decedent. Maxon v. Avery, 32 Cal.App.2d 300, 302, 89 P.2d 684; Munchiando v. Bach, 203 Cal. 457, 458, 264 P. 762; Scoville v. Keglor, 27 Cal.App.2d 17, 80 P.2d 162.

[5,6] When an interlocutory decree disposes of the property rights of the parties it becomes conclusive as to such property rights. Klebora v. Klebora, 118 Cal. App. 613, 618, 5 P.2d 965. Appellant questions the soundness of the foregoing principle and insists that the jurisdiction of the court extends to the hearing and determination of the application of the administratrix for a modification of the interlocutory decree. But whether or not the property settlement agreement and the interlocutory decree are subject to modification by the court, there is still no answer to the contention of respondent that no action can be taken in the premises prior to the substitution of decedent's administratrix. Estate of Cazaurang, 35 Cal.App. 2d 556, 558, 96 P.2d 185; Braun v. Brown, 13 Cal.2d 130, 133, 87 P.2d 1009.

[7,8] Appellant cites numerous cases in support of her contention that the judgment is subject to modification: Wylie v. Wylie, 26 Cal.App.2d 167, 79 P.2d 152; Norris v. Norris, 162 Wis. 356, 156 N.W. 778; 155 A.L.R. 622; Estate of Baker, 170 Cal. 578, 581, 150 P. 989, and others. Practically all such authorities deal with the question whether the provision in the interlocutory decree was one for alimony. Other authorities cited are for the purpose of enforcing her contention that she was sufficiently connected with the record to prosecute the application for a modification of the decree. But the method of be-

coming a party to an action is fixed by statute. Code Civil Procedure, section 1014. The filing of an affidavit by the attorney for the administratrix requesting thereby a modification of the interlocutory decree was not sufficient to substitute her as party defendant in the divorce action. Estate of Kratz, 192 Cal. 494, 497, 221 P. 340. For an attorney to appear in an action with which his client has no connection will not suffice to constitute his client a party. Such can be done only by substitution.

(3) By the foregoing it is demonstrated that the proceeding for modification was instituted by a stranger to the action and for that reason cannot be maintained.

It is ordered that the appeal be and it is dismissed.

McCOMB and WILSON, JJ., concur.




83 Cal.App.2d 779

**CLEMENTS v. RANKIN et al.**

Civ. 3579.

District Court of Appeal, Fourth District, California.

Feb. 20, 1948.

Hearing Denied April 19, 1948.

**1. Brokers ⇐49(1)**

If broker in good faith fully performs all conditions on his part to be performed and obtains a valid and binding contract of sale signed by all parties, broker is entitled to commission.

**2. Brokers ⇐48, 63(1)**

A broker employed to sell property has earned his commission when he has produced a person who is ready, able, and willing to purchase property on terms satisfactory to seller and has obtained binding and valid contract for sale on terms proposed by seller, or has brought seller and buyer together and thus enabled them to enter into contract of sale, or has produced such a buyer who has verbally accepted seller's terms and who has offered to enter into written contract embodying the same terms and binding upon both parties, and it is immaterial that seller is unable or unwilling to complete sale.

**3. Brokers ⇐86(5)**

In action to recover broker's commission, evidence was insufficient to support finding that broker secured purchaser ready, able, and willing to purchase on terms fixed by vendors.

**4. Vendor and purchaser ⇐30**

Where written agreement signed by proposed purchasers provided for conveyance of real estate only, but they intended that agreement should include personal property and beer license, when prospective purchasers discovered that vendors never intended to convey personal property and license, that vendors could not be compelled to do so, and that broker could not deliver title to property as represented by him, prosepective purchasers had right to rescind.

**5. Brokers ⇐60**

Where written agreement signed by prospective purchasers covered only realty and did not convey personalty and beer license as intended by purchasers and broker and, because of the misunderstanding, vendor and purchaser rescinded, vendor was not liable for broker's commission.

**6. Brokers ⇐86(1)**

In an action by broker to recover real estate commission after purported sale had been rescinded by mutual consent of vendors and purchasers, evidence did not establish conspiracy between vendors and purchasers to cancel escrow and transfer property by some other means or at a later date to avoid paying a commission.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action to recover a real estate commission by Harry C. Clements against R. P. Rankin and another. Judgment for plaintiff, and defendants appeal. Since the judgment was entered plaintiff died, and his

wife, as administratrix of his estate, was substituted as a party.

Reversed.

Mack & Bianco, of Bakersfield, for appellants.

T. R. Claflin, of Bakersfield, for respondent.

GRIFFIN, Justice.

Action to recover real estate commission. Respondent, a real estate broker, hereinafter referred to as plaintiff, brought this action to recover from the defendants and appellants $1300 on a claimed written agreement of defendants to pay a commission for the sale of real and personal property after the purported sale had been rescinded by the grantor and grantee by mutual consent. Since judgment was entered plaintiff died and his wife was substituted as administratrix of his estate.

Defendants owned a furnished auto court, a service station, and store equipped with certain stock and cases of beer, and also owned a license to dispense beer at those premises.

Defendants had listed their property for sale with plaintiff for $31,500. On November 8, 1945, Mr. and Mrs. Stone noticed an advertisement by the agent offering it for sale. They went to plaintiff's office. Mr. Williams, a salesman in that office, was sent with them to see the property. They went to the courts and looked over the premises. It was their understanding, from Mr. Williams, that everything was included in the sale, i. e., furniture, stock of merchandise, and the beer license. They became interested and went back that same night and took an inventory of the property. They then repaired to Clements' office and while there Mr. Rankin called and said if they took the property that night "the stock and all went, if not the stock wouldn't go." The Stones then said they would think it over. The next morning they made Clements an offer of $31,000, which they believed included furniture, stock, real property and the beer license, and gave him their check for $2500. They told him that since the cafe was unfinished they would take the property "as is," for $31,000, $15,000 down and $100 per month, rather than pay Rankins $31,500 and have them complete the cafe, as agreed. Later, Williams returned the check and stated that Rankins refused the offer. Clements then came to see the Stones and said the Rankins would take $15,000 down and $300 per month. The Stones then told Clements that "absolutely the beer license and stock had to go." Clements came back to them with escrow instructions which he had had drawn up at the title company and which merely described the property being transferred as lots 25 and 26. No mention was made as to the personal property, beer license or stock in trade. The Stones testified that they were busy painting and did not notice whether the escrow instructions contained a description of the entire property involved, but relied on the statement of plaintiff Clements that it did; that they signed it, believing that it did; that a few days later Mr. Stone went out and talked to Mr. Rankin and discovered that the beer license and stock in trade were not supposed to be included and that it was not the Rankins' intention, at any time, to include them; that they went to the title company and asked to see the bill of sale and were told that there was none; that they were shown the escrow instructions and found that no mention was made of the personal property in the escrow agreement; that he went to Clements' office and told him that there was no bill of sale in the escrow; that Clements said "he would get" one; that he told Clements that "no beer license was written down" and Clements said: "I don't know how you are going to get them to sign"; that Stone then said he would not go through with the deal unless the beer license was included; that he went to Rankins' house and told him that if the beer license, stock and fixtures didn't go, they did not want the place; that Rankin told them that the 38 cases of beer, cases of Seven-Up and tobacco stock were not included in the purchase price; that they then went to see Clements; that Clements said: "I will go out and line them up and have everything in A-1 condition." As a result of the misunderstanding the Rankins and the Stones mutually agreed to "call it all off." They went to the title company, signed a cancellation

agreement and stopped payment on the $2500 check given to the plaintiff. Mrs. Stone then testified that thereafter Mr. Clements offered to buy them a beer license but they did not know whether or not he would be able to obtain one; that "we understood we would get that one"; that at all times they were willing to take the property if the defendants would have sold the real property described in the escrow agreement, the property specified in the inventory, and the beer license. The inventory was placed in evidence and it included everything mentioned except the beer license.

Clements testified that he submitted the escrow instructions to defendants, at their place of business; that there was nothing said to him by defendants about the beer license as to whether or not it was a part of the property to be sold; that defendants signed the escrow instructions as prepared, which instructions contained a provision that the title company was authorized to pay him, as commission, $1300, and to pay certain costs of escrow. On that same day the Stones and the defendants signed a standard form of deposit receipt for $2500, prepared by plaintiff, which receipt described the property which the Stones agreed to buy only as lots 25 and 26. It also contained the provision:

"I agree to sell the above described property on the terms and conditions herein stated and agree to pay the above signed agent as commission the sum of Thirteen Hundred and No/100 Dollars, or one-half of the deposit should same be forfeited by purchaser, provided said amount shall not exceed the full amount of said commission.

"R. P. Rankin
"Lillian Rankin
"Seller."

Clements then stated that on November 10, 1945, he went to the Rankins' home to have them sign a bill of sale and he, Rankin, said he was not going to sign it because Clements had "misrepresented this thing", i. e., something about the seller having to pay cost of title certificate; that Rankin called a man working there to "come and throw me out." Clements admitted that a few days before, and on the day following the cancellation of the escrow instructions, he met the Stones and they "made some talk" about not getting the license; that he told them that if they did not get Rankins' license he would get one for them. He admitted on the stand that he had told the Stones, before going into escrow, that everything in the inventory and "everything that was there (at Rankins) went" and "if it didn't, the deal didn't go over"; that he didn't remember whether he specifically mentioned the beer license but "it might have been." On cross-examination Clements admitted he talked with the Stones shortly before the escrow instructions were signed by them, and gave the following testimony:

"Q. (By Mr. Bianco) And they told you if they couldn't get the beer license they wouldn't go through with the deal? A. That is what I am telling you, if they didn't get it they wouldn't have to go through with the deal * * *.

"Q. Isn't it a fact Mr. and Mrs. Stone insisted the deal wouldn't go through unless they got the beer license? A. They didn't want the deal at all unless it went as it was represented.

"Q. That included the beer license? A. As far as I know, yes. * * *

"Q. * * * I am asking you whether or not it isn't a fact that the Stones at all times prior to the signing of the escrow instructions insisted that they had to have the beer license? A. I will answer you the same way, they didn't specifically say beer license, they said everything that was there.

"Q. This is on your deposition, page 12. Do you remember the time your deposition was taken in our office? A. Yes.

"Q. At that time you were asked this question, page 12, line 6, 'Did you talk to Mr. and Mrs. Stone about the beer license before the escrow instructions were signed? A. Yes. Q. What did you tell them? A. I told them if they could not get a beer license the deal would not go through. Q. You told the Stones if they could not get a beer license the deal would not go through? A. Yes.'

"Q. Do you remember giving those answers? A. At the time I made the deal with them out there.

"Q. This is before the Stones signed the escrow instructions. A. I can't recall that, no. * * *

"Q. Now then isn't it a fact that as far as the Rankins were concerned you didn't know at any time throughout this transaction whether the Rankins would or would not transfer their beer license? A. No, that isn't a fact.

"Q. I will call your attention again to your deposition, page 15, lines 5 to 11, you were asked these questions: 'Q. As a matter of fact, you know the parties never got together on the beer license as to whether Rankin would sell it, and whether Stone was going to get it? A. As far as the beer license is concerned, I don't know whether Rankin ever intended to give it to him or not, but I do know I went to the Board of Equalization and asked about getting one for them, and the man said I could get one.'

"Q. Did you give that answer at that time? A. I guess I did if you have it down there.

"Q. As far as you know you didn't know whether the Rankins were willing to give up the beer license? A. I know they told me they would deliver what they had there.

"Q. They never mentioned beer license to you? A. No. * * *

"Q. And that took place the day you had the bill of sale prepared and went out there to get it signed, is that right? A. That was when the conversation took place is when I went out there to get it signed.

"Q. And they refused to sign the bill of sale? A. That is right.

"Q. And as part of that same conversation didn't they tell you at that time that they would not transfer the beer license, Mr. and Mrs. Rankin? A. At that time I took the bill of sale out there?

"Q. Yes. A. No, they didn't tell me that * * *

"Q. Calling your attention to your deposition on page 13, lines 9 and 12: 'Q. They had not told you they would not transfer the beer license? A. I don't think they said a thing about whether they would or would not, until after I went out there to give him the bill of sale.'

"Q. Does that refresh your recollection any as to whether they told you at that time they would not transfer it? A. My recollection of that bill of sale and beer license was that they never mentioned it at no time. * * *

"Q. In the deposit receipt there is nothing said about personal property to be sold, is there? A. I don't think so.

"Q. That is likewise true of the escrow instructions, isn't it? A. I don't think there is anything in there either.

"Q. Was that intentionally omitted by you? A. No, it was not.

"Q. Why didn't you include it? A. That I don't know, I can't say why it wasn't included because my intention was having it in there.

"Q. You knew the Stones were insisting on that personal property? A. Certainly.

"Q. And you knew that the Rankins were arguing with them about it, didn't you? A. No. * * *

"Q. * * * did you at any time after you made the other deal for $31,000.00 tell Mr. and Mrs. Rankin that for $31,000.00 they were selling the furniture, stock in trade and beer license? A. Selling everything we agreed to at the start.

"Q. When did you tell them that? A. When I went out there to sign the instructions.

"Q. Why didn't you include it in those instructions? A. I can't say why I didn't."

The Rankins then testified that the $31,000 deal was offered for one night only and that the $31,500 deal was not intended to cover the property in the inventory; that they never told Williams or Clements that the $31,500 deal included all of the property in the inventory plus the beer license; that they only intended to sell lots 25 and 26 as described in the escrow instructions for $31,000; that the only time personal property was ever mentioned was

when Clements asked them to sign the bill of sale and they refused.

Upon this evidence the trial court found that prior to November 9, 1945, plaintiff entered into the service of defendants, as agent, to dispose of lots 25 and 26; that plaintiff negotiated the sale of said property upon the terms and conditions agreed upon by them; that the purchaser procured by plaintiff was ready, able and willing to complete the purchase of defendants' property upon the terms and conditions fixed; that on November 9, 1945, defendants agreed in writing to pay plaintiff $1300 for such service; that plaintiff has duly performed all of the conditions of said contract on his part to be performed; that plaintiff has not been paid said sum and that it is not true, as claimed by defendants, that said agreement is invalid under section 1973 of the Code of Civil Procedure. Judgment was entered accordingly. Defendants appeal.

It is argued that there was no independent contract of employment of plaintiff as the agent of defendants except an order to pay a real estate broker's commission of $1300, found in the escrow instructions of which the deposit receipt was a part, and therefore the broker's right to a commission falls with a rescission of the respective agreements, citing Irwin v. Klimper, 56 Cal.App. 434, 435, 205 P. 714, and the rule stated in Dowds v. Armstrong, 17 Cal.App. 2d 485, 62 P.2d 411, 63 P.2d 1114, to the effect that where an agreement to pay a commission from the proceeds of the sale is contained in the agreement between the owner and the purchaser and there is no separate enforceable contract of employment the right of a broker to a commission is terminated with the rescission of the agreement between the owner and the purchaser.

[1] It appears from the evidence that there was a separate contract of employment by defendants contained in the standard form of deposit receipt whereby defendants agreed to pay plaintiff a commission of $1300. Neither that document nor the escrow instructions provide that the commission was to be paid only from the purchase price if and when the sale was completed. Under these circumstances the case comes well within the rule stated in Deeble v. Stearns, 82 Cal.App.2d 296, 186 P.2d 173, and, if there is sufficient evidence to support the finding that plaintiff, in good faith, fully performed all conditions on his part to be performed, and obtained a valid and binding contract of sale signed by all the parties, the judgment must be sustained.

In support of the contention that there is no substantial evidence supporting this finding, the rule laid down in Naylor v. Ashton, 20 Cal.App. 544, 546, 130 P. 181, 182, is cited to the effect that:

"The duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until this is done his right to commission does not accrue."

Hicks v. Christeson, 174 Cal. 712, 717, 164 P. 395, and Colton v. O'Brien, 217 Cal. 551, 553, 20 P.2d 43, are also cited.

It is argued that this is simply a case of an over-anxious real estate agent who was willing to promise anything to get some kind of a contract signed without actually bringing the parties together, and that the minds of the sellers and purchasers never actually met; that it follows, therefore, that the broker, having undertaken to bring about the execution of a binding agreement and having failed in his undertaking, has not earned his commission and that the evidence does not support the finding that the broker performed all of the provisions of the contract on his part to be performed.

[2] Opposed to this contention plaintiff cites the general rule laid down in Twogood v. Monnette, 191 Cal. 103, 215 P. 542, to the effect that a broker employed to sell real or personal property has earned his commission when he has produced a person who is ready, able and willing to purchase the property on the terms satisfactory to the seller and has obtained a binding and valid contract for a sale on the terms proposed by the seller, or has brought the seller and buyer together and thus enabled them to enter into a contract of sale, or has produced such a purchaser who has verbally accepted the seller's terms and who has offered to enter into a written

contract embodying the same terms and binding upon both parties. In such cases the broker's right to a commission accrues when the contract of sale is executed, or when oportunity to make such contract is given the seller, and the broker becomes entitled to his commission even though the seller is unable or unwilling to complete the sale. See, also, Walter v. Libby, 72 Cal.App.2d 138, 142, 164 P.2d 21.

[3-5] The only evidence supporting plaintiff's argument that he found a purchaser ready, able and willing to purchase on the terms fixed by the seller must be predicated upon the signed agreements in evidence. From an examination of those agreements the sellers agreed to sell, and as they contended, for the price of $31,000, only the real property therein described, i. e., lots 25 and 26. There is nothing in those contracts that would bind the sellers to include furnishings, stock in trade, or a beer license. The agreement, as signed by the proposed purchasers, provided that they were obligated to purchase lots 25 and 26 for $31,000 and without fixtures, furnishings, stock in trade, or a beer license. It clearly appears from the uncontradicted evidence that this was not the agreement intended to be signed by the purchasers or as the agent Clements, the plaintiff herein, intended. Even under the agent's uncontradicted testimony, and that of the prospective purchasers, the plaintiff would not have been able to enforce that agreement to purchase, as written, against the purchasers. Under the circumstances, it cannot be said that there was a meeting of the minds of the parties to be bound. When the Stones discovered that the Rankins never intended to convey the personal property above mentioned, and that under the written agreements, the Rankins could not be compelled to do so, and since Clements could not deliver title to the property, as represented by him, they had the right to rescind. The representations which gave rise to the right to rescind were made by Clements himself. The Rankins recognized this fact and instead of endeavoring to bring an action upon the agreement, which agreement the evidence conclusively shows would have been unenforceable, they should not now be obligated to pay a commission claimed to have been earned under the circumstances disclosed by the uncontradicted evidence here produced.

[6] There is no evidence of any conspiracy between the grantor and grantee to cancel the escrow and to transfer the property by some other means or at a later date to avoid paying a commission. Gunn v. Bank of California, 99 Cal. 349, 33 P. 1105; Mattingly v. Pennie, 105 Cal. 514, 39 P. 200, 45 Am.St.Rep. 87; Mott v. Minor, 11 Cal.App. 774, 779, 106 P. 244; Douglas v. Spangenberg, 23 Cal.App. 294, 296, 137 P. 1103; Massie v. Chatom, 163 Cal. 772, 776, 127 P. 56; Colton v. O'Brien, supra.

For the reasons expressed the judgment is reversed.

BARNARD, P. J., concurs.




83 Cal.App.2d 671

**DEPARTMENT OF MOTOR VEHICLES, CALIFORNIA HIGHWAY PATROL, v. INDUSTRIAL ACCIDENT COMMISSION et al.**

Civ. 13582.

District Court of Appeal, First District, Division 1, California.

Feb. 16, 1948.

**1. Workmen's compensation ⇐840**

Member of highway patrol, who was injured March 29, 1939, and who was paid his salary by the Department of Motor Vehicles until August 7, 1939, while he was disabled, was not entitled to recover workman's compensation for permanent or temporary disability for that period, in view of provision of the Labor Code that no temporary disability should be paid concurrently with wages or salaries. Labor Code, §§ 4661, 4800, 4803.

**2. Workmen's compensation ⇐840**

The word "concurrently", as used in provision of the Labor Code that no temporary disability shall be paid "concurrently"

with wages or salaries, should not be so strictly construed as to permit an employee to receive salary until his leave with salary has expired and then to apply for disability indemnity. Labor Code, § 4803.

See Words and Phrases, Permanent Edition, for all other definitions of "Concurrently".

**3. Workmen's compensation ⇐2**

The rights of applicants for workmen's compensation are governed by provisions of the Labor Code in force at time of injury.

**4. Statutes ⇐184**

In construing a statute liberally, courts are not permitted to pervert its purpose, and liberality of interpretation cannot go the length of accomplishing an end not within the terms of the statute, however desirable such a result may be.

---

Petition by the Department of Motor Vehicles, California Highway Patrol, petitioner, against the Industrial Accident Commission of the State of California and John M. Reed, respondents, for writ of review seeking a reduction of an award made by the Industrial Accident Commission to John M. Reed, a member of the Highway Patrol, for injuries received within the scope of his official employment.

Order and award remanded to commission with directions to reduce award.

Donald Gallagher, Royle A. Carter, and Harold B. Brewster, all of San Francisco, for petitioner.

T. Groezinger, E. B. Connolly, and John A. Rowe, Jr., all of San Francisco, for respondent.

WARD, Justice.

This is a petition by the Department of Motor Vehicles, California Highway Patrol, for a writ of review seeking a reduction in an award made by respondent to John M. Reed, a member of the highway patrol, for injuries admittedly received within the scope of his official employment. The amount of the award was $2,300. It is the contention of the state employing petitioner that the award should be reduced in the sum of $442.86 representing the applicant's 17⅞ weeks absence on leave from his official position immediately following his injury. During the last mentioned period of absence Reed was paid his salary in full.

The findings upon which the award is based set forth certain injuries to Reed, arising out of and in the course of his employment, due to a fall from a motorcycle. The findings also set forth that the injuries constitute "a permanent disability of 23 percent, entitling him to $25.00 per week for 92 weeks, in the total sum of $2,300.00, based upon earnings of $190.00 per month. Said injury also caused temporary total disability beginning March 30, 1939 to and including August 7, 1939 during which time applicant was paid his full salary and sustained no wage loss."

The accident occurred on March 29, 1939. The award was dated by the referee May 19, 1947. A petition for rehearing was denied by the commission on June 9, 1947. The California Highway Patrol is subject to the special provisions contained in Labor Code sec. 4800. The purpose of the section appears to be to permit compensation to be given those engaged in active law enforcement service in lieu of disability payments for one year. This section is applicable only to members of the California Highway Patrol. However, there are provisions for special payments to policemen and firemen who are members of the State Employees' Retirement Systems.

It is the contention of the Department of Motor Vehicles that Reed was not entitled to both his full salary during his temporary disability and to permanent disability payments for the same period; "that the Commission should have allowed credit for an amount equal to seventeen and five sevenths (17 & 5/7ths) weeks, (that is, the period of temporary disability, less the one week waiting period) at $25.00 a week, or the sum of $442.96; and that, therefore, the award should have been made for only $1857.14 for permanent disability compensation." Petitioner's position is that the award was unlawful at the time it was made. Respondent Industrial Accident Commission concedes that Reed's rights are controlled by Labor Code sections in force and effect at the time of Reed's injury.

At the date of Reed's injury Labor Code sections 4803 and 4661 provided respectively: "Whenever such disability of such member of the California Highway Patrol continues for a period beyond one year, such member shall thereafter be subject, as to disability indemnity to the provisions of this division other than Section 4800, during the remainder of the period of such disability or until the effective date of his retirement under the State Employees' Retirement Act, except that such compensation shall be paid out of funds available for the support of the Department of Motor Vehicles, and the leave of absence shall continue." Stats. 1937, Ch. 848, see Ch. 90, p. 286. "Where an injury causes both temporary and permanent disability, the injured employee is not entitled to both a temporary and permanent disability payment, but only to the greater of the two." Stats.1937, Ch. 90, p. 284. At the same time sec. 4804 read: "No disability indemnity shall be paid to said member concurrently with wages or salary payments or for time after the effective date of retirement under the State Employees' Retirement System." Stats.1937, Ch. 848, see Ch. 90, p. 287. Some of the provisions above quoted were changed by statute enacted in 1939, effective in September of that year, or in subsequent years, but in the Reed matter we must deal with the provisions of the statutes as they existed on March 29, 1939.

[1] When the quoted statutes are read together the conclusion is reached that when disability occurs to a member of the California Highway Patrol during the period that Reed suffered his injury, indemnity, whether temporary or permanent, shall not be paid concurrently with wages or salary.

The petitioner and the respondents cite a number of cases which they respectively claim bear upon the precise issue involved. Two of them should be mentioned: Department of Motor Vehicles v. Industrial Acc. Com., 14 Cal.2d 189, 93 P.2d 131 (the Dinan case), and Department of Motor Vehicles v. Industrial Acc. Com., 78 Cal.App.2d 626, 178 P.2d 43 (the Cope case).

The date of the Dinan injury is not mentioned but the opinion was filed on August 16, 1939. The facts appear in the opinion as follows, 14 Cal.2d at page 191, 93 P.2d at page 132: "William Y. Dinan, while a member of the state highway patrol and engaged in active law enforcement, suffered, in the course of his employment, a gunshot wound. For approximately twenty weeks Dinan was temporarily disabled and on leave of absence without loss of salary, as permitted by section 4800 of the Labor Code, St.1937, p. 285. At the end of the leave, the injured employee returned to active duty and shortly thereafter applied to the Industrial Accident Commission for permanent disability rating. After a hearing, the commission found the employee had sustained a permanent disability amounting to 24¾ per cent, and awarded him the sum of $2,475, less the sum of $457.14 which he had received on account of temporary disability. Sec. 4661, Labor Code." The court affirmed the award and stated its position, 14 Cal.2d at pages 195, 196, 93 P.2d at page 134: "If, in reading section 4804 of the Labor Code, there is kept in mind the provisions of section 4803 of the same code, the meaning becomes clear that no disability indemnity shall be paid to a patrol officer concurrently with salary, except where such officer has sustained a permanent partial disability and has returned to work and is rendering services for the salary received."

The Cope case was decided in 1947 and involves injuries to a highway patrolman approximately in April or May of 1944. Subsequent to the injury to Reed in March, 1939, and prior to the injury to Cope, the Legislature amended section 4803, effective September 19, 1939, so as to include the words "which refers to temporary disability only." Stats.1939, Ch. 902, p. 2519. In 1943 sec. 4804 was amended to read: "No disability indemnity shall be paid to said member as temporary disability concurrently with wages or salary payments." Stats. 1943, Ch. 1137, p. 3082. Cope suffered an injury which was declared to be a total permanent disability. The commission found that a total temporary disability resulted which extended over two definite periods. Following his injury Cope took a leave of absence with full pay for a period of fifty-two weeks. An award was made on account of the permanent disability in the sum of $6,000, payable at the rate of $25 a week. Attorney fees, medical expenses and a pension allowance were also awarded.

On the total permanent disability allowance the employer was given credit for all sums paid as temporary disability. The point raised in the case is that the Department of Motor Vehicles was entitled to a credit for permanent disability allowance payments while Cope was drawing full pay on leave of absence. As said in the Cope case, 78 Cal.App.2d at page 628, 178 P.2d at page 44: "Reading this Section with Section 4804 which provides that no temporary disability shall be paid concurrently with wages or salaries, and Section 4803 which declares that Section 4800 refers to temporary disability only, it is clear that no indemnity on account of any temporary disability may be paid to a patrolman who is drawing full pay while on leave of absence on account of injury." In the last quotation the court recognized the present effect of sections 4803 and 4804 with respect to the unavailablity of "temporary disability" while the claimant is on leave of absence with full pay. In the Cope case the Dinan case is analyzed with the conclusion reached (78 Cal.App.2d at page 628, 178 P.2d at page 44) that the court in that case construed "the prohibitory provisions of Section 4804, as it then stood." In the Cope case attention is called to the 1943 amendment to section 4804.

It seems to be demonstrated that without the 1939 and 1943 amendments to the controlling code sections, the court in the Cope case would have been bound by the language in the Dinan case to the effect that the legislation effective September 1939 prohibited the payment of both salary and indemnity for the one year period while the injured patrolman is on leave with full salary. The Cope case interpreted the changes in sections 4803 and 4804 as abrogating the previous rule when applied to injuries to a patrolman received subsequent to the amendments herein noted. In the present case Reed's injuries occurred prior to the amendments. The law must be construed in accordance with the provisions as they then stood, with the result that this court is forced to declare that no disability award of any type could be given a highway patrolman during the period he received his salary while on leave after an injury.

[2] It appears that Reed received his salary subsequent to March 1939 and at a later date sought a permanent disability award. The Commission contends that since the salary was previously paid him any amounts awarded subsequent to the leave of absence cannot be said to be paid concurrently. Respondents' conception of the word is an over-refined interpretation of "concurrently" as used in the section. It appears that what was being prohibited by the section was "double payment" for the same period of time of disablement, i. e., in the form of both salary and disability indemnity, and that the mere fact that the disability indemnity was not applied for and awarded until after the "leave with with salary" period had expired is an immaterial factor. If such was not the true meaning of the section then it would have been a fruitless enactment—for all that the patrolman would have to do to avoid it would be to wait until the permitted "year leave with salary" period had elapsed and then apply for disability indemnity.

[3, 4] Finally, the commission prays for a liberal construction of the section considered in this case. The rights of applicants for compensation are governed by the provisions of the section in force at the time of the injury. 27 Cal.Jur., p. 261, sec. 7. The fact that the Legislature changed the verbiage of the sections involved indicates that it did not believe that the sections provided as the commission now contends. In construing a statute liberally courts are not permitted to pervert its purpose. Liberality of interpretation cannot go the length of accomplishing an end not within the terms of the statute, however desirable such a result might be in the view of the commission or of the court.

The order and award are remanded to the commission with directions to reduce the award in the sum of $442.86.

PETERS, P. J., and BRAY, J., concur.

**NICHOLS v. MITCHELL et al.**
**Civ. 15767.**

District Court of Appeal, Second District, Division 1, California.

Feb. 16, 1948.

Rehearing Denied March 8, 1948.

Hearing Granted April 15, 1948.

**1. Husband and wife ⇐262(1)**

Statutory presumption that property conveyed to married woman constitutes her separate property is disputable. Civ. Code, § 164.

**2. Husband and wife ⇐264**

Clear and convincing proof that property was paid for with community funds is required in order to overthrow presumption that property conveyed to married woman constitutes her separate property. Civ.Code, § 164.

**3. Appeal and error ⇐1010(1)**

The trial court's determination that presumption that property conveyed to wife is her separate property has been rebutted is conclusive on appellate court unless it is manifestly without sufficient support in the evidence. Civ.Code, § 164.

**4. Husband and wife ⇐262(1), 264**

The statutory presumption that property or any interest therein or encumberance thereon conveyed to a married woman by an instrument in writing is her separate property is based on theory that under such circumstances it will be presumed that husband has made a gift of his interest to wife, and presumption will prevail until overcome by credible rebutting evidence. Civ.Code, § 164.

**5. Husband and wife ⇐249, 254**

Whether property acquired by husband and wife is separate or community property is determined at time of its acquisition, and separate property of one spouse at such time so remains, regardless of nature of funds which thereafter pay for it.

**6. Husband and wife ⇐270(8)**

In action by purchaser at sale on execution of husband's interest in property to quiet title against wife's claim of ownership, where uncontradicted evidence clearly established that property was separate property of wife and as such not liable for husband's debts, findings for purchaser were not supported by evidence. Civ.Code, §§ 164, 171.

DORAN, J., dissenting.

---

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Chas. B. Nichols against John S. Mitchell and others to quiet title to certain land and for declaratory relief. From a judgment for plaintiff, defendants appeal, and from an order denying their motion for new trials defendants attempt to appeal.

Judgment reversed and appeal from order denying motion for new trial dismissed.

Chase, Rotchford, Downen & Chase and Ransom W. Chase, all of Los Angeles, for appellants.

William R. Law and George Acret, both of Los Angeles, for respondent.

YORK, Presiding Justice.

The record herein discloses that the plaintiff secured a judgment against defendant John S. Mitchell on May 19, 1944, for $59,141, the basis of which was a demand note for $50,000, executed by said defendant on September 9, 1942, in renewal of a note for the same amount executed at an earlier date, in favor of Mrs. Genevieve D. Turner, who assigned the same to plaintiff. Thereafter, on November 20, 1944, and March 5, 1945, respectively, plaintiff purchased through execution sales under said judgment the individual interest of defendant John S. Mitchell, as well as his community interest in a parcel of land situate at 2527 Hill Drive, Los Angeles, for which certificates of sale were duly issued to plaintiff by the Sheriff of Los Angeles County.

The controversy presented by the instant action of quiet title revolves around the claim of plaintiff that he is the owner of the property by reason of his purchases under execution, and the contention of the defendants that Helen F. Mitchell, the wife of John S. Mitchell, is the owner of said realty as her separate property.

The trial court found, among other things, that the Mitchells were married on

* Subsequent opinion 197 P.2d 550.

March 31, 1928 and that the real property here involved was the community property of said John S. and Helen F. Mitchell at the time of the sales under execution; that the claim of Helen F. Mitchell to an interest in said property was unfounded and without right; that any right or claim which Helen F. Mitchell "may have had to said property by reason of a community property interest, or otherwise, was terminated and extinguished by the said sale of said property under execution"; that the funds or other property that went into the purchase of said property by the defendants on or about November 27, 1937, and all money or funds used to make the payments upon the note secured by a deed of trust evidencing a part of the purchase price thereof, "have been made with community money, funds or other community property of the said John S. Mitchell and Helen F. Mitchell, and that none of the money, funds or property that went into the purchase of said property was the separate property of Helen F. Mitchell"; that all separate property owned by Helen F. Mitchell at the time of her marriage to John S. Mitchell, or that was acquired by her subsequent to her said marriage, "became commingled with the community property of said defendants to such an extent that its identity was absolutely lost, and it is impossible to trace said separate property, and the real property herein mentioned was acquired by said parties after marriage by community funds and was the community property of said parties at the time of the sales above mentioned."

From the judgment which followed decreeing that plaintiff is the owner of and entitled to the possession of said realty; that neither defendant has any right, title or interest therein, and that plaintiff recover from defendants the sum of $100 per month "for the use or rental of said real property from November 20, 1944, to date of this judgment",—defendants have perfected this appeal.

It is here urged that the findings, in so far as they relate to appellant Helen F. Mitchell, "are all contrary to the evidence for the reason that the uncontradicted evidence establishes:

"(1) That the separate property owned by Helen F. Mitchell at the time of her marriage was not commingled with any property of her husband John S. Mitchell.

"(2) That the consideration for the original deed to the property to Helen F. Mitchell was paid solely out of her separate property and not out of any community funds or out of any funds belonging to her husband.

It is also contended that the judgment of the trial court is erroneous because "the separate property of the defendant Helen F. Mitchell was not subject to the debts of her husband and in particular was not subject to debts contracted by him before marriage."

The deed to the property here in question ran to Helen F. Mitchell, a married woman, and was recorded on November 27, 1937. Likewise, a note for $5,000 and a deed of trust securing same, dated November 15, 1937, covering said property, were executed by Helen F. Mitchell alone, and at the date of trial herein, a balance of $3,500 remained unpaid on this encumberance.

[1, 2] By the express terms of section 164 of the Civil Code, "whenever any real or personal property * * * is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property." This presumption is disputable, however, and may be overcome by competent evidence (Estate of Bruggemeyer, 115 Cal.App. 525, 2 P.2d 534; Truelsen v. Nelson, 42 Cal.App.2d 750, 109 P.2d 996; Wuest v. Wuest, 72 Cal.App.2d 101, 111, 164 P.2d 32); but "in order to overthrow the presumption the husband must establish by clear and convincing proof that the property was paid for with community funds." Attebury v. Wayland, 73 Cal.App.2d 1, 5, 165 P.2d 524, 526.

[3, 4] The case of Williamson v. Kinney, 52 Cal.App.2d 98, 102, 125 P.2d 920, 922, holds that "The determination of the trial court that the presumption raised by section 164 of the Civil Code, that property conveyed to the wife is her separate property, has been rebutted is conclusive on an appellate court unless it is manifestly

without sufficient support in the evidence. Fanning v. Green, 156 Cal. 279, 282, 104 P. 308; Fulkerson v. Stiles, 156 Cal. 703, 105 P. 966, 26 L.R.A.,N.S., 181; Hammond v. McCollough, 159 Cal. 639, 115 P. 216; Killian v. Killian, 10 Cal.App. 312, 101 P. 806; Estate of Kelpsch, 203 Cal. 613, 265 P. 214; Estate of Cronvall, 220 Cal. 503, 31 P.2d 372." See, also, Homeland Bldg. Co. v. Reynolds, 49 Cal.App.2d 176, 121 P.2d 59, and People v. One 1939 La Salle 8 T. Sedan, 45 Cal.App.2d 709, 714, 115 P.2d 39, 42, where it is stated: "Section 164 of the Civil Code provides in part that 'whenever any real or personal property, or any interest therein or encumberance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property.' This rule is based on the theory that * * * the husband has made a gift of his interest to the wife, and this presumption will prevail until overcome by credible rebutting evidence."

[5] In Palen v. Palen, 28 Cal.App.2d 602, 604, 83 P.2d 36, 37, it was held: "Whether or not the property acquired by a husband and wife is separate or community property is determined at the time of its acquisition, and if, when acquired, it was the separate property of one of the spouses it so remains, regardless of the nature of the funds which thereafter pay for it. In Vandervort v. Godfrey, 58 Cal. App. 578, 208 P. 1017, this rule was laid down, the court saying [page 1019]: 'The character of the property must be determined as of the date of the conveyance. If at that time the parties intended that it should be the wife's separate property, no subsequent change of purpose is material. See, generally, Miller v. Brode, 186 Cal. 409, 199 P. 531.'"

Mrs. Mitchell was unable to appear for the trial herein, but her deposition taken in December of 1945 was read into the record, the following being excerpts therefrom:

"Q. Now at the time you married, did you have any money or property? A. Yes, I had some investments and also money. * * *

"Q. * * * What did these investments consist of? A. When I graduated from high school my family gave me some Liberty Bonds and * * * when I graduated from college they gave me some Southern California Edison stock.

"Q. Do you know how much of this Edison stock they gave you? A. * * * I think the value was around $250.00.

"Q. And the Liberty Bonds? A. I think it was around $200.00. * * *

"Q. Now, then after you married, did you keep a separate bank account? A. Always. * * *

"Q. Can you tell me approximately how much money you had in that bank account at any time, the largest amount? * * * A. About $1,000.00.

"Q. * * * Do you remember when that was? A. Definitely. * * * 1937.

"Q. Where did you get that thousand dollars. A. I explained to you that I had transferred from, I had those three and a half months teaching, and I had transferred that money from Beverly. That was my money. I had taught and earned it. I transferred it there. I had these other investments and when I wished to buy this house everything was sold out and there was some money deposited to my account there from these investments that I had sold.

"Q. You mean you sold investments and with the money from your teaching you had about $1,000.00 all told. A. No, I had more than that all told. * * * I had over $2,000.00.

"Q. * * * When you speak of these investments, you are referring to the Edison stock and to the Liberty Bonds? A. They were not in their original form. They had been re-invested even before marriage and there had been other money invested for me too.

"Q. Where did the other money come from? A. It came from my account, from my savings, money I had saved before I married.

"Q. Now, all the money that you had including the value of the investment stock and Liberty Bonds at the time you married, how much did that amount to? * * * A. * * * it was probably between $2,000.00 and $2,500.00. * * *

"Q. Now, since you have bought that house you have maintained a bank account? A. Yes.

"Q. Where did you get the money to put in that account? A. I have told you that I had money that I had brought over from Beverly Hills which was my money that I had earned. I had other money given to me. I had an allowance which is absolutely mine. It is understood it is mine. I have had various gifts from my family. I am an only child, and after all my family has tried to look after me and I have had very substantial gifts from them.

"Q. Now can you tell us what those gifts were, and the amount of them * * *? A. * * *

"At Christmas time my family would send me a check of probably $100.00. * * * I imagine my mother gave me on an average of at least $25.00 a month plus presents at Christmas and birthdays.

"Q. What did you do with that money? A. I put it in the bank. * * * I used it as I saw fit. * * * Mostly on this house.

"Q. Did your husband give you any money for your support and maintenance? A. Yes * * *.

"Q. How much allowance did he give you? A. It depended on what he was making, but * * * most of the time it ran around $50.00 a week.

"Q. What did you do with that money? A. I was expected to do certain things, any help I had in the house, I was expected to pay the utilities, I was expected to take care of myself and the children, as far as I could, and anything left over, it was understood it was to be mine. * * *

"Q. * * * What proportion of the money that your husband gave you in cash actually reached that bank account. A. I can't answer that. I know I always saved at least $10.00 a week and very often more. * * *

"Q. Now, how much a month did you contract to pay for this house when you first bought it? A. I don't know how much it figured by the month. It figures out $200.00 a quarter. * * *

"Q. Who paid those payments on the house since 1937? A. I paid them. * * * I probably haven't paid all of them. My husband at times would take cash and buy a cashier's check, which I would give to him. Very often I would not have all of it and I would give him part of it and then we would settle the rest of it, he would take it out of my allowance. * * *

"Q. How much did you agree to pay Mr. Haines for the house * * * what was the purchase price of the house? A. I turned over to him about $1,200.00 of these securities, plus $1,500.00 in cash, which was gotten when I increased the mortgage. The mortgage had been paid down to $3,500.00 and Dr. Freudenstein advanced $5,000.00 and Mr. Haines received $1,500.00 in cash plus the securities. * * *

"Q. You paid between $7,500.00 and $8,500.00 for the property? A. Yes, sir.

"Q. You bought it from Mr. Haines? A. Yes, sir.

"Q. And he got about $3,500.00 down as cash payment, is that right? A. Well, no, not cash. He got $1,500.00 in cash plus these securities and I think their value was—I don't remember—I will say $1,200.00, I believe.

"Q. When you say 'these securities' what do you refer to? A. There is a record of what they were. They were various investments which my husband had made out of this money that I had originally had that had been transferred, invested and re-invested, and he would make a little money and sell it out and put it into something else.

"Q. And those securities were the result of your Liberty Bonds and Edison stock? A. Yes, and other money that I had invested before I was married. * * *

"Q. Well, the total amount of those securities that went into this house was approximately $1,200.00? A. Yes, I believe so. It may have been more.

"Q. How much was paid in besides that, do you remember? A. I told you $1,500.00.

"Q. $1,500.00. Where did that $1,500.00 cash come from. * * *

"Q. Mr. Haines had owned the house and there was a $3,500.00 mortgage. * * *

"Q. I begin to see the light now. There was a $3,500.00 encumbrance on the property when you bought it? A. Yes, sir.

"Q. You put on a new lien of $5,000.00? A. Yes.

"Q. And paid off the $3,500.00? A. And Mr. Haines got $1,500.00 difference. * * * Dr. Freudenstein advanced the $5,000.00.

"Q. Then between the $5,000.00 and the purchase price you put in this * * * $1,200.00 * * *. All those securities and everything? * * * And then when you actually bought the property you only owed $5,000.00 on it? A. Yes."

Counsel for respondent stated at the trial herein that the deposition, of which the above recital is a part, "is in evidence on our part under 2055, C. C. P."

In October, 1944, respondent examined Mr. Mitchell in a supplementary proceeding when he was interrogated with regard to the manner in which Mrs. Mitchell acquired the property here in controversy. A transcript of Mr. Mitchell's testimony was admitted in evidence and portions of it read into the record, to-wit:

"Q. Who owns that property? A. Mrs. Mitchell. * * *

"Q. Is it your testimony, Mr. Mitchell, that all of the money paid on account of this property was furnished by Mrs. Mitchell? A. Are you talking about the original purchase price of the property, Mr. Nichols?

"Q. For the moment, I am, yes. A. That's right, it was all furnished by Mrs. Mitchell at the time. I had nothing to do with that deal at all.

"Q. Did you thereafter directly or indirectly add to the funds used by Mrs. Mitchell, to the funds used in acquiring the property? A. No, I have not.

"Q. Is it your testimony that at the time that property was acquired Mrs. Mitchell had in her own separate account in which you have no interest whatever, an adequate amount to make whatever down payment was made on the property? A. That's right.

"Q. Now, subsequent to that time did you contribute any part to any of the monthly payments made on the property? A. I think I have. It has a mortgage and sometimes I have made maybe one or two or three of the payments; I don't recall. * * *

"Q. Well, what is your recollection, best recollection as to the amount of the down payment? A. I think, as I recall it, there was about $1,700.00 in cash that was raised on the mortgage from the old mortgage that was against the property, and then Mrs. Mitchell gave the seller some securities that she owned as completion of the payment of the purchase price. * * *

"Q. You don't know how much those two amounts aggregated in dollars and cents? A. I would think about between $2,500.00 and $3,000.00.

"Q. And what was the total purchase price of the property? A. Well, that would make it roughly $8,000.00."

This witness also testified at the trial herein that at the time of their marriage, his wife had some Edison stock, some Liberty Bonds and some cash; and that he received at that time approximately a thousand dollars to invest for her; that none of his earnings were involved in the securities standing in his wife's name; that when Mrs. Mitchell bought the property she borrowed $5,000 from Dr. Freudenstein from which the existing encumberance on the property was paid off and that a balance of $1,900 in cash was paid to Mr. Haines; "After the $5,000.00 was deposited in the escrow and he, Mr. Haines, got his $1,900.00 for the balance of the purchase price, Mrs. Mitchell delivered her fiscal fund securities and I think also 50 shares of Firemen's Annuities. * * * Outside of escrow there was no cash; the only cash amount that went in was the difference between what the former encumbrance was and the new encumbrance which Mrs. Mitchell assumed to pay off, and these securities. That was the total consideration for the property."

Mr. Zell Henley, an officer of the Title Insurance and Trust Company, the escrow

agent which handled the sale of the property in question, testified in effect that his files disclosed that $5,000 was derived through a loan in favor of W. H. Freudenstein; also disclosed a demand by and a receipt from Western Service Corporation for $3,109.15, the amount then owing on the encumbrance which was paid off in escrow, leaving a balance of $1,890.85, which "went to make the down payment on the property."

Opposed to the foregoing, the witness Turner testified that Mr. Mitchell told her that "somebody got a judgment against him on an automobile and he never would hold anything in his own name any more, he would put it in his wife's name * * *." Mr. Mitchell denied that such a conversation took place "because I never had a judgment taken against me in my life until this one was taken. I never had any conversation with anybody about a judgment and putting things in my wife's name; never did."

Mrs. Turner also testified that she first met Mrs. Mitchell after her marriage to Mr. Mitchell, that they went driving together, to dinners, and visited back and forth in each other's home; that she had a conversation with Mrs. Mitchell at which time "she told us about her getting married. She said it took nearly everything she had to get ready for the wedding and her clothes; and for a long time she didn't have any clothes because she didn't have any money coming in from her husband. And she substituted as a teacher occasionally. And then she told me once about getting a present of Edison stock from her husband, I don't know how much, a few different times she received it from her husband. * * * She said she used her money that she had on hand to finance the wedding." On cross-examination, this witness testified that she did not know how much money Mrs. Mitchell had; that Mrs. Mitchell did not say how much Edison stock her husband gave her; that Mrs. Mitchell said she got money from her father at Christmas and for her birthday, "but she didn't say what or how much." Further that Mrs. Mitchell never told her what securities she owned at the time of her marriage.

[6] Appellants' contention that the findings of the trial court are unsupported by the evidence must be sustained, for the reasons that (1) the evidence produced by respondent is insufficient to overthrow the presumption that the property in question was acquired by Mrs. Mitchell as her separate property; and (2) the uncontradicted evidence, hereinbefore recited, clearly establishes that said property is the separate property of Mrs. Mitchell, and as such is not liable for her husband's debt. Section 171, Civil Code.

The judgment is reversed. Appeal from order denying motion for new trial is dismissed.

WHITE, J., concurs.

DORAN, J., dissents.




83 Cal.App.2d 787

**CARTMILL et al. v. ARDEN FARMS CO. et al.**

**Civ. 3674.**

District Court of Appeal, Fourth District, California.

Feb. 20, 1948.

**1. Automobiles ⇨242(2)**

Usually evidence that a moving vehicle has collided with another moving vehicle ahead of it furnishes at least some proof of negligence on the part of the driver of the colliding vehicle.

**2. Automobiles ⇨245(8)**

Whether driver of truck negligently overtook minor bicyclist proceeding near the right curb and ran her down in view of physical conditions after the accident should have been submitted to the jury and court erred in granting a nonsuit.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by Randall R. Cartmill, as guardian ad litem of Sondra Cartmill, a minor, and Randall R. Cartmill against Arden Farms Company, a corporation, and W. T. Fields for personal injuries. Verdict for defendant. From an order granting a new trial, defendants appeal.

Order affirmed.

Monroe & McInnis, of San Diego, for appellants.

Clarence Harden, Crandall Condra, and Sarah C. Harden, all of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action for damages arising from collision between a bicycle on which the minor plaintiff was riding and a truck owned and operated by the defendant. A nonsuit was granted and later the court ordered a new trial, from which order the defendants have appealed.

The minor plaintiff, who was eight years old at the time of the accident, testified she was riding a bicycle and was proceeding to the home of a friend who lived on University Avenue in La Mesa; that she rode north on Maple to its intersection with University, which runs east and west; that at the intersection she stopped, looked in both directions and saw no cars coming; that she rode across to the north side of University and proceeded westerly on the right-hand or northerly side of University, close to the curb; that she was unable to tell how far she rode before the accident; and that the next thing she remembered was that she had been hit. She outlined her course on a map which was introduced into evidence, which corresponds with her testimony, to the effect that she was proceeding westerly near the north curb of University Avenue.

University Avenue at that point is paved and curbed, being 36 feet wide from curb to curb. According to other testimony the truck stopped about 250 feet west of Maple on the north side of University and close to the curb. It was headed west, its right front wheel being against the curb and its right rear wheel a few inches out from the curb. There were black marks or skid marks on the highway beginning at a point 30 or 35 feet to the rear of the truck and about 6 or 7 feet from the north curb on University, and proceeding at an angle to where the truck was stopped. There were also black tire marks along the north curb for 10 or 12 feet. An officer testified that the latter marks were "like a tire rubbing against the curb." The damaged bicycle was found with its front part directly behind the left front wheel of the truck and with its rear portion sticking out beyond the running board.

The appellants contend that the court correctly granted a nonsuit and erred in granting a new trial because there is no evidence or justifiable inference of negligence on their part, with no evidence of anything beyond the fact that an accident occurred, and none to show how it occurred. It is also argued that the position in which the bicycle was found might well indicate that it and the truck were not traveling in the same direction. This inference, if possible, would do no more than create a conflict.

[1, 2] The appellants recognize the usual rule that evidence that a moving vehicle has collided with another moving vehicle ahead of it furnishes at least some proof of negligence on the part of the driver of the colliding vehicle. Gornstein v. Priver, 64 Cal.App. 249, 221 P. 396; Elford v. Hiltabrand, 63 Cal.App.2d 65, 146 P.2d 510; Day v. General Petroleum Corporation, 32 Cal.App.2d 220, 89 P.2d 718; Linde v. Emmick, 16 Cal.App.2d 676, 61 P.2d 338; Wright v. Ponitz, 44 Cal.App.2d 215, 112 P.2d 25; Shannon v. Thomas, 57 Cal.App. 2d 187, 134 P.2d 522. It is argued, however, that except by basing one inference upon another, there is nothing here to indicate that this bicycle and this truck were proceeding in the same direction, or that the truck ran into the bicycle from behind. There is direct evidence that the minor plaintiff was proceeding on the bicycle westerly near the north curb of University Avenue. The position of the truck after the accident and the marks on the curb and pavement are sufficient evidence of the fact that the truck was also proceeding in the same direction. The facts appearing in evidence would justify an inference of negligence on the part of the appellants, in the absence of any explanation. A ques-

tion of fact and not one of law was presented by the evidence, and the court erred in granting a nonsuit. It follows that the subsequent action in granting a new trial was proper and is sufficiently supported by the record.

The order appealed from is affirmed.

GRIFFIN, J., concurs.




83 Cal.App.2d 766

**In re KRONE'S ESTATE.**

**KRONE et al. v. KRONE.**

**Civ. 16216.**

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1948.

Hearing Denied April 19, 1948.

**1. Marriage ⇐54**

A "putative marriage" is a matrimonial union which has been solemnized in due form and celebrated in good faith by both parties but which by reason of some legal infirmity is either void or voidable, and the essential basis of such marriage is belief that marriage is valid.

See Words and Phrases, Permanent Edition, for all other definitions of "Putative Marriage".

**2. Husband and wife ⇐273(1)**

The wife inherited estate of putative union on death of her husband intestate, especially where she and deceased were partners with joint and equal rights and all property of estate was acquired by parties during the marriage. Probate Code, § 201.

Appeal from Superior Court, Los Angeles County; Raymond McIntosh, Judge.

Proceeding in the matter of the estate of Isaac Krone, also known as Isack Krone, Issack Krone, and I. Krone, deceased, wherein Allen Krone and others filed a claim of interest and Fanny Krone filed a statement of claim of interest. From the decree, Fanny Krone appeals.

Decree modified, and as modified affirmed.

McLaughlin, McGinley & Hanson and John P. McGinley, all of Los Angeles, for appellant.

George G. Glick and Sigmund S'Renco, both of Los Angeles, for respondents.

MOORE, Presiding Justice.

Issac Krone departed this life in April, 1946, leaving surviving him his wife Fanny and three children by a former marriage, respondents herein. All proceedings having been duly had in his estate to put it in a condition to be closed, respondents filed their claim of interest declaring that the property of the estate is the separate property of decedent and that appellant was not the lawful wife of decedent; whereupon they demanded that the estate be distributed to them in equal portions.

Appellant filed her statement of claim of interest in which she alleged that she is the sole surviving lawful heir of decedent; that she married decedent in April, 1934, and continuously lived with him as his wife to the date of his decease; that during such period as a result of their joint efforts all the personal property comprising the estate of decedent was accumulated; that at the time of such marriage she believed in good faith that she was the lawfully wedded wife of decedent. Also, she alleged that at the time of the marriage she and decedent "agreed that any property acquired, accumulated or contributed to, or owned and held as a result of their joint efforts, moneys expended or services rendered during the marriage" would be their joint property, and that upon the death of either the estate so accumulated would become the exclusive property of the survivor. She further alleged that during her life with decedent she expended substantial sums of money and personal services in the accumulation of the personal property shown on the inventory and appraisement, and that from March, 1943, to the date of decedent's death she was actively engaged in conducting the operation of the grocery store from which all the estate set forth in the inventory was accumulated.

The court found that appellant and decedent lived and cohabited as man and wife from the date of their attempted marriage until decedent's death; that at the time of such marriage neither had any property; that as a result of their joint efforts the parties accumulated personal property of the value of $16,412.51; that at the time of her marriage appellant believed in good faith that she was the lawfully wedded wife of decedent, due to her ignorance of the law which requires the lapse of one year after the entry of an interlocutory decree; that she had obtained an interlocutory decree from her former husband February 13, 1934, and that the final judgment therein was not entered until February 19, 1935, or ten months after her purported marriage to decedent; that she had no information of any claim of illegality of her marriage to decedent until the filing by respondents of their claim to an interest in the estate; that during the lifetime of decedent he and appellant "were partners with joint and equal rights as partners and that all of the personal property acquired and contributed to by said parties during said period as shown by the inventory on file in this proceeding of the value of $16,412.51 is partnership property and that Fannie Krone is the surviving partner." From such findings the court concluded and adjudged that the personal property acquired by decedent and appellant was partnership property, and that they were owners as equal partners thereof.

The appeal is from all portions of the decree except that which directs appellant as administratrix to pay the sum of $730.20 to her son Jack Reed Millard, held by appellant with the assets of the estate.

Appellant demands a reversal of the judgment on two grounds, namely: (1) that the estate accumulated by the spouses of a putative marriage descends according to the succession statutes governing community property; (2) that the trial court erred in excluding testimony of an oral agreement which created a joint tenancy in the personal property comprising the estate.

[1] "Putative marriage" is a phrase derived from the civil law which once prevailed in the southwestern states and in Louisiana. It is still recognized by the Louisiana Civil Code, Article 117. The term is applied to a matrimonial union which has been solemnized in due form and celebrated in good faith by both parties but which by reason of some legal infirmity is either void or voidable. The essential basis of such marriage is the belief that the marriage is valid. Vallera v. Vallera, 21 Cal.2d 681, 684, 134 P.2d 761. Although null on account of some dissolving impediment, yet by reason of the good faith of the celebrants and the ignorance of such impediment by both or one of them, in the absence of an agreement fixing the respective rights of the parties to the gains of their joint efforts, an equitable division of the estate accumulated by them is made upon a dissolution of the marriage by death or separation. McKay, Community Property, 2d Ed., p. 92.

The appellate decisions of this state generally support the doctrine of a division between the spouses of their accumulations in the event of a dissolution of a putative marriage although their pronouncements vary slightly as to the extent of a wife's share. In Coats v. Coats, 1911, 160 Cal. 671, at page 678, 118 P. 441, at page 444, 36 L.R.A.,N.S., 844, it is said that in dividing the gains of a putative marriage when it is annulled, courts should apply "by analogy, the rules which would obtain with regard to community property, where a valid marriage is terminated by death of the husband or by divorce." Since "the apportionment of such property between the parties is not provided by any statute. It must therefore be made on equitable principles. In the absence of special circumstances, such as might arise through intervening claims of third persons, we can conceive of no more equitable basis of apportionment than an equal division." In Schneider v. Schneider, 1920, 183 Cal. 325, 191 P. 533, 11 A.L.R. 1386, it was in effect declared that a putative wife is entitled to the same rights in the estate accumulated as if the marriage were valid. The Coats case was an affirmance of a judgment for $10,000 in favor of the wife out of an estate of $70,000. In denying the husband's petition for a re-

hearing the court said: "We do not hold that a woman occupying the position of the plaintiff here is, under any and all conditions and as a matter of strict legal right, entitled to one-half of the property acquired during the existence of the supposed marriage. The amount to be allotted to her is to be determined by the exercise of the sound discretion of the trial court." In Feig v. Bank of America, 1936, 5 Cal.2d 266, 54 P.2d 3, 7, it was held that "under the plainest principles of equity" the property as acquired by the putative spouses "should be marked by all the incidents of community property," citing the Coats and Schneider cases. Figoni v. Figoni, 211 Cal. 354, 295 P. 339; Sanguinetti v. Sanguinetti, 9 Cal.2d 95, 69 P.2d 845, 111 A.L.R. 342, and Macchi v. La Rocca, 54 Cal.App. 98, 201 P. 143, following the same authorities held to the same effect. In Vallera v. Vallera, 1943, 21 Cal. 2d 681, 683, 134 P.2d 761, 762, it is declared that "the property is divided as community property would be upon the dissolution of a valid marriage", citing the Coats, Schneider and Sanguinetti cases. In Blache v. Blache, 1945, 69 Cal.App.2d 616, 624, 160 P.2d 136, it was held that a putative wife has the same rights as the wife of a valid marriage, citing the Schneider, Coats and Vallera cases.

[2] From the foregoing review it appears that the preponderant holdings of the appellate courts coincide with the view that upon the dissolution of a putative marriage by decree of annulment or by death the wife is to take the same share to which she would have been entitled as a legal spouse. However, none of the authorities reviewed involved a consideration of the statute subsequently enacted whereby the surviving spouse of a valid marriage inherits the entire estate in event of intestacy. Probate Code, sec. 201. But the logic appears irrefutable that if according to statute the survivor of a valid, ceremonial marriage shall be entitled to take all of the community estate upon its dissolution, then by parity of reasoning why should not the wife inherit the entire estate of a putative union upon the death of her husband intestate? Clearly she does inherit all.

That appellant herein should be entitled to the inventoried estate is implemented by the finding that she and decedent "were partners with joint and equal rights as partners", and that all the property of the estate was acquired by the parties during the marriage. But aside from the extraordinary services rendered by appellant she justly claims the estate by virtue of the authorities above reviewed, pursuant to section 201, supra. This section had not been enacted at the time of the pronouncement of the Coats and Schneider cases and for that reason it was not mentioned in either of them, which may explain the silence of the subsequent decisions upon its provisions. However, in view of the positive declarations in such later decisions it would now be contrary to established law to deny to this putative wife her rights as a surviving spouse to inherit the total of the gains of the putative marriage.

In view of the foregoing, consideration of the second assignment is unnecessary. If the estate belongs to appellant as the survivor of the putative marriage, proof of her oral agreement though admissible could add nothing to establish her rights as owner under section 201.

It is therefore ordered that the decision and judgment be modified as follows: (1) strike finding VIII and substitute in lieu thereof the following: The court finds that decedent left surviving him three adult children by a previous marriage, Allen Krone, Seymour Krone and Mildred Weitzmer; (2) strike paragraph 5 from the conclusions of law and substitute in lieu thereof the following: That the entirety of the property listed in the inventory belong to Fanny Krone subject to administration; (3) that portion of the third paragraph of the judgment after the word "marriage" and substitute in lieu thereof the following: but the entirety of the estate of said decedent is vested in Fanny Krone subject to administration.

As thus modified the judgment is affirmed, appellant to recover her costs.

McCOMB and WILSON, JJ., concur.

84 Cal.App.2d 39

**GILMER et al. v. SPITALNY et ux.**

**SAME v. SPITALNY.**

**Civ. 3583.**

District Court of Appeal, Fourth District, California.

Feb. 27, 1948.

Rehearing Denied March 19, 1948.

Hearing Denied April 27, 1948.

**1. Judgment ⇐397**

Where defendant moved to set aside judgment for plaintiffs as having been incorrectly entered, and court entered an order which recited that motion to set aside judgment was granted and that a new trial or hearing was ordered, latter part of order could be treated as surplusage, though order further recited that plaintiffs' attorney had consented that motion be deemed one for new trial.

**2. Appeal and error ⇐854(2)**

Order correctly setting aside judgment could be affirmed regardless of reasons given therefor by trial court.

**3. Judgment ⇐822(3)**

An Arizona judgment reciting a finding that judgment should be entered as upon a community debt incurred by husband and ordering that plaintiffs recover sum named from defendants as such a community debt incurred by husband during marriage, and limiting execution accordingly, disclosed intent that judgment should be enforceable only against wife's interest in community property and that she should not be personally liable, so that such restriction or exemption was not controlled by exemption statutes of another state.

**4. Judgment ⇐822(3)**

Restriction in judgment which recited a finding that judgment should be entered as upon a community debt incurred by husband and ordered that plaintiffs recover a sum named from defendants as such community debt incurred by husband during the marriage constituted a part of judgment and was as binding as any other part thereof.

**5. Judgment ⇐822(1)**

Validity and effect of judgment are governed by laws of state in which rendered, and hence judgment cannot be enlarged by mere use thereof in an action in another state.

**6. Judgment ⇐822(3)**

Foreign judgments will usually be accepted as conclusive proof of the exact rights which have been adjudicated thereby.

**7. Judgment ⇐822(1)**

Full faith and credit clause is designed to provide a method of proving record of a judicial proceeding in one state for express purpose of carrying out results of that proceeding in other state and requires only that judgment should be given such effect as it had by law or usage of the state of its origin.

**8. Judgment ⇐900**

An action to enforce a personal liability cannot be maintained on a judgment unless it adjudicates a personal liability.

**9. Judgment ⇐822(1)**

A foreign judgment when raised as a bar can be allowed no more force than would be accorded to that judgment by courts of the state which rendered it.

**10. Judgment ⇐822(3)**

An Arizona judgment against husband and wife but against wife only insofar as her interest in community property was concerned and excluding any personal liability on her part could not be used in California to establish general personal liability of wife and could not be enforced in California without restriction and as a personal judgment against both husband and wife.

---

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by Thomas L. Gilmer and Joseph W. Gilmer, copartners doing business under the name of Gilmer Brothers against Sam Spitalny and Betty Spitalny, his wife, on a foreign judgment. From an order granting motion to set aside judgment for plaintiffs, the plaintiffs appeal, and from the judgment for plaintiffs, Betty Spitalny cross-appeals.

Judgment reversed and order setting aside judgment affirmed.

Calvin H. Conron, Jr., of Bakersfield, for plaintiffs-appellants.

Borton, Petrini, Conron & Borton, of Bakersfield, for defendant-appellant.

BARNARD, Presiding Justice.

On March 22, 1945, the plaintiffs recovered a judgment in Arizona against the defendants, husband and wife, the material part reading as follows: "The above-entitled matter having been submitted on motions for judgment on the pleadings * * * and the Court finding that judgment should be entered in favor of plaintiffs as *upon a community debt of the defendants incurred by the defendant Sam Spitalny.* It is therefore ordered, adjudged and decreed that plaintiffs have and recover the sum of ($2,974.14 with interest from November 9, 1939) from the defendants *as a community debt of the defendants incurred by the defendant, Sam Spitalny during the marriage of the defendants. Let execution issue in accordance herewith.*" (Emphasis added.)

On March 5, 1946, the plaintiffs filed this action in Kern County, the complaint alleging that on March 22, 1945, a judgment was entered in the superior court of Maricopa County, Arizona, in favor of the plaintiffs and against the defendants in the amount of $2,974.14 principal and $24.20 interest; that no part has been paid; and that interest was accrued in the amount of $209.88. The prayer was for a judgment against the defendant for $3,208.22, with costs. The terms and provisions of the Arizona judgment were not set forth in the complaint or in any exhibit thereto. The plaintiffs also secured a writ of attachment which was levied upon any interest of the defendants in certain real property located in Riverside County, California.

The defendants filed an answer setting forth a copy of the Arizona judgment, and alleging that it was not a personal judgment against the defendant wife, and that it was enforceable as to her only as to her interest in the community property of herself and her husband. The prayer was that plaintiffs take nothing except a judgment in conformance with the Arizona judgment, which shall be restricted to recovery, insofar as the defendant wife is concerned, to her interest in such community property. The defendant wife also filed a cross-complaint for declaratory relief alleging more in detail the restrictive nature of the Arizona judgment, and that the property which had been attached in Riverside County is her separate property. The prayer was that it be adjudged that the Arizona judgment was enforceable only against her interest in community property, that her interest in the Riverside property be found to be her separate property, and that it be found that this property is not subject to attachment or execution in this action.

The plaintiffs then moved to strike this cross-complaint and for judgment on the pleadings. After a hearing, a minute order was entered ordering that the motion for judgment on the pleadings be granted. A judgment was then prepared by plaintiffs' counsel and entered on January 20, 1947, which ordered that the cross-complaint filed by the defendant wife be stricken from the files and that the plaintiffs have judgment against both defendants for $2,974.14, together with interest, amounting in all to $4,078.89.

The defendant wife then moved to set aside this judgment as having been incorrectly entered and to make the same conform to the true judgment intended by the court. After a hearing on January 29, 1947, the court entered an order which, after reciting that the defendant wife had moved to set aside the judgment entered on January 20, 1947, and that the plaintiffs' attorney had stated in open court that the motion might be deemed one for a new trial, ordered that the motion made by the defendant wife be granted and that a new trial or hearing be had on all the issues. This order further stated that it was based on the ground that the judgment had been entered through inadvertence. The plaintiffs have appealed from this order and the defendant wife has taken a cross-appeal from the judgment entered on January 20, 1947, pursuant to Rule 3 of the Rules on Appeal.

At the oral argument the defendant wife moved to augment the record by including therein a photostatic copy of the written directions handed to the clerk by the judge prior to the entry of the minute order granting the motion for judgment on the pleadings. There is also presented a certificate by the trial judge stating that the minute order is incomplete and that he did not notice the omission when the clerk's transcript was prepared. This motion for augmentation of the record was submitted with the appeals, and although the matter is not very important here, that motion is granted.

The plaintiffs contend that a cross-complaint was improper in this case and should be stricken, arguing that the right to cross-complain is restricted by section 442, Code Civ.Proc. to matters relating to the contract sued upon; that the substance of the cross-complaint related to the attachment of real property; and that this has no relation to the contract or judgment involved in the principal action. While it is difficult to see why the attempt to set aside this attachment had no relation to the subject matter of the principal action, it is unnecessary to consider this contention since other matters are controlling.

[1, 2] The plaintiffs also contend that the trial court erred in setting aside its previous judgment, by which it had held that both of the defendants were liable to the plaintiffs without any restriction whatsoever. It is argued that this was an attempt to set aside the judgment on the ground of inadvertence and also to grant a new trial, that a new trial may not be granted where there has been no previous trial on an issue of fact, and that there is no evidence of any inadvertence on the part of the court. While, technically, a new trial may not be granted under these circumstances (Abbey Land, etc., Co. v. San Mateo County, 167 Cal. 434, 139 P. 1068, 52 L.R.A., N.S., 408, Ann.Cas. 1915C, 804), and while in its order the court recited that the plaintiffs' attorney had consented that the motion be deemed one for a new trial, the order itself was that the motion to set aside the judgment be granted and that a new trial or a hearing be ordered. The latter part of this order may be treated as surplusage. There is some showing of inadvertence in that the minute order entered by the clerk was not in accordance with the written directions given him by the judge. It also appears that the judgment was for something over $800 more than the amount prayed for in the complaint. In any event, since the real issue between the parties can be determined on the cross-appeal these incidental matters are of little importance. The action of the court in setting aside the judgment being correct, it may be affirmed regardless of the reasons given therefor.

The main question presented is whether this Arizona judgment, with the restrictions appearing therein, may be enforced in this state without any restriction and as a personal judgment against both defendants. The plaintiffs concede that this judgment was unenforceable in Arizona as against the wife personally or as against her separate property. They argue, however, that on its face this judgment holds both defendants liable and makes the judgment as much a debt of the wife as it is of the husband; that the liability of the defendant wife is thus established, and the debt represented by the judgment is now her debt; that while Arizona had the right to, and did, grant an exemption to her with reference to her personal property that exemption is not controlling in this state; that California has its own exemption laws and a wife's separate property, as such, is not exempt from execution here; and that it follows that they were entitled to a judgment in this action holding both defendants liable for this debt, without any restriction in the judgment saying whether or not execution may be had upon separate property of the defendant wife.

[3] It is not correct to say that this Arizona judgment on its face holds both defendants equally liable, or that on its face it makes the debt one owed by the wife as much as by her husband. While that judgment was entered against both defendants it recites upon its face a finding that judgment should be entered as upon a community debt incurred by the husband, orders that the plaintiffs recover the sum named from the defendants as

such a community debt incurred by the husband during the marriage, and limits the execution accordingly. By its terms and the language used an intent is clearly disclosed that the judgment shall be enforceable only against the wife's interest in community property, and that she shall not be personally liable. It would be unreasonable to hold that such a restricted judgment, expressly limiting the wife's liability, could be changed into one of general liability merely by using it as evidence in an action in another state. The restriction or exemption is sufficiently expressed in the judgment, and made a part thereof, so that it is not dependent upon or controlled by the exemption statutes of another state.

[4–9] While we are cited to no direct authority, and have found none, a number of general principles would seem to be controlling. The restriction placed in the judgment itself is a part of that judgment and should be as binding and effective as any other part thereof. It is well settled that both the validity and the effect of a judgment is governed by the laws of the state where it is rendered. This being true, it should follow that this evidence cannot be enlarged or extended by the mere use of the judgment in an action in another state. Judgments rendered in another state will usually be accepted as conclusive proof of the exact rights which have been finally adjudicated thereby. In re Culp, 2 Cal.App. 70, 83 P. 89. The full faith and credit provisions of the constitution is designed to provide a method of proving the record of a judicial proceeding in one state for the express purpose of carrying out the result of that proceeding in other states. In re Estate of Kershow, 2 Coffey Prob.Dec. 213. The full faith and credit clause requires only that the judgment should be given such effect as it had by the law or usage of the state of its origin. First Nat. Bank of Findlay v. Terry, 103 Cal.App. 501, 285 P. 336. An action to enforce a personal liability cannot be maintained on a judgment unless it adjudicates a personal liability. Seligman v. Kalkman, 17 Cal. 152. When raised as a bar, no more force is to be allowed to a judgment of a sister state than would be accorded to that judgment by the courts of the state which rendered it. Harding v. Harding, 140 Cal. 690, 74 P. 284. No good reason appears why this same rule should not apply in a case where a direct enforcement of such a judgment is sought. In 2 Freeman on Judgments, Sec. 575, the author says: "The first question to be determined in regard to a judgment of another state, after jurisdictional inquiries have been satisfactorily answered, is, what is its effect in the state whence it was taken? The effect which it has there is precisely the effect which must be accorded to it in every other state."

[10] Where a judgment in one state is entered against a party solely in his official capacity or as a trustee, it could not be contended that such a restriction expressed in the judgment was of no effect in another state, or that a personal liability could result in another state because of its different laws relating to the enforcing of judgments in general. In principle, there is no distinction between such a situation and the one here in question. The Arizona judgment was given against the defendant wife only insofar as her interest in community property is concerned, and the judgment is so worded as to clearly exclude any personal liability on the part of the wife. The restriction expressly stated in the judgment limits its application and effect as a judgment in that state, and precludes its use in another state as establishing a general personal liability.

The judgment entered on the pleadings is reversed and the order setting aside that judgment is affirmed. The defendants to recover their costs on appeal.

GRIFFIN, J., concurs.

Hearing denied; CARTER, J., dissenting.

83 Cal.App.2d 677

## HEATLY v. HEATLY.

## KINGS COUNTY ABSTRACT CO. et al. v. SAME.

Civ. 3721.

District Court of Appeal, Fourth District, California.

Feb. 16, 1948.

Rehearing Denied March 8, 1948.

Hearing Denied April 15, 1948.

**1. Appeal and error ⇐607(1)**

Rule that notice given by appellant to clerk for preparation of transcript shall not be effective unless, within 10 days after notification from clerk of estimate of cost of preparing transcript, appellant shall arrange for payment therefor, is mandatory and an appeal will be dismissed for noncompliance. Rules on Appeal, rule 5(c).

**2. Appeal and error ⇐607(1)**

Where appellant delayed more than six months in moving to set aside a default, was defeated on her motion after third parties purchased in reliance on the judgment, filed notice of appeal but failed to give notice for preparation of transcript within 10 days or to arrange to pay costs within 10 days after estimate of costs by the clerk, appeal was dismissed for failure to comply with the rules. Rules on Appeal, rules 4(a), 5(a, c); Code Civ.Proc. § 473.

---

Appeal from Superior Court, Kings County; Clark Clement, Judge.

Action by Travis Heatly, Jr., against Jane Heatly, wherein Kings County Abstract Company, a corporation, J. A. Doran and Winnie Doran, H. J. Jacob and Lillian Jacob filed complaints in intervention against defendant to quiet title to real property. From an order denying defendant's motion to set aside her default, defendant appealed. On motion to dismiss the appeal.

Motion granted, and appeal dismissed.

Charles C. Montgomery, Jr., of Burbank, for appellant.

Sidney J. W. Sharp and Herbert M. Braden, both of Hanford, and David S. Folsom, of Corcoran, for respondents.

BARNARD, Presiding Justice.

This action is a motion to dismiss an appeal arising out of an action to quiet title to real property. The action was brought on June 11, 1946, and an affidavit was filed showing personal service on the defendant on July 1, 1946. The default of the defendant was entered on August 1, 1946, and an order for judgment and a decree quieting title in the plaintiff were filed on August 5, 1946.

On January 30, 1947, the defendant filed notice that on February 3, 1947, she would move to set aside her default and the judgment for permission to file an answer and cross-complaint, the motion to be based on the ground that a summons had not been served upon her.

On February 3, 1947, the motion was continued for hearing to April 1, 1947, with the rights of the parties to be reserved as if the motion were made and heard on February 3. In the meantime other parties who had purchased the land in reliance on the judgment and the Kings County Abstract Company, which had issued a Policy of Title Insurance thereon, filed complaints in intervention.

The motion was heard on April 1, 1947, both documentary evidence and oral testimony being received. The matter was submitted on briefs and on May 20, 1947, the court denied the motion on the grounds that a valid service of process had been made on the defendant and that the motion, if considered as made on February 3, 1947, was not made within six months after entry of the default. See, Bowman v. Bowman, 29 Cal.2d 808, 178 P.2d 751, 170 A.L.R. 246.

This appeal was taken from that order, notice of appeal being filed on June 13, 1947. However, a notice to the clerk to prepare a transcript was not filed until July 10, 1947. The appellant was notified of the clerk's estimate of the cost of preparing the transcript on July 17, 1947, but no arrangement for the payment of these costs was made until September 15, 1947. The clerk's and reporter's transcripts were then prepared and were filed in this court on November 17, 1947.

On December 9, 1947, the respondents filed notice of motion to dismiss this ap-

peal on the ground that a notice to prepare a transcript was not served and filed within ten days after filing the notice of appeal, as required by rules 4 (a) and 5 (a) of the Rules on Appeal, and that arrangements had not been made for the payment of the cost of such transcripts within ten days after notification of the clerk's estimate of such costs, as required by rule 5 (c) of the Rules. This motion was made and heard on January 13, 1948, and has been submitted on affidavits and points and authorities presented by the respective parties.

Rules 4 (a) and 5 (a) of the Rules provide that an appellant desiring the preparation of a record "shall" serve and file a notice to that effect within ten days after filing notice of appeal. Rule 40 (b) provides that the word "shall", as used in these rules, is mandatory. Rule 5 (c) provides that the notice for the preparation of a clerk's transcript shall not be effective for any purpose unless arrangements are made with the clerk for the payment of the cost thereof within ten days after notification of the clerk's estimate of such cost. Rule 45 (b) provides that the trial court may, for good cause, extend the time for doing any of these acts provided application therefor is made before the expiration of the time allowed therefor by the rules. Rule 45 (c) then provides for a still further extension upon application to the presiding justice of the appellate court.

In resisting the motion to dismiss the appeal the appellant relies on the rule formerly applied under the old rules, as set forth in Murphy v. Krumm, 21 Cal.2d 846, 136 P.2d 8, that where a transcript, although not filed within the time prescribed, is on file at the time notice is given of a motion to dismiss that fact shall be a sufficient answer to the motion.

[1] In Whelpton v. Taylor, 81 Cal. App.2d 949, 185 P.2d 391, 392, it was held that Rule 5 (c) is mandatory and that an appeal should be dismissed where arrangements were not made with the clerk within the time provided by that rule. While not necessary to the decision in that case it was further stated: "Even if the transcript on appeal were now filed in this court (which it has not been) it would 'not be effective for any purpose.'" In the case now before us, the transcripts were filed in this court before notice was given of the motion to dismiss.

The language of these rules indicates an intention to provide that compliance therewith should be mandatory. While not directly providing that a later compliance shall not be considered sufficient in answer to a motion to dismiss, Rule 5 (c) definitely provides that the notice for a transcript shall not be effective for any purpose unless arrangements with the clerk for the payment of costs were made within a certain time. The rules are reasonable and ample provision is made for obtaining an extension of time where good cause appears therefor. In the instant case, the rules were very substantially violated, no effort was made to obtain any extension of time, and no attempt has ever been made to secure relief from this default under section 473, Code Civ.Proc.

The appellant was not only in default in these respects but with full knowledge she allowed six months to elapse after the entry of her default before moving to set aside the judgment, during which time the rights of third parties intervened. It further appears that her counsel was informed in advance that a default judgment was about to be entered, and that with full knowledge of the facts he deliberately chose to make no appearance. Moreover, the record discloses that the evidence amply sustains the court's finding and conclusion that proper service had been made. Her attorney had agreed to appear for her, but later demanded that she be served. She was informed that such service would be made. When the constable tried to hand her the papers she said "No, I don't want them", and ran. He then left the papers on a table in her home. Her attorney was advised as to what had occurred, and he stipulated at the hearing that opposing counsel had informed him by letter on July 6 that the defendant had been served on July 1.

No reason is given for the failure to comply with Rules 4 (a) and 5 (a). The reasons given for failure to comply with Rule 5 (c) are not only inconsistent and unconvincing in themselves, but the essen-

tial facts are denied in the opposing affidavits, which are supported by other known facts. The conclusion is inescapable that the appellant's main purpose throughout has been to delay and hinder, rather than to secure an opportunity to be heard in this action.

[2] The purpose and effect of the rules here in question should not be lightly set aside. If it be assumed that in a proper case and upon a sufficient showing a delayed compliance might be excused, the showing here made is, in our opinion, insufficient to justify a denial of the motion.

The motion is granted and the appeal is dismissed.

GRIFFIN, J., concurs.




83 Cal.App.2d 730

## LITCHFIELD et al. v. MARIN COUNTY et al.

Civ. 13239.

District Court of Appeal, First District, Division 2, California.

Feb. 19, 1948.

**1. Taxation ⇐788(1)**

Tax deed from state was insufficient in itself to establish title in grantee, where deed by which land was conveyed to the state or certified copy thereof was not introduced in evidence, since statute making deed from state conclusive evidence of the regularity of prior proceedings refers only to taxing procedure and does not purport to make deed from state conclusive evidence that property was previously deeded to the state. Revenue and Taxation Code, § 3711.

**2. Taxation ⇐788(1)**

The legislature cannot make a tax deed conclusive evidence of jurisdictional matters prerequisite to state's right to execute a deed to a purchaser at tax sale. Revenue and Taxation Code, § 3711.

**3. Appeal and error ⇐243**

Failure to object at trial of quiet title action to introduction of tax deeds from state to plaintiffs on ground that no proper foundation had been laid for their introduction did not preclude defendant claiming under former owner from contending on appeal that such deeds were insufficient to establish title in plaintiffs in absence of deeds by which the land was conveyed to state or certified copies thereof. Revenue and Taxation Code, § 3711.

**4. Evidence ⇐264**

Admissions by one claiming under former owner that he knew land was delinquent and had been sold to the state for taxes and never redeemed and that there was to be a sale of such land did not supply defect in proof of title of holders of tax deeds resulting from failure to introduce in evidence deeds by which such land was conveyed to the state or certified copies thereof, since such admissions did not imply an admission that a deed was made to the state or that prerequisites to legality of intended sale were fulfilled. Revenue and Taxation Code, §§ 3476, 3711.

**5. Continuance ⇐51(2)**

Setting quiet title action for trial notwithstanding request for continuance on ground that defendant's attorney was not in fit condition to prepare and try case and defendant had not succeeded in securing other counsel was not abuse of discretion, where trial had twice before been postponed on the same grounds.

---

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Irving B. Litchfield and others against County of Marin and others to quiet title to realty. From a judgment quieting title in plaintiffs, defendant George Middleton appeals.

Judgment reversed.

Erskine & Erskine, A. P. Black and M. Anderson Thomas, all of San Francisco, for appellant.

Freitas, Duffy & Keating, of San Rafael, for respondents.

DOOLING, Justice.

This is an appeal by the defendant George Middleton only from a judgment quieting title in the several plaintiffs, holders of tax deeds, to several lots in Forbes Subdivision No. 3, City of San Rafael, County of Marin, State of California, formerly assessed to Beatriz Michelena Middleton, appellant's wife, who died in October 1943. The situation as to the several plaintiffs and properties, delinquent since the year 1928, is identical.

In his answer appellant denied the alleged title and possession of the plaintiffs and claimed an interest in the properties as owner, either as the surviving husband of Beatriz Michelena Middleton or as her sole heir at law. Defendant Thomas P. Boyd, administrator of the estate of said Beatriz Michelena Middleton alleged in his answer title and possession in said estate. The other defendants, County of Marin and City of San Rafael, disclaimed interest.

The trial took place on May 5, 1945, notwithstanding request for continuance of appellant and his attorney on the ground that the latter was not in fit condition to prepare and try the case and that appellant had not succeeded in engaging other counsel. However, the trial had been postponed from March 17th to April 20th and from April 20th to May 5th on those same grounds.

At the trial tax deeds executed by the collector of the County of Marin to the plaintiffs were introduced and identified. They were admitted subject to a motion to strike on the ground that the sale of the tax property was irregular and in general subject to later attack on the validity of these deeds on future motion, but at the end of the short trial the trial judge immediately rendered judgment for plaintiffs, without any such motion or further objection having been made by appellant.

Plaintiffs' attorney stated to the court from the record of the tax collector of Marin County that the property was sold to the state on June 22, 1929, for taxes of 1928, sale No. 369 and deeded to the state July 19, 1934, Deed No. 66 but failed to introduce said deed or a certified copy of it into evidence, relying on section 3711 of the Revenue and Taxation Code which provides with respect to the deed from the state to the purchaser: "Except as against actual fraud, the deed duly acknowledged or proved is conclusive evidence of the regularity of all prooceedings from the assessment of the assessor to the execution of the deed, both inclusive."

[1, 2] In this reliance plaintiffs were mistaken. In Roma v. Elbert, Ltd., 73 Cal. App.2d 338, at page 340, 166 P.2d 294, at page 295, it is said with respect to the scope of section 3711 of the Revenue and Taxation Code: "That section refers only to the regularity of the taxing procedure and does not purport to declare that the deed received by a purchaser from the State is evidence that the property had previously been deeded to the State. The legislature cannot make a tax deed conclusive evidence of matters that are essential to the exercise of the taxing power, that is, as to the steps that are jurisdictional in their nature. Ramish v. Hartwell, 126 Cal. 443, 448, 58 P. 920. See also Carter v. Baker, 133 Cal.App. 430, 432, 24 P.2d 539. The State cannot convey title that it does not possess. A deed to the State is a jurisdictional prerequisite to its right to execute a deed to a purchaser at a tax sale." Therefore by introducing into evidence merely a tax deed from the state, the plaintiffs failed to establish title in themselves. Swann v. Carson, 56 Cal.App.2d 502, 132 P.2d 863. See also DeFlon v. Van Lue, 83 Cal.App.2d 288, 188 P.2d 301.

[3] Respondents' contention that appellant cannot on appeal rely on the insufficiency of the proof of title, because he did not object at the trial to the introduction of the deeds from the state to respondents on the ground that no proper foundation had been laid for their introduction, is without merit. The lack of such objection may prevent appellant from arguing that these deeds were not properly part of the record but it cannot confer on the deeds evidentiary force with respect to the title of the state denied to them by the authorities.

[4] Neither is there merit in the contention that the defect in the proof of title was obviated by admissions made by appellant

when heard as a witness. The admissions were to the effect that appellant knew that the lost were delinquent, that they were sold to the state for taxes some years before, that they had never been redeemed and that there was going to be a sale of these lots on September 18, 1944. The admission that appellant knew of the sale to the state does not imply an admission that a deed was made to the state, and act to be performed not less than five years after the sale (Section 3476, Revenue and Taxation Code), nor does the admission of knowledge of the intended sale imply admission of fulfillment of any prerequisite of the legality of such sale.

As the defect in the proof of title requires a reversal and new trial, we do not think it advisable to give our opinion as to appellant's further contention that the notice of the tax sale given by the tax collector, as shown by the evidence on this trial, did not comply with the code provisions. It may be expected that the evidence as to this point on the new trial will be more ample than that now before us.

[5] We do not find in the record any abuse of discretion of the trial judge as to the setting or the conduct of the trial.

Judgment reversed.

NOURSE, P. J., and GOODELL, J., concur.




83 Cal.App.2d 809

**PALPAR, Inc. v. THAYER.**

Civ. 13572.

District Court of Appeal, First District, Division 2, California.

Feb. 24, 1948.

Hearing Denied April 22, 1948.

**1. Abatement and revival ⇐7**
**Action ⇐53(1)**
**Judgment ⇐585(3)**

An assignee's action on book account for rock sold and delivered was not barred by judgment in his previous action, as assignee of same person, against same defendant, for partition of tractor and accounting of profits from operation thereof, on ground of another action pending, res judicata, or splitting of causes of action, as causes of action in two cases were not the same.

**2. Action ⇐53(1)**

A party may bring separate suits on separate causes of action, even if joinder thereof is allowed.

**3. Assignments ⇐73**

Whether two causes of action, on which assignee brought separate suits, were included in one assignment, was immaterial, where both were assigned by either one or separate assignments.

**4. Appeal and error ⇐901, 938(3)**

Where error appears on face of partial transcript of record, appellate court must presume, under rule on appeal, that transcript is complete on such point and that error was not cured by other proceedings not included, but such rule does not eliminate necessity of affirmatively showing error, and if no error appears on face of partial transcript, appellate court will not presume that some error would appear had whole transcript been presented. Rules On Appeal, rule 52.

**5. Appeal and error ⇐695(3)**

A single ledger page, included among exhibits in clerk's transcript of record on appeal from judgment on book account and purporting on its face to support judgment, was sufficient to support finding of book account, in absence of showing that page was not taken from complete ledger for convenience of introducing it in evidence. Rules on Appeal, rule 5(a).

**6. Appeal and error ⇐204(5)**

Defendant, not objecting to admission of single ledger sheet as evidence in action on book account, cannot urge objection, on appeal from judgment for plaintiff, that entries therein were for lumped items and not made contemporaneously with transactions recorded.

**7. Appeal and error ⇐673(1)**

A statement in clerk's partial transcript of record on appeal from judgment

for plaintiff in assignee's action on book account did not constitute account stated, in absence of showing in transcript that such statement ever came to assignor's attention or that he accepted it by written or oral word or conduct.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Palpar, Incorporated, against W. A. Thayer, Jr., on a book account for rock sold and delivered. Judgment for plaintiff, and defendant appeals.

Affirmed.

Elizabeth Cassidy, of San Francisco, for appellant.

Alfred J. Harwood, of San Francisco, for respondent.

DOOLING, Justice.

Plaintiff recovered judgment against defendant upon a book account for rock sold and delivered, from which judgment defendant appeals. Appellant designated certain exhibits to be included in the clerk's transcript pursuant to rule 5(a), Rules on Appeal. He also requested a partial reporter's transcript without stating the points to be raised by him on appeal as required by rule 4(b), Rules on Appeal. When respondent pointed this out in the lower court and requested a complete reporter's transcript appellant moved to strike the reporter's transcript and this motion was granted. The appeal is therefore presented to us on the clerk's transcript alone.

[1-3] Another action involving the same parties was before us on appeal in Palpar, Inc. v. Thayer, 82 Cal.App.2d 578, 186 P.2d 748. In that case plaintiff as assignee of one Morton was seeking the partition of a tractor and an accounting of the profits from the tractor's operation. In the proceeding now on appeal the plaintiff is also suing as assignee of Morton. Appellant pleaded another action pending and res judicata. On appeal he also asserts a splitting of causes of action. We find nothing in any of these points. It is too patent for need of elaboration that a cause of action for rock sold is not the same as a cause of action for a share of the profits from the operation of a tractor. A party may bring separate suits on separate causes of action even if joinder is allowed. 1 Cal. Jur. 346; Lynch v. Kemp, 4 Cal.2d 440, 49 P.2d 817. The question whether or not the two causes of action were included in one assignment from Morton is likewise immaterial, so long as they were both assigned either by one or separate assignments which is undisputed.

[4, 5] Appellant also asserts that the evidence does not support the finding of a book account. A single ledger page is included in the exhibits in the clerk's transcript. On its face it supports the judgment. Appellant argues that a single page is not a book of account. There is no showing that this page was not taken from a complete ledger for convenience of introducing it in evidence.

In Palpar, Inc. v. Thayer, supra, 82 Cal. App.2d 578, 186 P.2d 748, we adverted to rule 52, Rules on Appeal. That rule reads: "If a record on appeal does not contain all of the papers, records and oral proceedings, but is certified by the judge or the clerk, or stipulated to by the parties, in accordance with these rules, it shall be presumed in the absence of proceedings or augmentation that it includes all matters material to a determination of the points on appeal."

The purpose of the rule is to permit appeals to be presented on the shortest possible record which will show the error complained of. If error appears on the face of a partial transcript it must be presumed under rule 52 that the transcript is complete on that point and that the error was not cured by some other proceedings not included; but the rule does not do away with the necessity of affirmatively showing error, and if no error appears on the face of the partial transcript the appellate court will not presume that if the whole transcript had been presented some error would appear. See Alkus v. Johnson–Pacific Co., 80 Cal.App.2d 1, 181 P.2d 72, where this rule is elaborately discussed. Since the mere fact that a single ledger page was introduced does not show that it was not taken from a true account book no error in that regard appears on the face of the record before us.

[6] This is likewise true of the claim that the entries were for lumped items and not contemporaneously made with the transactions recorded. The transcript does not show any objection to the admission of the ledger sheet in evidence. If it was admitted without objection appellant cannot now urge an objection to the time or manner of making the entries. Argue v. Monte Regio Corporation, 115 Cal.App. 575, 579, 2 P.2d 54, et seq.

[7] A statement is included in the clerk's transcript which is claimed to constitute an account stated. There is nothing in the partial transcript to show that this statement ever came to Morton's attention or that he accepted it by written or oral word or conduct. No error of any sort appears on the face of the transcript.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.




## TYRA v. BOARD OF POLICE AND FIRE PENSION COM'RS OF CITY OF LONG BEACH et al.*

Civ. 15908.

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1948.

As Corrected on Denial of Rehearing March 9, 1948.

Hearing Granted April 19, 1948.

**1. Limitation of actions ⇐197(1)**

Evidence supported superior court's findings that one suing for Long Beach city fireman's disability pension was permanently disabled on date over three years before filing of petition, so that action was barred by statute of limitations. Code Civ. Proc. § 338, subd. 1; St.1931, p. 2787, § 187(3).

**2. Limitation of actions ⇐65(3)**

Failure of disabled Long Beach city fireman, physicians employed by himself and city pension commissioners, and city police surgeon, to file sworn disability certificates, required by city charter, before date on which he claimed to have been first informed that his injuries were permanent, did not toll running of statute of limitations against his action for disability pension in absence of allegation or proof that such certificates were ever filed. Code Civ. Proc. § 338, subd. 1; St.1931, p. 2787, § 187(3).

**3. Limitation of actions ⇐43**

A cause of action accrues when suit may be maintained.

**4. Limitation of actions ⇐65(1), 66(1)**

The running of statute of limitations cannot be delayed by deferring demand or delaying performance of acts within plaintiff's power preliminary to instituting legal action.

**5. Pleading ⇐127(2)**

In action for Long Beach city fireman's disability pension, defendant pension commissioners, by admitting allegation of petition that they arbitrarily refused to order petitioner's retirement or to pay him anything from pension fund on asserted ground that his rights were barred by limitations, did not admit that disability certificates required by city charter were filed on date on which plaintiff claimed that he was first informed that his injuries were permanent. Code Civ.Proc. § 338, subd. 1; St. 1931, p. 2787, § 187(3).

**6. Estoppel ⇐62(5)**

Where disabled Long Beach city fireman knew of city's claim that he could not receive both pension benefits under city charter and benefits provided by Workmen's Compensation Act and had ample opportunity to file claim for pension benefits, as well as disability certificates required by city charter, within statutory time for filing of action for such benefits, city pension commissioners were not estopped from pleading statute of limitations on ground of plaintiff's reliance on city officials' statements of such attitude of city. Code Civ. Proc. § 338, subd. 1; St.1931, p. 2787, § 187(3).

**7. Estoppel ⇐62(2)**

Generally, estoppel will not be recognized against state or its agencies.

* Subsequent opinion 197 P.2d 710.

**8. Estoppel ⇐62(5)**

Statements by Long Beach city officials to disabled fireman that he had more time than that allowed by statute of limitations to file claim for disability pension were opinions on legal matter and furnished no basis for estoppel of city pension commissioners from pleading statute of limitations as defense to action for pension, in absence of fiduciary relationship between plaintiff and such officials. Code Civ.Proc. § 338, subd. 1; St.1931, p. 2787, § 187(3).

**9. Evidence ⇐83(2)**

The Long Beach city police surgeon's failure to file certificate of city fireman's permanent disability before date within limitation period for filing of his action for disability pension was not conclusive proof that his condition did not necessitate his retirement before such date, so as to defeat defense of statute of limitations because of presumption that pension board and surgeon would properly perform their official duties, in absence of request by plaintiff for physical examination. Code Civ.Proc. § 338, subd. 1; St.1931, p. 2787, § 187(3).

**10. Evidence ⇐210, 265(18)**
**Witnesses ⇐379(4)**

Statements in affidavits of one suing for Long Beach city fireman's disability pension that he became permanently disabled on date over three years before filing of petition were admissible as admissions against interest, as well as to impeach his contrary testimony, and warranted court's finding that action was barred by statute of limitations. Code Civ.Proc. § 338, subd. 1; St.1931, p. 2787, § 187(3).

---

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Joseph W. Tyra against the Board of Police and Fire Pension Commissioners of the City of Long Beach, the members thereof, and such city, to compel defendants to award and pay plaintiff a fireman's disability pension. Judgment for defendants, and petitioner appeals.

Affirmed.

Kenneth Sperry, of Long Beach, for appellant.

Irving M. Smith, City Atty., Nowland M. Reid, Asst. City Atty., and Clifford E. Hayes, Deputy City Atty., all of Long Beach, for respondents.

MOORE, Presiding Justice.

By this action petitioner sought to compel respondents to award and pay appellant a disability pension pursuant to subdivision (3) of section 187 of the Long Beach city charter. Stats.1921, p. 2054; as amended: Stats.1925, p. 1330; Stats.1931, p. 2787. His disability resulted from injuries sustained by him while performing his duty as a fireman for the city. This is the second appeal. 71 Cal.App.2d 50, 162 P.2d 32. The substance of the former holding was that the petition was sufficient as against a general demurrer, and the court therefore reversed the judgment of dismissal with the suggestion that on a retrial it would be a question of fact for the court to determine from the evidence when plaintiff's condition became such as to necessitate his retirement from active service. Further details of the allegations of the petition and the language of section 187(3) of the charter will be found in the opinion cited.

The respondents having pleaded that the action was barred by the provisions of section 338 of the Code of Civil Procedure, the questions on this appeal are two: (1) whether appellant's alleged cause of action accrued on November 30, 1937, as contended by respondents, and (2) whether the acts and declarations of respondents and their agents during the period following the last mentioned date and until February, 1940, were such as to estop them from pleading the statute of limitations. A discussion of the other affirmative defenses will be unnecessary in view of the conclusions derived.

Permanently Disabled November 30, 1937.

[1] Appellant received his disabling injuries February 8, 1937. Two documents were in evidence which alone support the finding of the court that appellant's cause of action accrued on November 30, 1937. On this date he filed an affidavit with the city treasurer in which he averred, "that claimant is now and ever since the 8th day of February, 1937, has been totally and

permanently disabled as a direct result and consequence of said injury." On April 13, 1939, he filed his application with the Industrial Accident Commission in which he stated that the controversy is the "extent of permanent disability" and requested a "commutation of future payments." Such declaration could not have been made with any other thought in view than that appellant was the victim of a permanent disability, for at that time no dispute existed with respondents with respect to a temporary disability. If he had not aimed then to reap the benefits of a permanent disability he had no business before the Industrial Accident Commission.

Appellant's complaints to the physicians and their findings, together with the sworn declarations, are substantial evidence to support the findings that appellant was permanently disabled on November 30, 1937, and so physically disabled as a result of his injuries as to render necessary his retirement from active service; that more than three years had elapsed, and that his action was barred by subdivision 1, section 338 of the Code of Civil Procedure.

Appellant's Failure to File His Certificate of Disability.

[2] In his attempt to defeat the statute of limitations appellant contends that according to the charter before he could proceed with this action for a pension it was essential (1) that sworn certificates of disability should be filed by himself and three physicians, namely, one employed by himself, one appointed by the board and the police surgeon, and (2) that the board should have refused to act or had acted in an arbitrary manner; that inasmuch as no certificate had been filed he could not have instituted his suit prior to February 1, 1940. But there is neither allegation nor proof that such certificates were ever filed prior to February 1, 1940. When he filed his affidavit with the city treasurer on November 30, 1937, he might at the same time have filed his own certificate and that of his doctor showing his permanent disability. A denial of his pension by the board or its refusal to act would then have enabled him to maintain his action for mandate to enforce his retirement as provided in section 187 of the charter.

[3-5] A cause of action accrues when a suit may be maintained, and the running of the statute of limitations cannot be delayed by the simple expedient of deferring the act of making demand or of delaying to do those acts preliminary to instituting legal action which are within the power of the claimant. Dillon v. Board of Pension Commissioners, 18 Cal.2d 427, 430, 116 P.2d 37, 136 A.L.R. 800; Barnes v. Glide, 117 Cal. 1, 48 P. 804, 59 Am.St.Rep. 153; Harrigan v. Home Life Insurance Company, 128 Cal. 531, 548, 58 P. 180, 61 P. 99; Osborn v. Hopkins, 160 Cal. 501, 506, 117 P. 519, Ann.Cas.1913A, 413; Williams v. Bergin, 116 Cal. 56, 61, 47 P. 877; Lattin v. Gillette, 95 Cal. 317, 319, 30 P. 545, 29 Am. St.Rep. 115; Reuter v. Pacific Mutual Life Insurance Company, 5 Cal.App.2d 333, 337, 43 P.2d 576; County of Los Angeles v. Metropolitan Casualty Insurance Company, 135 Cal.App. 26, 28, 26 P.2d 699. A claimant cannot suspend indefinitely the operation of the statute of limitations by not performing an act which the law requires as a condition to the maintenance of his action. If appellant had become so disabled on November 30, 1937, as to render it necessary for him to be retired, his action had accrued then. The contention that his action had not accrued because he had not filed his certificate and the physicians had not filed theirs showing his disability is without support in authority or reason. He swore then that he was permanently disabled, and in view of the evidence it must be presumed that the board would have performed its duty by designating a physician to examine and certify and that the duly appointed and acting police surgeon would likewise have performed his duty. Certainly they could not act prior to appellant's filing his certificate. Their acts were conditions subsequent to appellant's taking the first step. No allegation was made that the police surgeon or another physician appointed by the board filed a certificate of appellant's disability. Neither is there declaration of delay on the part of the board or of the police surgeon after appellant filed his certificate. The only allegation with reference to the board's action is the following: "that defendants have at all times refused and still refuses to order him retired from further service * * * or to

pay or cause to be paid to him any sums whatever from said pension fund. In refusing * * * defendants have acted arbitrarily * * * upon the asserted ground that petitioner's rights * * * are barred by the statute of limitations." But by admitting such allegation respondents did not admit that the certificates were filed on February 1, 1940, or that they were ever filed.

It is the law of this case that the test to be applied in determining appellant's rights is: When did he become so disabled as to render his retirement necessary? The court has found on substantial evidence that he became so disabled on November 30, 1937. The date of February 1, 1940, is of no materiality. Appellant names it as the day he was first informed that his injuries were permanent. But he himself knew it on November 30, 1937. If his cause did not accrue until the police surgeon filed his certificate then he has stated no cause of action, for that fact was not alleged.

Inasmuch as he could not toll the statute by not filing the certificates it follows that appellant's action was barred.

### Respondents Not Estopped to Plead the Statute.

[6] Appellant contends that he was advised by specified city officials that he could not receive both the pension benefits provided by the charter for disabled firemen and those provided by the Workmen's Compensation Act; that by reason of his reliance upon such advice he did not proceed to obtain the pension. While he did receive such advice from a deputy city attorney in 1937 and 1938, the fact is that pursuant to advice received from his own privately employed attorney on September 12, 1938, appellant filed his application with the Industrial Accident Commission on April 13, 1939, after having discussed the question of the pension with his own attorney. Thus he was not relying upon the advice of city officials but upon his own decision. In July, 1939, he told another deputy city attorney that he would not waive his right to a pension when the same officer told him that if a substantial settlement was made of his workmen's compensation claim it would be necessary that he waive his right to receive a pension. Thus he knew the city's attitude with respect to his claim for a pension from July, 1939, to November 29, 1940, a term wholly within the statutory period computed from November 30, 1937. Within such time he had ample opportunity for the filing of his claim as well as his certificates of disability. Spencer v. City of Calipatria, 9 Cal.App.2d 267, 269, 49 P.2d 320. At the same time he was receiving the advice of his own attorney. No act was done or utterance voiced by any agent of the city within those months that was calculated to deceive appellant, to defer his demand or to prevent his presentation of a claim. That he was himself able to do so is demonstrated by his actually having filed a claim in December, 1941.

[7, 8] In support of his contention that the statements and acts of the city officials estop the city from pleading an estoppel appellant cites Farrell v. County of Placer, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323; Garrison v. State, 64 Cal.App.2d 820, 149 P.2d 711; Katz v. Ruhlman & Co., Inc., 69 Cal.App.2d 541, 159 P.2d 426; Benner v. Industrial Accident Commission, 26 Cal.2d 346, 159 P.2d 24, and Carter v. City of Los Angeles, Cal.App., 181 P.2d 103.[1] A scrutiny readily discloses that in each of those cases the claimant was positively deceived by the representations of an agent or by an act upon the part of the debtor, and because of such deception delayed the filing of his claim. While such authorities furnish support under certain circumstances for an equitable estoppel, the general rule is that an estoppel will not be recognized against the state or its agencies. First Trust & Savings Bank v. City of Pasadena, 21 Cal.2d 220, 223, 130 P.2d 702; Aebli v. Board of Education, 62 Cal.App.2d 706, 724, 145 P.2d 601. Moreover, if it be conceded that agents of respondent city stated to appellant that he had more time within which to file his claim, such statement is a misrepresentation of law, a mere opinion upon a legal matter, and furnishes no basis for estoppel in the absence of a fiduciary relationship. Sacra-

1 Hearing granted.

mento and San Joaquin Drainage District v. Ray L. Riley, 194 Cal. 624, 638, 229 P. 957; Smith v. Brown, 59 Cal.App.2d 836, 838, 140 P.2d 86; Haviland v. Southern California Edison Company, 172 Cal. 601, 608, 158 P. 328; Rheingans v. Smith, 161 Cal. 362, 365, 119 P. 494, Ann.Cas.1913B, 1140. There was no confidential relationship between appellant and the city officials. It could hardly be contended that the city attorney could have deceived appellant while the latter was acting upon the advice of his own counsel.

[9] By unique dialectics appellant contends that the failure of the police surgeon to file a certificate of appellant's necessity of retirement prior to February, 1940, is conclusive proof that the latter's condition was not such as to necessitate his retirement prior to that date. He argues (1) that he had a right to rely upon the presumption that both the pension board and the police surgeon would properly perform their official duties; (2) that during "the period following my injury" he was able to perform the light duty assignments; (3) that he offered his services for light duty work; (4) that he was denied the privilege by the "Chief" because of an unfriendly basis arising from personal differences; (5) that one doctor thought it would be two months before he could return to duty while another thought it would be a few months; (6) that prior to his operation in October, 1939, he was able to walk around; (7) that in 1939 three physicians advised surgery and hoped that thereafter he couuld return to his duties; (8) that although he regained consciousness four weeks after the operation on October 24, 1939, they told him nothing of his bad infection and permanent disability until February 1, 1940. Whatever may be the virtue of such declarations, neither singly nor collectively did they induce the trial court to determine otherwise than that appellant was permanently disabled November 30, 1937, as he averred and as borne out by his statements to the several examining physicians and by their opinions. The presumption that the board and the surgeon would do their duties does not operate so far as to say that either would act without the necessity of having such duty brought to their attention by some appropriate act on the part of appellant. At no time did he seek a physical examination either as a prerequisite to return to duty or to obtain a certificate of permanent disability.

[10] The contention that the statements in the affidavits were admissible for the purpose of impeachment only finds no support in law. Any statement made by a litigant may be properly considered as an admission against interest as well as an impeachment of his testimony. (Card v. Boms, 210 Cal. 200, 204, 291 P. 190), and such admission may well be the basis of the court's finding. Hall v. The Emily Banning, 33 Cal. 522, 524.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.




84 Cal.App.2d 11

**HARKNESS et al. v. MONTGOMERY.**

**Civ. 3576.**

District Court of Appeal, Fourth District, California.

Feb. 24, 1948.

**1. Landlord and tenant ⇐124(1)**

Tenants, to whom landlord agreed to furnish water for irrigation of leased land, were not obligated to ask company to which landlord previously leased adjoining land with exclusive right to use two pumps, indicated by landlord to tenants as source of water, for water from such pumps, but properly addresed demand therefor to landlord as other party to contract.

**2. Landlord and tenant ⇐48(1)**

Evidence supported findings that tenants, to whom landlord agreed to furnish water for irrigation of leased land, made timely demands on landlord for water, that such demands were not complied with, and that damages because of death of grapevine cuttings, planted in land by tenants,

resulted from landlord's failure to comply with agreement, so as to authorize recovery thereof by tenants.

3. Landlord and tenant ⇐48(1)

Evidence was insufficient to show that damage to tenants of land because of death of grapevine cuttings as alleged result of landlord's failure to furnish irrigation water as agreed was entirely due to tenants' neglect in waiting until landlord plowed ditch to bring water to land.

---

Appeal from Superior Court, of Fresno County; T. R. Thomson, Judge.

Action by Floyd J. Harkness and others, copartners doing business under the firm name and style of United Packing Company, against B. E. Montgomery for breach of an agreement to furnish irrigation water. Judgment for plaintiffs, and defendant appeals.

Affirmed.

David E. Peckinpah and L. N. Barber, both of Fresno, for appellant.

W. M. Conley, Philip Conley, Mathew Conley, Conley, Conley & Conley, and L. Kenneth Say, all of Fresno, for respondents.

BARNARD, Presiding Justice.

This is an action for damages for breach of an agreement to furnish irrigation water.

The defendant owned a ranch of over 5000 acres in the Mendota district. The plaintiffs had a large number of grapevine cuttings and were looking for land on which to plant these and raise rootings. On January 3, 1945, the defendant leased 30 acres of this land for one year to the plaintiffs for this purpose, at a rental of $2000 paid in advance. By a written agreement, reciting this purpose, the defendant agreed to furnish water for irrigation "in ample amounts and at times when our Mr. Stafford deems it necessary for the irrigation to keep said nursery stock growing properly." Stafford, who was in charge for the plaintiffs, was a nurseryman of long experience, and in addition to his salary he was to receive one-third of the net proceeds from the project. Before the contract was signed the defendant showed the plaintiffs two pumping plants, indicating that they would be the source of the water, but did not tell them that he had previously leased 500 acres of the adjoining land to the Friedman Company, with the exclusive right to the use of the two pumps. The defendant was told that the plaintiffs planned to preirrigate the land and agreed to provide water for that purpose.

There is no controversy with respect to five acres of the leased land. On the other 25 acres the plaintiffs planted 873,800 cuttings. Planting was begun on April 11 and finished on April 22nd. They were planted on soil which was very dry and the first water for irrigation of the 25 acres was received on April 19, through the courtesy of the Friedman Company. Practically all of the cuttings died and it is admitted that this was caused by the lack of water at the proper times.

The complaint alleged a failure to furnish water as agreed and the answer admitted an agreement to furnish water in ample amounts to keep said nursery stock growing properly, and further admitted that at various times the plaintiffs had demanded that the defendant furnish them water and, in particular, that such a demand had been made in writing on April 9, 1945. The court found in all respects in favor of the plaintiffs and entered judgment for $9775.63, from which the defendant has appealed.

[1, 2] It is first contended that the evidence is not sufficient to support the finding that there was a breach of the covenant to furnish water. It appears, without dispute, that the cuttings which were planted were good healthy cuttings which had been properly "healed in" and had made a good healthy growth. The appellant admits in his brief: "There can be no doubt that the rootings died from lack of water, but the only logical explanation of the undisputed facts is that they were dead when the water was applied. The irrigation was delayed too long after the planting." It is argued that the appellant was under no obligation to furnish water ex-

cept when it was demanded; that there is no evidence that he refused any such demands; that the respondents knew that the water must come from the Friedman Company, who had a lease on the pumps; that no demand which was made on the Friedman Company was refused; and that considerable water was furnished which would have been sufficient if taken and used at the proper times. He relies largely on the testimony of a foreman for the Friedman Company, who testified that the land of the 25 acres was very dry when the cuttings were planted; that Stafford asked him for water after most of the cuttings had been planted; that he first let Stafford take water for the 25 acres on April 19, and as soon as it was requested; that Stafford was told to take what he wanted; that Stafford took some water and on April 25, he gave him all the water for three days; and that he then told Stafford to take all the water he wanted.

On the other hand, there is evidence of the following facts. On Januray 3, Stafford told the appellant that he wanted water for the ground prior to the middle of March because they wanted the cuttings planted by April 1. The appellant said he would furnish such water. Stafford again requested water from the appellant about the first of March, the latter part of March, and several times in the early part of April. While he had desired to plant the cuttings earlier, he finally started on April 11 because they would be useless if he waited longer. No water was furnished in time to preirrigate the land. In many conversations the appellant told Stafford that the water would be there in a few days. He asked the appellant for water many times. Stafford reported to the respondents nearly every night that the appellant would not give him water, but kept promising to do so. On April 9, the respondents wrote a letter to the appellant telling him that Stafford advised them that he was unable to get the necessary water to proceed with the nursery deal, reminding him of their heavy investment and of his agreement to furnish the water, telling him that any loss would be chargeable to him, and requesting him to make the necessary arrangements without further delay. The appellant testified that he received this letter on April 10 and that, "I just laughed about it." The appellant promised to dig a ditch to bring water to the land but did not do so until April 17. While some water was furnished after that there is evidence that it was not furnished in sufficient quantity even then. However, the evidence fully justifies the inference that the damage had been done before that time.

The first water was received through the courtesy of the Friedman Company on April 19, and then in limited quantity. While admitting that even this was too late, the appellant argues that there is evidence that the respondents did not ask the Friedman Company for water at an earlier date. Their contract was not with the Friedman Company. There is evidence that the Friedman Company had been using all of the water from the two pumps and was trying to buy more water from another source owned by the appellant, and the respondents properly addressed their demands to the appellant, whose duty it was to furnish the water. In any event, nothing more than a conflict appears and there is ample evidence to support the court's findings to the effect that timely demands for water, including one in writing, were made; that these were not complied with; and that the damage resulted from the appellant's failure to comply with his agreement.

[3] The only other point raised is that the damage was entirely due to neglect on the part of the respondents. It is argued that the respondents waited until the appellant ploughed a ditch on April 17; that the contract did not require the appellant to plough this ditch; that there is no evidence to show that the respondent could not have ploughed the ditch himself if he thought appellant's delay was endangering the rootings; and that it was the respondent's duty to minimize the damage. At best, these arguments rest upon a conflict in the evidence. The appellant had agreed to furnish water for this land. While the written contract did not state that the water would be brought to the land that is a reasonable inference from its terms, and the parties so interpreted it. Stafford ask-

ed the appellant to dig the ditch in March, and he promised to do so. There is evidence that the digging of the ditch, which took less than a day, required heavy equipment which the appellant had and which was not available to the respondents. Moreover, they would have no right to dig a ditch across lands owned and controlled by other people, and there is no evidence that they could have received water had they built the ditch earlier, until something was done by the appellant to supply the water. There is evidence that Stafford also asked the appellant to put in the ditch three times between April 4 and April 9, that each time a promise was made to put in the ditch, that another request was made on April 14, and that the ditch was finally installed on the 17th. The contention here made is without merit, and the record sustains the court's action in not applying the minimizing rule relied on.

The judgment is affirmed.

GRIFFIN, J., concurs.




83 Cal.App.2d 790

## DRY v. CITY & COUNTY OF SAN FRANCISCO.

Civ. 13512.

District Court of Appeal, First District, Division 1, California.

Feb. 24, 1948.

Rehearing Denied March 25, 1948.

Hearing Denied April 22, 1948.

**1. New trial ⇐102(1)**

In support of motion for new trial on ground of newly discovered evidence, moving party must show that he made reasonably diligent effort to produce the evidence at trial.

**2. New trial ⇐150(1)**

A party moving for a new trial on ground of newly discovered evidence is not required to have his counsel file an affidavit that he had no knowledge of newly discovered evidence prior to verdict.

**3. Appeal and error ⇐981**

Ordinarily, conclusion of trial court on motion for new trial based on newly discovered evidence, is not disturbed on appeal, because trial judge is in better position to determine effect of alleged new evidence than is reviewing court, but trial judge's discretionary determination is not final.

**4. Appeal and error ⇐981**

Whether party moving for new trial on ground of newly discovered evidence, made timely and diligent search for witnesses who might reasonably be expected to be in possession of evidence concerning material facts, is a matter which appellate court will consider in determining whether trial court abused its discretion in granting motion for new trial.

**5. Appeal and error ⇐981**

Fact that witnesses who could give allegedly newly discovered evidence were not discovered at the time of the trial but were located soon after verdict, might raise a suspicion as to plaintiff's good faith in using diligence to discover the witnesses, was not sufficient to warrant District Court of Appeal in deciding as a matter of law that trial court abused its discretion in granting plaintiff a new trial on ground of newly discovered evidence.

**6. New trial ⇐163(2)**

Order for new trial on ground of newly discovered evidence was an implied finding that plaintiff exercised reasonable diligence in view of all surrounding circumstances, and that new evidence was of sufficient importance to require resubmission of the issues to another jury.

**7. Appeal and error ⇐981**

Fact that newly discovered evidence was relied on by plaintiff in support of motion for new trial related solely to defendant's negligence and had no pertinency to issue of contributory negligence, did not establish that order granting new trial was prejudicially erroneous to defendant, where there was no evidence that would have supported a finding that plaintiff was guilty

of contributory negligence on which a verdict for defendant could have been upheld.

**8. New trial ⇐104(3)**

Order granting plaintiff's motion for new trial on ground of newly discovered evidence, in action for injuries sustained when plaintiff was thrown from defendant's street car, was not abuse of discretion, where plaintiff was only witness who testified that his fall was caused by jerk of street car, and affidavits of alleged newly discovered witnesses showed that they would give testimony tending to strengthen plaintiff's version of the accident.

---

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

On rehearing.

Prior opinion modified.

Prior opinion, 188 P.2d 533.

John J. O'Toole, City Atty., John F. Moran, Dep. City Atty., and Geo. E. Baglin, all of San Francisco, for appellant.

Gladstein, Andersen, Resner & Sawyer and Ewing Sibbett, all of San Francisco, for respondent.

WARD, Justice.

Defendant failed to file an adequate record on appeal in the above entitled matter. After the original opinion Cal.App., 188 P.2d 533 had been filed defendant presented a motion to augment the record. That motion was granted, which requires a modification of the opinion. A petition for rehearing was granted and the matter submitted. After reconsideration of the record as augumented we are convinced that the opinion heretofore filed correctly disposed of this appeal. The opinion has been redrafted in view of the augumented record and is as follows:

The appeal, as appears in the trial court minute record, is from an order granting a motion for new trial after verdict by jury, on the ground of newly discovered evidence.

Plaintiff, an employee in the construction department of an electric service company, on May 21, 1945, was proceeding homeward after 6 o'clock p. m. on a Geary Street municipal car. He testified the car "was crowded but not jammed * * * people [were] standing in the aisles and on the back platform * * * I stood on the back platform, inside the door, between the controller box and the opening at the back * * * the extreme rear of the car * * * There seemed to be something out of control of the operator, which caused it to give a terrific jerk at several stops. I believe the first I noticed was at Polk Street. That is, when the electric braker goes out, it stops and starts with a terrific jerk." Near Octavia Street "The car pulled up to the usual stop at the intersection, and I presume there were people getting off, and it started again with a violent jerk, pulled up a few feet and stopped very abruptly, causing all the standing passengers to surge forward and back as the car moved. Then it started again, immediately after that stop, and made another terrific jerk and stopped, and passengers were overbalanced, all surging back again, and knocking me right out of the back door into the street." On cross-examination plaintiff testified: "There is an iron grill that they use when they turn the car around, and which was directly against my back, and that was joined onto it, within a space of a foot or so. I was leaning against that, and another person was leaning against the controller, and several jammed between me and the fare box, toward the center of the car." Plaintiff testified that at the time of the last jerk he was not holding on to anything but that prior thereto he had "held on." The record shows:

"Q. You say that some one bumped against you and threw you out to the right, onto the street? A. That's right.

"Q. This person that bumped against you, did that person fall out in the street, too? A. I don't know. I was knocked unconscious. * * *

"Q. As you were going out of the car—you say you were thrown to the right out of the car—did you see anybody else thrown out of the car? A. No, I was busy grabbing for the center rod and wasn't paying any attention to the rest of the people.

"Q. Well, in any event, as far as you are aware at this particular time, you did

not notice anyone but yourself going out to the right, out of that car? A. No.

"Q. You are sure you were riding inside of the car? A. Positive. * * *

Mr. Moran [for the defendant]:

"Q. I assume that in your condition, you did not know whether the street car came to a stop after the accident? A. No."

A conductorette, called as a witness by the defense, testified that she had no recollection of any one falling or being thrown from the car. Subsequently plaintiff testified that the witness was not the conductorette on the car in question. A police officer, at the time of the accident attached to the Accident Prevention Bureau, reading from his report of the accident, testified: "The victim, who was riding on the platform of the westbound 'B' line, stated that the street car after making a stop at the intersection of Octavia Street, started to move ahead and due to another passenger falling against him, he lost his balance and fell off the street car onto the pavement causing the above injuries." An important issue was whether plaintiff was thrown from the street car as the result of an unusual jerk or lurch.

The jury returned a verdict in favor of defendant on December 4, 1946. A notice of motion for a new trial upon the usual statutory grounds including newly discovered evidence was filed December 11, 1946. Affidavits supporting the motion on the ground of newly discovered evidence were sworn to on December 18, 1946, and filed the following day.

An affidavit sworn to by Audrey R. Buynoch set forth that "As I was about to cross Octavia Street, all of a sudden I heard a noise like brakes screeching, which caused me to look in the direction of a street car going west, and I saw the street car give a great movement, which I can best call a 'lurch,' and then proceed ahead; and then I saw a body which I later identified as Mr. Dry, lying on the street near the tracks * * * the street car did not stop and render any aid or assistance to Mr. Dry, but continued on out Geary Street * * *" A second affidavit, made by Albert H. Pellandini, the proprietor of a grocery store, set forth: "That I remember an accident occurring about May 1945, and at that time I was standing near the front window of the store, and my attention was attracted to a street car by suddenly hearing the noise and crunch and screech of street car brakes, and then I saw the street car sort of stop and lurch, and during that period I saw the body of a man fall off the rear platform of the car and land in the street by the street car tracks. * * * The street car, after the terrific lurch which I have mentioned, did not stop, but thereafter continued on and the street car was crowded."

In a counter-affidavit one of the attorneys for defendant, disputing the correctness of the affidavit of Pellandini, states that previous to the trial Pellandini had stated "he did not witness the accident, but saw the injured man lying in the street." It was also averred that subsequent to the action Pellandini informed "affiant that he did not see the plaintiff fall off the street car in question and was not aware that such statement was in the affidavit he signed." The affidavit attacking that of Pellandini merely raises the question of Pellandini's veracity, a matter to be decided by the trial judge. The Buynoch affidavit is not attacked on this ground. The court may have considered one or both of the affidavits.

The first question to consider is whether the plaintiff exercised proper diligence to obtain the designated newly discovered evidence. Plaintiff filed an affidavit in which he averred that immediately after the accident he was rendered unconscious, shortly thereafter becoming semi-conscious; that either while he was lying upon the ground or en route to a hospital in such semi-conscious condition he heard various people talking and that he had a hazy recollection of a name that sounded like "Vinnock"; that after leaving the hospital he made a search for witnesses in the neighborhood of the accident but without success. Plaintiff further averred "That by virtue of the facts pleaded and set forth herein, plaintiff was unable, with reasonable diligence, to discover and produce said evidence prior to the date of trial; that said evidence is material to the issues herein; and that said testimony, if admitted, would

result in a different verdict, upon another trial of said cause."

[1, 2] Plaintiff does not dispute the well-established rule that in support of a motion for new trial on the ground of newly discovered evidence, the moving party must show that he made a reasonably diligent effort to produce the evidence at the trial. A number of citations, including People v. Byrne, 160 Cal. 217, 116 P. 521, are listed by defendant in support of this rule, in all of which the orders appealed from were affirmed. Defendant argues that plaintiff's attorney failed to file an affidavit that prior to the verdict he did not know of the newly discovered evidence. Defendant cites in this connection cases headed by Estate of Cover, 188 Cal. 133, 204 P. 583. In all of these cases the trial court's action in refusing to grant a new trial on the ground of newly discovered evidence was upheld on appeal. None of these cases are authority for a requirement that the party moving for a new trial on the ground of newly discovered evidence should have his counsel file an affidavit that he had no knowledge of the newly discovered evidence prior to the verdict.

It is next urged by defendant that plaintiff's counsel was required to show that in the preparation of the case they made every reasonable search for witnesses who might reasonably be expected to give testimony concerning the facts in issue. Defendant quotes Sofuye v. Pieters-Wheeler Seed Co., 62 Cal.App. 198, 208, 216 P. 990, 995: "An attorney holds himself out as one who will faithfully perform any service within the scope of his profession committed to him by a litigant or a client, and when employed in his professional capacity is always specifically charged with the duty of taking such steps as the case requires shall be taken to protect or conserve the rights of the client." The quoted statement was made by the court in connection with its ruling on the problem of reliance upon the promise of a third party to defend an action as excusable neglect justifying the trial court in setting aside a default judgment. It does not cover the problem at hand. A number of cases are cited seemingly upholding the views of the respective parties. It does not appear necessary to harmonize or reconcile or differentiate the various holdings. The language used in each decision is designed to present the facts of the particular case so that the reviewing court might affirm or reverse the order or judgment in conformity with the conclusion it had reached.

[3, 4] Ordinarily the conclusion of the trial court on a motion for a new trial based on newly discovered evidence is not disturbed on appeal for the simple reason that the trial judge is in a better position, due to his familiarity with the facts and circumstances, to determine the effect and value of the alleged new evidence, than is a reviewing court. However, the trial judge's discretionary determination is not final. As applied to the present problem, whether a party moving for a new trial made timely and diligent search for witnesses who might reasonably be expected to be in possession of evidence concerning the material facts, is a matter which the appellate court will consider in determining whether the trial court abused its discretion. This does not mean that the reviewing court may substitute its opinion for that of the trial court, but that it will consider and determine whether the discovered evidence is reasonably likely to result in a different verdict, and whether the moving party was timely and diligent in his search for new evidence. Defendant stresses the case of Vertson v. City of Los Angeles, 116 Cal.App. 114, 2 P.2d 411. There the action was for personal injuries consisting of serious burns suffered by plaintiff while working in a storm drain, laying pipe, when defendants' power wires fell and came in contact with him. In support of the motion defendants presented the affidavits of 13 persons of which only two (116 Cal.App. at pages 118-120, 2 P.2d at page 412) contained "the statement that the affiant actually saw the boom of the trench machine strike the power wires * * * This is significant, since [defendants'] * * * principal defense [was] that the boom of the dragline machine operated by the contractors then engaged in constructing the storm drain * * * had come in contact with the power wires, causing them to short circuit

and fall. * * * Despite the emphatic avowals of diligent search for witnesses contained in the affidavits of the genetlemen who conducted the investigation * * * the bald facts indicate surprising lack of diligence." Diligence in discovering new evidence in one case may not be the diligence that should be required in another case. Heintz v. Cooper, 104 Cal. 668, 38 P. 511. With these tests in mind the facts and circumstances may be considered.

[5, 6] In the present case the plaintiff was the only witness who testified that the car gave a "terrific jerk," which knocked him "out of the back door into the street." The affidavit of plaintiff shows that he did not know but had cause to believe that there were witnesses, unknown to him, who witnessed the accident. Plaintiff's affidavit shows that a search was made by him to discover such witnesses within a reasonable time after his release from the hospital. The fact that the witnesses were not discovered at that time and were located so soon after the verdict may raise a suspicion as to plaintiff's good faith, but a suspicion is not sufficient to warrant this court in deciding as a matter of law that the trial court abused its discretion in granting a new trial. The order for a new trial was an implied finding that plaintiff had exercised reasonable diligence in view of all the surrounding circumstances, and that the new evidence was of sufficient importance to require a resubmission of the issues to another jury.

The answer to the complaint, after denial of defendant's negligence, alleged that plaintiff was negligent and that such negligence proximately contributed to and caused the happening of the accident. On a new trial contributory negligence under the present pleadings may be an issue. Whether there will be evidence sustaining the special defense is a matter that cannot be determined at this time. However, on the previous trial the court stated in the instructions to the jury: "I may say in passing that there is no evidence of contributory negligence in this case."

[7] Defendant urges: "The claimed newly discovered evidence relates solely to the alleged negligence of defendant, whereas there was sufficient evidence to support the finding of the jury that plaintiff was guilty of negligence proximately causing his injuries, wherefore the trial court committed prejudicial error in granting plaintiff a new trial." Defendant argues that in the instant case the newly discovered evidence bears solely on the defendant's negligence. As to this, defendant contends that there is ample evidence of contributory negligence, and that the jury found against plaintiff because of his own negligence. The evidence of the two witnesses may be corroborative of plaintiff's testimony. It will be evidence tending to answer the material question propounded by the defense—"whether the street car came to a stop after the accident."

The contention that in the last trial there was evidence to support a finding of the jury that plaintiff was guilty of contributory negligence is not borne out by the record. In Parker v. Southern Pacific Co., 204 Cal. 609, 269 P. 622, it was said that the newly discovered evidence had no pertinency to the issue of contributory negligence, but in that case there was evidence of contributory negligence introduced. Likewise, in Dougherty v. Union Traction Co., 23 Cal.App. 17, 136 P. 722, there was testimony given by plaintiff that she was to blame for the accident. In the present case it appears that plaintiff noticed the "lurch or jerk" of the car approximately four blocks from the scene of the accident. It is not contended that he should have left the car at a "car stop," but that at the time of the accident he should have grabbed or held on to part of the stanchion or the mechanism of the car. Plaintiff testified that he had ben holding on but that immediately before the accident he was "jammed" by other passengers and did not hold on as he was thrown from the car. There is no evidence to show that at the time of the accident plaintiff could have held on.

Each of the appeals referred to attacking an order granting a motion for a new trial was decided upon the particular and peculiar facts of the case, which are not, nor are those of the other cases cited by defendant,

identical with those here considered. They simply and correctly set forth rules for the determination of the particular case then before the court.

[8] The order granting plaintiff's motion for a new trial is affirmed.

PETERS, P. J., and BRAY, J., concur.




83 Cal.App.2d 798

## FALLON v. FALLON.

Civ. 13615.

District Court of Appeal, First District, Division 1, California.

Feb. 24, 1948.

Hearing Denied April 22, 1948.

**1. Divorce ⇐37(8)**

A husband was not legally obliged to accept his estranged wife's conditional offers, on terms not stated, to return to him after one year from her departure, so that his cause of action against her for divorce on ground of desertion was not barred by his refusal to accept such offers.

**2. Divorce ⇐133(1)**

Evidence supported conclusion that wife's separation from husband was not with intent to desert him or without his consent, as required to entitle him to divorce. Civ.Code, §§ 95, 96, 99.

**3. Divorce ⇐133(1)**

Testimony of husband's witness in wife's divorce suit that spouses had separated and were living apart was insufficient corroboration of husband's testimony to support cause of action alleged in his cross-complaint for divorce on ground of desertion. Civ.Code, §§ 95, 96, 130.

**4. Divorce ⇐184(10)**

To justify reversal of judgment denying divorce, record should show great preponderance of evidence against trial court's findings.

**5. Divorce ⇐37(7)**

A spouse's consent to other spouse's separation, barring divorce on ground of desertion, need not be expressed in writing or even in words, but may be implied from circumstances, such as spouses' failure to make overtures after quarrel or acquiescence in separation, and may be tacit, as where spouse is willing for other spouse to separate and makes no objection. Civ. Code, § 99.

**6. Divorce ⇐231, 235**

Whether wife, denied divorce, should be awarded support money, depends on circumstances and court's sound descretion. Civ.Code, § 136.

**7. Divorce ⇐240(1)**

An award of year's support in sum of $250 per month to childless wife by judgment denying husband divorce on his cross-complaint after granting of non-suit on wife's cause of action for divorce was not abuse of discretion, in view of services rendered by wife in managing husband's properties, his financial worth of over $300.000, with net yearly income of at least $8,500 and wife's employment as practical nurse. Civ.Code, § 136.

**8. Divorce ⇐223**

Allowance of counsel fees to wife in divorce suit is within trial court's sound discretion.

**9. Divorce ⇐227(1)**

Allowance of $500 additional counsel fees to wife for services during trial of her divorce suit and particularly in connection with trial of issues raised by husband's cross-complaint for divorce, which was denied to both parties, was not abuse of discretion.

---

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Margaret Fallon against Frederick A. Fallon for a divorce and enforcement of an antenuptial agreement, in which defendant cross-complained for divorce. From a judgment denying defendant a divorce and ordering him to pay plaintiff a

stated monthly sum for her support for one year and counsel fees, defendant appeals.

Affirmed.

John G. Reisner, of San Francisco, for appellant.

Jack Flinn and John A. Foley, both of San Francisco, for respondent.

BRAY, Justice.

Plaintiff sued defendant to enforce an antenuptial agreement and for divorce on the grounds of extreme cruelty. Defendant, besides answering, cross-complained for divorce on the grounds of both cruelty and desertion. At the trial, the court granted defendant's motion for a nonsuit on both causes of action. The trial then proceeded on the single cause of action for desertion alleged in the cross-complaint, as the defendant elected not to proceed on the other ground. At the conclusion of the trial, the court denied a divorce and ordered defendant to pay plaintiff $250 per month for a period of one year, and the further sum of $500 counsel fees.

Defendant contends that the evidence showed without conflict a cause of action for desertion, and hence the court erred in denying the divorce, and also in granting the support and counsel fees award.

Desertion.

[1,2] While the evidence establishes the fact that plaintiff left defendant and remained away for more than the statutory period, the court found, in effect, that such separation was with the consent of defendant. The evidence supports that conclusion.

To understand the circumstances of the separation it is necessary to consider briefly the background of the marriage, which indicates that it was little more than a mutual business proposition and not guided by the usual lofty motives which prompt individuals to unite in wedlock. The marriage took place in Reno in 1940, at which time plaintiff was 32 years of age and defendant 71. Defendant owned considerable property and was wealthy. Plaintiff is a practical nurse, and in October, 1938, started to take care of defendant, who was in ill health. After a few months plaintiff occupied a bedroom in the flat where defendant lived so that she would be available whenever needed. Several of the apartments in the building which was owned by defendant were dirty and unoccupied. In addition to nursing and caring for defendant, plaintiff did all the housework, cooking and washing, cleaned up defendant's flat and made it liveable. She also made the vacant apartments rentable, painting them and doing considerable other work herself. As a result of her efforts in this respect, defendant's income was increased $200 per month by the rentals. About seven months after plaintiff was employed, defendant started proposing marriage to her, repeating the proposal every month or two. She testified that he offered certain sums of money and the inducement that by marrying him she could more easily obtain citizenship, as she was a subject of New Zealand. An antenuptial agreement was drawn up which was to be effective only when signed in the presence of defendant's attorney. As it was never signed by either of the parties, the cause of action based upon it fell.

Defendant paid plaintiff $21 per week for her services. In November, 1942, defendant's manager left and plaintiff took over the position and received $50 per month therefor. These payments continued after the marriage, plus the rental of an apartment which defendant permitted plaintiff to retain, so that at the time of separation plaintiff was receiving approximately $200 per month. Out of this sum, plaintiff had to pay for her own clothes, personal expenses, and presumably amusement.

Plaintiff testified that defendant was of a quiet temperament, uncommunicative, would run away, close himself up in his room, had moody spells, would not let her drive the car, never took her to a show or allowed her any company or social life. Every night he would leave the dinner table, go to his room to listen to the radio, read, or study, and at 10 o'clock would lock his room door. Sometimes he would not talk and would lock himself away from plaintiff. If she stayed home

at night he would never say anything to her. Apparently, although she did not testify as to why she left defendant, plaintiff became fed up with the situation, filed a suit for divorce, continued to live with him for four months, and then left home. Plaintiff admitted that the habits, ideas, and actions of defendant before marriage, with which she was thoroughly familiar, were practically the same as those after marriage.

After the court denied plaintiff a divorce on the grounds of cruelty, defendant took the stand. It is his testimony, backed by that of a witness, who merely corroborated the fact that plaintiff moved out and that the parties remained separated for over a year, that defendant contends is sufficient to require a finding of desertion by plaintiff. Defendant testified that on February 23, 1945, plaintiff had an express man remove her belongings and trunk and moved to an apartment about six blocks away. When asked what the conversation was at the time of leaving he said there was very little conversation. "It was understood about the last week of October of the preceding year that she intended to get a divorce, and the circumstances were such that she had a difference of opinion with one of the tenants as to who should control the apartments there * * *" This referred to a situation as to which plaintiff had testified that defendant had hurt her by taking the side of the tenant and plaintiff had said to him, "if that is the way you are going to be, and you can't stand up for me, I am not wanted around" or something to that effect. After leaving she visited him half to a dozen times to collect alimony and the last time to get some of her belongings. The court then asked:

"Q. Well, did you ask her to come back? A. No, there was no conversation on the subject at all. I think the statutory period had already passed. * * *

"Q. Did you want her to come back? A. I told her when it was all over that it was all right for her to come back and take care of me in the apartment there.

"Q. After what was all over? A. After the law suit was all over, but I don't think I made any overtures for her to come back and live with me as my wife, nor did she make any, except for two letters. Shall I testify as to that, Mr. Reisner?

"Mr. Reisner [counsel for defendant]: That is all right. A. She did make overtures after the statutory period had passed, she specified that there should be some agreement, we didn't specify what the terms of that agreement should be, and the peculiar thing was that when she called in person, she did not mention the subject at all and it was out of my mind."

On June 7, 1946, over a year after the suit was filed but before trial, plaintiff wrote defendant a letter in which she stated, among other things: "Also on leaving San Francisco, you will recall my telling you I am willing to return home, if you want me to, providing we could come to some agreement between you and I. I don't think in any event that we need any lawyers, Fred, surely you and I can settle this matter without them." Again in September, 1946, she wrote defendant, evidently referring to this June 7th letter: "While I am down here just for the change and a job, I want you to know that I meant what I told you before I went east in June, Fred * * * that I am willing to come home to you, that is if you want me, and you make an agreement whereas we will both be satisfied, I think that is the fairest way." Referring to the time of plaintiff's leaving, defendant was asked:

"Q. Did you ask her to become reconciled? A. No, it didn't occur to me. * * *

"Q. Did you do anything to make it pleasant, so she would stay? A. Not that I can remember, no. It was sort of useless."

He also testified that he never asked her to stay. When asked "Did she leave you home against your will and without your consent?" he answered "About everything she did was against my consent in that period * * *" (leaving the sentence unfinished). Defendant also testified that he understood that she was going to leave, yet he at no time discussed with her the matter of leaving or asked her not to leave. The defendant at no time positively testi-

fied that her leaving him was without his consent, the above extract being the nearest he came to so testifying. It is apparent from the record as a whole that the trial court was justified in finding, in effect, that the separation was not against his consent but was mutually agreeable. Plaintiff was leaving to get away from a situation that was intolerable to her. At that time she had on file a divorce suit against defendant which she had filed on November 1, 1944. However, she continued to live with defendant thereafter until February 23, 1945, and did not proceed with her action for 14 months thereafter, when she filed an amended complaint, and did not bring the case to trial for another 14 months. As shown by her letters, she was willing to come back provided a mutually agreeable agreement could be reached. Defendant was unwilling even to discuss a possible basis for return.

While the offers to return expressed in the letters were conditional and upon terms not stated, and were after the passage of a year from plaintiff's departure, and hence defendant was not obliged under the law to accept the offer (Stacy-Judd v. Stacy-Judd, 93 Cal.App. 465, 269 P. 561), they, when considered with the other actions of the parties, sustain the position that the separation by plaintiff was not with the intent to desert defendant, and that such separation was not without defendant's consent.

Defendant cites certain cases such as Kirkpatrick v. Kirkpatrick, 152 Cal. 316, 92 P. 853; Vileta v. Vileta, 53 Cal.App.2d 794, 128 P.2d 376, and Dee v. Dee, 87 Cal. App. 17, 261 P. 501, as authority for the proposition that where the evidence clearly and without conflict sustains a cause of action, the court cannot arbitrarily deny a decree. There can be no quarrel with that principle of law, but it does not apply here, for the reason that the evidence fails to sustain the desertion cause of action. The following sections of the Civil Code are pertinent here: (Sec. 95) "Willful desertion is the voluntary separation of one of the married parties from the other with intent to desert." (Sec. 96) "* * * the refusal of either party to dwell in the same house with the other party, when there is no just cause for such refusal, is desertion." (Sec. 99) "Separation by consent, with or without the understanding that one of the parties will apply for a divorce, is not desertion." (Sec. 130) "No divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission, or testimony of the parties * * *; but the court must, in addition to any statement * * *, require proof of the facts alleged, and such proof, if not taken before the court, must be upon written questions and answers."

[3] Defendant's evidence toward establishing a cause of action for desertion would appear to be weak. He did not testify to any conversation indicating an intent to desert, and the only evidence on the point is the fact that she did leave. He did not protest her leaving or object in any manner. Since plaintiff had four months previously filed a complaint for divorce all indications would seem to be in favor of a separation by consent. In any event, there was insufficient corroboration to support a cause of action in favor of defendant as his witness, in effect, merely testified that the parties had separated and were living apart. In Sweet v. Sweet, 64 Cal.App. 786, 222 P. 634, plaintiff testified that his wife left him against his will and without his consent, that he knew of no particular reason why she left, only that she did not want to live with him. The corroborating witness merely testified to the fact that the parties were living apart and that the separation occurred by reason of the wife moving to and living in another city. In refusing a divorce on the ground of desertion, the court stated: "There was not a particle of corroboration, and in fact there was no direct testimony, that when the wife left the domicile she did so 'with intent to desert.' (Civ.Code, sec. 95.)" Page 788 of 64 Cal.App., page 634 of 222 P. Quoting from Corder v. Corder, N. J.Ch., 59 A. 309, the opinion continued: "The corroboration of the petitioner as to the fact that subsequent to the separation the wife lived alone is not a sufficient corroboration of the desertion charged." Page 789 of 64 Cal.App., page 635 of 222 P.

[4] Hatton v. Hatton, 136 Cal. 353, 68 P. 1016, held that the findings of the trial court will not be disturbed upon appeal unless the evidence in support of them is so slight as to indicate a want of good judgment and an abuse of discretion, and this rule is particularly applicable when the findings are against a divorce. "To justify a reversal of the trial court in refusing to grant a divorce, the record should show a great preponderance of evidence against the findings * * *" page 356 of 136 Cal., page 1017 of 68 P.

[5] Concerning separation by consent, the following pertinent and seemingly applicable statement is found in 9 Cal.Jur. 669: "The consent need not be expressed in writing, or even expressed in words, but it may be implied from the circumstances of the case. As has been stated, 'It may be implied from the failure of the parties to make overtures after a quarrel; from acquiescence in the separation; or from other circumstances which show the plaintiff's consent or that the separation was not against her will. The consent need not be express. It may be tacit, as where the plaintiff is willing and has made no objection.' [Citing McMullin v. McMullin, 140 Cal. 112, 115 [73 P. 808], quoting Nelson on Divorce and Separation, sec. 67.] It is for the court trying the case to determine from all the facts and circumstances appearing therein whether or not there was an absence of that consent to living separate and apart which is essential to constitute a desertion. * * *"

Award for support.

[6, 7] There are no children of the marriage and no community property. According to the evidence, the defendant is worth at least between $300,000 and $400,000 with a net yearly income of not less than $8,500, while plaintiff is employed in her profession as a practical nurse. After the filing of the suit plaintiff received $200 per month for support under court order, until about two months before the trial, when the order was set aside. At the end of the trial the court at first refused to make any allowance, but on being shown section 136 of the Civil Code made an order granting plaintiff support in the sum of $250 per month, for the limited period of one year.

Defendant contends that the court had no power to make this allowance as there was no showing of need therefor on the part of plaintiff, and cites in support of this position. Peyre v. Peyre, 79 Cal. 336, 21 P. 838; Loeb v. Loeb, Cal.App., 185 P. 2d 42; Lampson v. Lampson, 171 Cal. 332, 153 P. 238; Volkmar v. Volkmar, 147 Cal. 175, 81 P. 413; and Mayr v. Mayr, 161 Cal. 134, 118 P. 546. All these cases, however, referred to awards of permanent alimony or awards under section 137, and not to temporary awards under section 136 of the Civil Code, which reads as follows: "Though judgment of divorce is denied, the court may, in an action for divorce, provide for the maintenance by the husband of the wife and children of the marriage, or any of them." In Bensen v. Bensen, 20 Cal.App. 462, 129 P. 596, the court mentions section 136 but states that as to any reason for the application of that section and section 137 "we are left completely in the dark as to whether the parties are living together or separate * * *" page 464 of 20 Cal.App., page 596 of 129 P.

In Broad v. Broad, 35 Cal.App. 646, 170 P. 658, the court held that a wife living separate and apart from her husband, although not entitled to a divorce, was entitled to be supported by him while such separation existed, even though "her conduct towards her husband had been cold and indifferent." Page 649 of 35 Cal.App., page 659 of 170 P. In Hagle v. Hagle, 68 Cal. 588, 9 P. 842, an award of maintenance under section 136 was held not to be an abuse of discretion where the court found "that while defendant was not guilty of anything amounting to legal cruelty, * * * nevertheless his conduct as a husband was cold, harsh, and disagreeable, making it unpleasant for the plaintiff to live with him; that the wife's conduct was not free from blame; that the marriage had been unhappy from the beginning; that the wife was a good many years older than her husband, and love or affection no longer existed between them; that at the time of their marriage the woman was hard-working * * *" and each had about the same amount of money and the greater part of the property was community.

In Jacobs v. Jacobs, 68 Cal.App. 725, 230 P. 209, in which a hearing was denied by the Supreme Court, permanent alimony was granted the wife, although a divorce was denied to both husband and wife. It is apparent from section 136 of the Civil Code and the cases that whether an award will be granted for support of the wife where a divorce is denied, depends on the circumstances of each case and the sound discretion of the court. Under the circumstances of our case, in view of the services rendered the husband in managing his properties while they lived together, and the comparison of his position with hers, we cannot say that the court abused its discretion. The court left the parties still married, although separated by consent, and it was not unreasonable to require defendant for the limited period of one year to support her in a style commensurate in some degree to his income.

Counsel Fees.

[8, 9] The court granted an additional sum of $500 attorney's fees. At the opening of the trial, plaintiff moved for an allowance for attorney's fees. The court stated: "* * * the motion is made and due consideration will be given to it later." No objection was raised to the court thus postponing determination of the matter. The services for which additional fees were asked were not past services, but those to be furnished during the trial and particularly in connection with the trial of the issues raised by the cross-complaint. In Westphal v. Westphal, 122 Cal.App. 388, page 390, 10 P.2d 122, 123, the court held: "that the law does not require a wife to have recourse to her own resources first, to the impairment of the capital of her own separate estate." An award of $1,500 for counsel fees for defense against the cross-complaint was sustained, even though the wife had separate property of the value of $15,000 from which she derived an annual income of $500, where the husband had an income in excess of $2,500 per month. The allowance of counsel fees is a matter within the sound discretion of the trial court. Heck v. Heck, 63 Cal.App.2d 470, 147 P. 2d 110. It cannot be said that the court in the case at bar abused its discretion in making the allowance for additional counsel fees.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting; TRAYNOR, J., not participating.




84 Cal.App.2d 6

**FADEL v. SLAYMAN et al.**

**Civ. 16016.**

District Court of Appeal, Second District, Division 1, California.

Feb. 24, 1948.

Rehearing Denied March 12, 1948.

Hearing Denied April 22, 1948.

**1. Contracts ⇐138(1)**

An illegal contract cannot be made the basis of a cause of action.

**2. Contracts ⇐141(1)**

Where a contract can be performed legally, it will not be presumed that the parties intended to perform it in an illegal manner.

**3. War ⇐4**

Where parties to contract for proposed construction of fruit packing house did not contemplate violating a conservation order of the War Production Board, but sought to obtain governmental priorities for materials and abandoned proposed construction when no priorities were granted, defendants were not relieved from liability for reasonable value of services performed by plaintiff in preparation for proposed construction or for expenses incurred by plaintiff in employing attorney and architect at defendant's request on ground that the contract for the construction was illegal. Civ.Code, § 1667.

**4. Appeal and error ⇐1010(1)**

Appellate interference with trial court's decision is not justified, where there is substantial evidence to support the finding and judgment.

5. Contracts ⇐322(4)

In action to recover for contractor's services in proposed construction of fruit packing house, evidence sustained finding in favor of plaintiff concerning services rendered.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Norman I. Fadel against Victor Slayman and others to recover allegedly agreed compensation for contractor's services in proposed construction of a fruit packing house, and for a declaration of rights with reference to two contracts allegedly entered into, at defendants' request, with an attorney and an architect. From an adverse judgment, the defendants appeal.

Judgment affirmed.

Henry O. Wackerbarth, of Los Angeles, for appellants.

Joseph T. Enright, of Los Angeles, for respondent.

DORAN, Justice.

The original complaint herein sought recovery of $4,000 as agreed compensation for contractors' services in the proposed construction of a fruit packing house at Lindsay, California. The then named plaintiffs included Alfred N. Fadel and Job N. Fadel, but at the commencement of the trial the court sustained defendant's objection to the introduction of evidence as to these plaintiffs. The complaint also sought a declaration of rights with reference to two contracts claimed to have entered into, at defendant's request, with an attorney named Hal Hughes employed to obtain war priorities, and an architect named Peter Whitehill. The packing house was never constructed.

The trial court held that in making the contract the parties contemplated the obtaining of governmental priorities for materials and that since no such priorities were granted "both parties were then released from going further in execution of their agreement." By way of declaratory relief, however, the court found that respondent had, at appellants' request, entered into contracts with the above mentioned attorney and architect and that "defendants are liable to said plaintiff in whatever sums the said plaintiff may by final judgment be held liable to said Hughes (attorney) and Whitehall (architect)." To prevent a multiplicity of actions, the trial court also permitted an amendment to the complaint to conform to the proof, pleading quantum meruit.

In addition to the declared liability for attorney and architect fees, judgment was rendered for $1,875 as the reasonable value of services performed by Norman I. Fadel in preparation for the building of the plant.

It is contended in appellants' brief that the court erred in holding defendants liable for the reasonable value of services rendered in preparing to construct the packing house for the reason that "An illegal contract can not be made the basis of recovery of the reasonable value of services," and that "substantially all of the services performed by plaintiff were performed in preparing to carry out an illegal contract." Appellants' contention of illegality is based upon regulations of the War Production Board, in force in 1945 when the contract was to be performed; Section 1075.1 Conservation Order L–41, prohibiting "construction" without authorization and necessary priorities. In the instant case, the War Production Board did authorize construction of the packing house on August 27, 1945, but refused to grant a priority for materials.

"Construction" within the meaning of the above order is defined in Subdivision (b) therein as "putting up, altering, remodeling, rehabilitating, reconstructing or repairing any structure such as a building, road, bridge, dam, sewer or the like." This prohibition, according to Subdivision (c), "applies to a person who does his own construction work, to a person who gets a contractor to do it for him and to any contractor, subcontractor, architect, or engineer who works on the job or gets others to work on it or to supply materials for it. No person shall accept an order for, sell, deliver or cause to be delivered material which he knows or has reason to believe will be used in violation of the terms of

this order." The respondent's brief also calls attention to the fact that among the exceptions to the above prohibition is Sec. 1075.1(e) (9), specifying "Grading, ditch-digging or similar earth-moving operations, if no lumber or other building materials are permanently installed, except drainage pipe." It is the respondents' position that since no construction was carried on in the instant case, no illegality of contract was involved, and that nothing in the regulations prohibits preliminary work which does not involve actual construction as above defined.

[1] While it is undoubtedly true that an illegal contract cannot be made the basis of a cause of action, the record herein discloses nothing which indicates that the contract to construct the packing house was in any sense illegal, or that the parties thereto contemplated any improper or illegal action. According to the appellants' brief, "All or practically all of the work done by Fadel was in *preparing* to erect or construct the building." (Italics added.) Robert Fadel, son and employee of Norman I. Fadel, testified to the making of various investigations concerning building materials, the surveying of grades and elevations for the proposed building, the making of the necessary excavation, and other preliminary work, none of which included any actual construction. A survey of the war production regulations hereinbefore mentioned, fails to reveal any express or implied prohibition in reference to such preliminary work. The activity which is prohibited is "construction," expressly defined as the "putting up," etc., of a building. Moreover, in the present case, permission to construct the plant was actually granted, although without priorities, and the appellants' repudiation of the contract occurred after the granting of such authorization.

[2, 3] "It is the universal presumption of law," says the court in Fites v. Marsh, 171 Cal. 487, 488, 153 P. 926, 927, "that where a contract can be performed legally, it will not be presumed that the parties intended to perform it in an illegal manner." The above statement of the rule has been quoted with approval in later cases, such as Crawford v. Imperial Irrigation Dist. 200 Cal. 318, 324, 253 P. 726, and Vagim v. Brown, 63 Cal.App.2d 504, 510, 146 P.2d 923. In the instant case, as respondent's brief avers, "it is apparent that the parties to this contract did not contemplate violating, nor was it necessary for them to violate, any of the provisions of Civil Code 1667 * * * or the War Production Board regulations." Section 1667 of the Civil Code provides: "That is not lawful which is: 1. Contrary to an express provision of laws; 2. Contrary to the policy of express law, although not expressly prohibited; or, 3. Otherwise contrary to good morals." None of the decisions cited by appellants are factually similar to the present situation nor do they support the contentions made in appellants' brief.

It is further contended by appellants that the trial court erred in holding that respondent should be reimbursed in connection with the claims of the attorney Hal Hughes and the architect Peter Whitehill; that the evidence was insufficient to sustain the findings and judgment, and that the appellate court should disregard certain evidence as "inherently improbable." In this connection it may be noted that the trial court did not attempt to adjudicate the merits of the claims of the attorney and the architect, but as a matter of declaratory relief adjudged reimbursement in the event that such claims "should be established by final judgment of a competent court against the plaintiff." There appears to be no dispute over the fact that appellants had approved the respondent's employment of Attorney Hal Hughes to attempt to secure necessary priorities, and of the architect Peter Whitehill to prepare plans for the proposed building. Obviously, neither claim involved any prohibited "construction."

[4, 5] Although the appellants "are not unmindful of the rule that the weight of the evidence is for the trial court, and as a general rule an Appellate Court does not pass upon the weight or preponderance of the evidence," nevertheless it is insisted that a reversal is required because the evidence is "inherently improbable." In part this contention is based upon the assertion

that although Robert Fadel claimed to have worked on the matter for many months in 1945, the witness "did not know what kind of a packing house was to be built." This witness had, however, testified that the plant was to be a combination fruit packing house. Neither in this respect nor in reference to any other item of evidence, does the record reveal any inherent improbability which would justify a reversal. On the contrary, there is substantial evidence to support the findings and judgment and under the well known rule applicable in such cases, appellate interference with the decision of the trial court is not justified. There is no merit in any of the appellants' contentions.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.




84 Cal.App.2d 15

## DE MATTIE v. HENRY.

Civ. 3593.

District Court of Appeal, Fourth District, California.

Feb. 24, 1948.

1. Appeal and error ⇐957(1)

On motion to set aside default judgment for plaintiff and permit defendant to file his answer, credence to be accorded to affidavits, if in conflict, is matter within discretion of trial court.

2. Judgment ⇐143(17)

Trial judge did not abuse his discretion in setting aside default judgment in favor of plaintiff in automobile accident case on ground of excusable neglect, where plaintiff's attorney chose to enter into negotiations for settlement with representative of defendant's insurance carrier after original stipulation for time to appear and thereafter claimed a default before a reply to his offer had been received, without withdrawing his offer, without notice of his intention to end negotiations for settlement, and without notice of his intention to require a prompt appearance within time originally given.

3. Appeal and error ⇐957(1)

Order setting aside default judgment on ground of excusable neglect will not be disturbed on appeal, unless abuse of discretion clearly appears.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by John DeMattie against Dean Leslie Henry for damages arising out of automobile accident. From order setting aside default judgment and permitting defendant to file answer, the plaintiff appeals.

Affirmed.

J. A. Chase and J. M. Lopes, of Visalia, for appellant.

Chester O. Hansen and John Said, both of Fresno, for respondent.

BARNARD, Presiding Justice.

This is an action for damages arising out of an automobile accident. On March 27, 1947, summons was served on the defendant and by him turned over to his insurance carrier. On April 1, 1947, a representative of the insurance company, Mr. Owen, called on one of the attorneys for the plaintiff and obtained a written stipulation giving the defendant "to and including" April 26, 1947, in which to appear. No appearance was made within that time and on April 28, 1947, the default of the defendant was entered by the clerk. On the same day, a default judgment was entered against the defendant. The defendant then moved for an order setting aside the default judgment and permitting him to file his answer, which was submitted therewith. After a hearing on affidavits the motion was granted, and an order entered vacating and setting aside the default judgment and permitting the defendant to file his answer. From that order the plaintiff has appealed.

The appellant contends that there was no showing of mistake, inadvertence, surprise or excusable neglect; that no reasonable

excuse for the default was offered; and that the court abused its discretion in vacating the judgment on the showing made.

By written stipulation the respondent was given to and including April 26, in which to appear. That day was a Saturday and a default was requested and taken on Monday, the 28th, the first day on which this would have been possible. It appears from Owen's affidavit that on April 1, he called on one of the attorneys for the appellant and stated to him that he was prepared to discuss the possibility of a settlement or, if the attorney preferred, that the summons and complaint would be referred immediately to counsel; that this attorney informed him that he was desirous of exploring the possibility of a settlement but was not then prepared to discuss its terms, because of the absence of his associate counsel, and because he did not then know the amounts of the special damage; that affiant then asked for an extension of time in which to appear, so that the possibility of settlement could be thoroughly explored; that the attorney agreed to this and the stipulation was prepared giving them to and including April 26, in which to appear; that affiant again called on this attorney (on April 6) and discussed a settlement but was informed that the items of special damage were still undetermined; that affiant called on this attorney again (on April 16), at which time the attorney submitted a proposal of settlement; that affiant advised the attorney that this would be promptly submitted to his superiors; that affiant then stated that the time to appear provided in the stipulation was about to expire and the attorney replied "That will be all right"; that affiant promptly submitted the attorney's proposition to his superiors, but before he received a reply thereto the default judgment was entered; and that affiant then called on these attorneys and asked them to set aside the default, which they refused to do.

None of the foregoing is denied, except with respect to what occurred on April 16. In that regard the attorney who had given the original extension of time, and with whom these conversations were had, stated in his affidavit that during the conversation on April 16 Owen had referred to the expiration date and stated, in effect, that the time was sufficient; that Owen stated he would submit the compromise proposal to his superiors and no further extension was needed; and that no additional time was requested and no statement was made by him that additional time would be granted. He further stated that if he used the expression "That will be all right" this was not said with the intention of referring to a further extension of time.

[1] There is a clear conflict here as to the conversation on April 16, and its meaning and effect. As was said in Bonfilio v. Ganger, 60 Cal.App.2d 405, 140 P.2d 861, 864, "The credence to be accorded to the affidavits, if in conflict, is a matter entirely within the discretion of the trial court." The following language from Rossi v. Ghiotto, 29 Cal.App. 550, 156 P. 974, 975, is appropriate here: "It was for the court below to say which showing it would accept as the truth, and inasmuch as it may be fairly inferred from the showing made by the defendant that his default was induced primarily by the conversations, conduct, and promises of the agent of the plaintiff, we are not prepared to say that the lower court abused its discretion in making the order complained of."

[2, 3] The attorney who gave the original stipulation for time chose to enter into negotiations for a settlement in preference to having the matter turned over to an attorney. It was understood that appellant's counsel would submit an offer of settlement. The respondent's representative acted promptly, coming back on April 6, but the matter was delayed by appellant's counsel who took sixteen days in which to prepare and submit his offer of settlement. Aside from the conflict with respect to what was said on April 16, it appears that this attorney claimed a default before a reply to his offer had been received, and after allowing the other party less time than he had himself taken. He then acted without withdrawing his offer, without notice of his intention to end the negotiations for a settlement, and without notice of his intention to require a prompt appearance within the

time originally given. These circumstances were well calculated to mislead the other side, and furnish additional justification for the court's action in granting the motion. No abuse of discretion clearly appears (Tearney v. Riddle, 64 Cal.App.2d 783, 149 P.2d 387) and under such circumstances the order of the trial court will not be disturbed. Stub v. Harrison, 35 Cal.App.2d 685, 96 P.2d 979.

The order appealed from is affirmed.

GRIFFIN, J., concurs.




**REED et al. v. SIMPSON et al. ***
**Civ. 16051.**

District Court of Appeal, Second District, Division 2, California.
**Feb. 20, 1948.**
Hearing Granted April 19, 1948.

**1. Automobiles ⇐175(2)**

Section of the Vehicle Code exempting the driver of an authorized emergency vehicle from certain traffic laws under certain conditions was enacted for protection of municipalities and their officers who operate emergency vehicles, against liability for damage caused when the vehicles are being used in the immediate pursuit of an actual or suspected violator of the law. Vehicle Code, § 454(b).

**2. Automobiles ⇐175(5)**

Provision of Vehicle Code that an emergency vehicle's exemption from traffic laws shall apply only when the driver of the vehicle sounds a siren as may be reasonably necessary as a warning to others and at night time when the vehicle is equipped with at least one lighted lamp displaying red light to the front, requires that a siren be sounded only when the driver deems it reasonably necessary, and does not require that the siren be sounded in every situation. Vehicle Code, § 454(b).

* Subsequent opinion 196 P.2d 895.

**3. Appeal and error ⇐1064(1)**
**Automobiles ⇐175(5)**

In action for death of highway patrol officer whose motorcycle collided with automobile while officer was in pursuit of a motorist, instruction that officer was not entitled to statutory exemptions from complying with traffic laws because he did not sound his siren was erroneous, but was not prejudicial, where at the time the traffic was heavy and it was reasonably necessary under the circumstances to sound the siren in order to entitle the officer to exemption from traffic laws. Vehicle Code, § 454(b).

**4. Trial ⇐192**

A trial court properly declares a fact in an instruction when the fact is a conceded fact or one established by clear, positive and uncontradicted evidence.

**5. Automobiles ⇐146, 175(1)**

Every motorist, whether he drives an emergency vehicle or a heavy truck, has the duty to exercise reasonable care. Vehicle Code, § 454(b).

**6. Trial ⇐241**

An instruction in the very language of a pertinent statute is ordinarily not erroneous.

**7. Automobiles ⇐175(5)**

The operator of a vehicle on a public highway, including a highway motorcycle patrolman in the operation of a motor vehicle, is required to exercise his faculties of hearing and seeing for the purpose of ascertaining whether or not he can proceed in safety. Vehicle Code, § 454(b).

**8. Automobiles ⇐242(8)**

A highway motorcycle patrolman who was fatally injured when his motorcycle collided with automobile, presumably looked and saw what an ordinary prudent person would have seen, but such presumption could be overcome by physical facts. Code Civ.Proc. § 1963, subd. 15.

**9. Appeal and error ⇐1170(9)**
**Automobiles ⇐246(23)**

The use of the word "negligently" in instruction that the operator of a vehicle on a public highway cannot "negligently" proceed in a situation of danger and thereby

proximately produce an accident, and yet have his heirs recover damages for his death resulting therefrom, was technically error in death action, but was not reversible, where there was no alternative to the finding that deceased proceeded negligently and that he proximately caused collision. Const. art. 6, § 4½.

**10. Trial ⇐185**

In action for death of highway motorcycle patrolman who collided with automobile, instructions that attempted to itemize certain physical factors such as damage to motorcycle and automobile, their weights and sizes, absence of skid marks, and other physical phenomena, were proper.

**11. Evidence ⇐574**

The mere opinion of a witness in his direct examination has no weight as against facts stated by him that are contrary to such opinion, and physical facts established by other evidence should be considered in connection with such opinion.

**12. Automobiles ⇐246(2)**

In action for death of highway motorcycle patrolman who collided with automobile instruction that if jury found that at time defendant made left turn, traffic from opposite direction, including patrolman's motorcycle, was at such distance that defendant, as a reasonable and prudent man, while in exercise of ordinary care, would not have anticipated that such traffic would approach him so quickly as to create a situation of danger then he was not negligent in failing to expect the sudden approach of westbound traffic, was not erroneous.

---

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Helen L. Reed and others against Robert Nathan Simpson and the Davenport Manufacturing Company to recover for the wrongful death of the plaintiffs' husband and father. From a judgment for defendants, the plaintiffs appeal.

Judgment affirmed.

Spray, Davis & Gould, Clarence G. Weisbrod and H. L. Duckett, all of Los Angeles, for appellants.

Forrest A. Betts, of Los Angeles, for respondents.

MOORE, Presiding Justice.

In their action for the wrongful death of their husband and father a jury denied recovery to plaintiffs. From the judgment entered upon the verdict they appeal upon the ground that they were prejudiced by certain instructions.

Deceased and his companion, Ralph Fritsche, were officers of the Highway Patrol and as such were assigned to oversee traffic on Sunset boulevard near the city limits of Los Angeles, May 18, 1944. The boulevard extends west from the city's center to the Pacific ocean. To the north of Sunset at about 200 feet east of La Cienega Boulevard lies the driveway to a night club. Kings Road enters Sunset about three blocks east of the club's driveway.

In the course of prosecuting their official duties as they traveled eastward at about 11:20 p. m. when about three blocks east of the driveway, they observed an automobile going west, oscillating over the center line. The traffic was heavy and proceeded at about 35 miles an hour. The boulevard was well lighted and the weather was clear. An unlighted automobile could be seen for a half or three quarters of a block. In order to apprehend the offending motorist Reed turned west and after a few cars had passed Fritsche followed at about 150 or 200 feet behind his companion who drove in the lane of traffic adjacent to the center line. Fritsche estimated Reed's speed at about thirty five miles an hour and observed him driving the three blocks they travelled behind the eccentric vehicle. While the officers were thus proceeding, respondent Simpson coming from the west in a large automobile arrived at the club driveway into which he purposed to turn. To do so it was necessary for his car to cross the north lanes of Sunset and the stream of westbound traffic. As he was in the act of making the left turn the motorcycle crashed the right side of the automobile rendering Officer Reed unconscious. The machine then stood with its two front and left rear wheels north of the center line and its right rear

wheel to the south thereof. Simpson was accompanied by three guests, one man and two women. Each of them testified that the Simpson machine stopped before attempting to head northward. They were contradicted by the witness Weber who observed the accident from the kitchen of his apartment. He had seen the vacillating vehicle coming west followed by Officer Reed about four car lengths behind when suddenly the Simpson car, going at a speed of between ten and fifteen miles an hour, made a left turn in the center of the boulevard opposite the driveway and collided with the motorcycle of deceased. He saw the white light of the stricken motorcycle and witnessed someone's turning off its red light after it had fallen.

Respondent Simpson testified that after stopping to make his left turn, he allowed three or four cars to pass, and that after a Buick had gone by he began his left turn as the nearest westbound car was about 150 feet away; that he did not see Reed's motorcycle before commencing the turn; that he did not stop again until the crash. The headlights on his car were visible several blocks in the absence of intervening traffic. Fritsche did not see the vehicles collide. On arriving at the point of the collision he observed that Reed and his motorcycle were on the right side of Simpson's car and that the rear wheel of the motorcycle was at the front wheel of the automobile and in the ten-foot lane north of and adjacent to the center. There were no marks on the pavement left by the officer's motorcycle, nor was there any testimony that its siren had sounded. The witness Howard testified that he lived across from the club; that on hearing the noise he went at once to the scene, saw the red light on Reed's motorcycle burning and turned it off. Reed never regained consciousness and expired at six o'clock the following morning.

Six instructions are assigned as prejudicially erroneous. The first is as follows: "The motorcycle which the deceased, Officer Reed, was riding at the time of the collision in question was an authorized emergency vehicle. The driver of an authorized emergency vehicle is exempt from certain traffic laws if (1) he is in the immediate pursuit of an actual or suspected violator of the law; (2) he sounds a siren in a way that is reasonably necessary to give warning of his approach to others; and (3) at night his vehicle is equipped with at least one lighted lamp displaying a red light to the front. In this case the evidence shows that there were others on said street and that Officer Reed did not sound his siren at all; therefore he was not entitled to exemptions above mentioned and he was required to comply with all traffic rules and regulations to the same extent as the operator of any other motor vehicle then and there on the highway. (Given at Court's own motion.)"

[1] The statute involved in this discussion, section 454 of the Vehicle Code, was enacted for the protection of municipalities and their officers who operate emergency vehicles against liability for damage caused when the vehicle "is being * * * used in the immediate pursuit of an actual or suspected violator of the law." The part pertinent is as follows: "(b) Said exemptions shall apply only when the driver of said vehicle sounds a siren as may be reasonably necessary as a warning to others and at night time when the vehicle is equipped with at least one lighted lamp displaying red light to the front. Under the circumstances hereinabove stated, any said driver shall not be required to observe those regulations contained in Chapters 6 to and including Chapter 13 of Division IX of this code, but said exemptions shall not relieve the driver of any said vehicle from the duty to drive with due regard for the safety of all persons using the highway, nor shall the provisions of this section protect any such driver from the consequences of an arbitrary exercise of the privileges declared in this section."

[2, 3] A fair construction of the first sentence of subsection (b) is that the exemption shall apply only when the driver sounds a siren as a warning to others and then only when he deems it reasonably necessary so to do. The legislature could not have intended that before he is to be exempt an operator of such emergency vehicle must in every situation proceed along a boulevard screeching to the terror of

the inhabitants although the violator he pursues may be miles away and there is only one motorist on the highway of his route. The construction adopted by the trial court operates a forfeiture of the exemption as a matter of law, whereas it was intended that the officer might determine when it is "reasonably necessary." Therefore it was a fact to be determined by the jury whether the sounding of the siren was reasonably necessary. Isaacs v. City and County of San Francisco, 73 Cal.App.2d 621, 626, 167 P.2d 221.

However, the error embodied in the erroneous construction of section 454 (b) cannot avail appellants. They concede that during the pursuit by decedent of the erratic car the traffic was heavy on Sunset boulevard and that no siren was sounded by him. If the siren had sounded all traffic would presumably have halted by the curb. The latter portion of subsection (b) specifically deprives the operator of an emergency vehicle of the exemption provided unless he shall "drive with due regard for the safety of all persons using the highway." If he was traveling at 60 miles an hour, as some witnesses testified, his excessive speed and his failure to sound his siren contributed proximately to cause the accident; and if he was proceeding at 35 miles an hour as other testimony indicates, his failure to keep on the lookout and avoid the dangers of traffic contributed proximately to his tragic end. Also, if he had sounded his siren Simpson would not have turned. "In no instance shall the drivers of emergency vehicles be absolved of the duty to drive with due regard for the safety of all persons using the highway." Russell v. Smith, 12 Cal. App.2d 399, 401, 55 P.2d 562, 564.

Appellants list four instructions, A, B, C and D, as erroneous in that they were "extremely argumentative and could only lead the jury to think the court felt deceased was negligent." They follow:

(A) "You are instructed that the fact, if you find it to be a fact, that the deceased approached the point of the accident under circumstances and conditions which ordinarily might have given him the right-of-way, did not give him the right to proceed without exercising reasonable care to look for vehicles then and there on the highway."

(B) "You are instructed that the operator of a vehicle upon a public highway, including a highway motorcycle patrolman in the operation of a motor vehicle under the evidence in this case, is required at all times to exercise his faculties of hearing and seeing for the purpose of ascertaining whether or not he can proceed in safety. He cannot negligently proceed into a situation of danger and thereby proximately produce an accident, and yet have his heirs recover damages for his death resulting therefrom.

"Thus, in this case, if you find from a preponderance of the evidence that Officer Reed, as he approached the point where the accident occurred, negligently failed to make use of his faculties so as to observe the condition of the traffic, and particularly whether or not the vehicle of the defendant turned in front of him, and if you further find that because of such negligent failure on his part he proximately contributed to the happening of the accident, then plaintiffs cannot recover, and this is true even though you find the defendant Simpson to have been also negligent."

(C) "You are instructed that the question of whether or not Officer Reed at any time before the accident observed the vehicle of the defendant, or its lights, is one upon which we can have no direct evidence because of the death of Officer Reed. Therefore, if it becomes necessary in your deliberations to determine this issue of fact, you will have to determine it by indirect evidence. In so doing you may take into consideration the physical facts indicated by the damage to the two vehicles, the presence or absence of any marks indicating an attempt or lack of attempt on the part of Officer Reed to stop his vehicle, the physical evidences indicating the speed at which the two vehicles came together, and such other physical evidence and facts in evidence as may be proven to your satisfaction."

(D) "In determining the question of the speed at which the motorcycle was being driven by Officer Reed you are to take into

consideration not only the direct evidence, but also the indirect evidence on that issue. Eye witness evidence of such speed is but the opinion or conclusion of the witness with reference thereto, and you are to weigh it for what it is worth. You may also consider the evidence of the damage to the Cadillac automobile, the character of the vehicle, as to whether it was large or small, and the comparative weights or sizes of the two vehicles as indicated by the evidence and by the pictures. The determination of what the speed probably was is an issue of fact for you to decide after a consideration of all of the evidence."

[4-6] Appellants contend that A is argumentative; also that it assumes (1) that deceased proceeded without exercising reasonable care and (2) that the Simpson car was "then and there directly in front of him." It is true that A assumes that there were "vehicles then and there on the highway"; but upon that subject there was no dispute. Appellants say in their brief that the traffic was heavy and "all of it was moving at a speed of about 35 to 36 miles an hour." The trial court performs no more than a valued service when it declares in an instruction that which is a conceded fact or that which is established by clear, positive and uncontradicted evidence. Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868. As to that part of A with reference to the officer's approach to the point of the accident, the instruction may be fairly construed to read as follows: "In the event that you find it to be a fact that Officer Reed approached the entrance to the club's driveway with his front red lamp lighted and his siren sounding, you are instructed that such fact did not justify his proceeding without exercising reasonable care to look for vehicles then and there on the highway." The exercise of reasonable care is the duty of every motorist whether he drives an emergency car or a heavy truck. The concluding passage of section 454(b), supra, specifically declares that notwithstanding the exemptions provided for the drivers of emergency cars they shall not relieve "the driver of any said vehicle from the duty to drive with due regard for the safety of all persons using the highway." An instruction in the very language of a pertinent statute is ordinarily not erroneous.

[7-9] Appellants contend that the last sentence of B is "an argument of the most prejudicial nature" in that it assumes that "deceased did what the court told the jury he could not do"; that there was "no direct evidence as to whether deceased looked or how often he looked or what he saw." The first sentence of B is a mere declaration of a clearly established and statutory principle. While the presumption (Code Civ.Proc. sec. 1963, subd. 15) is that the officer looked and saw what an ordinarily prudent person would have seen, yet such presumption can be overcome by physical facts. Had deceased looked he would have seen the Simpson car and would have sounded his siren or applied his brakes. He did neither, but struck the automobile with great violence. Considering such physical facts there was no alternative to the finding that deceased proceeded negligently and that he proximately caused the collision. The use of the word "negligently" in the second sentence of B was technically an error, but under the authority of article VI, section 4½ of the Constitution reversal of the judgment is not required.

The authorities cited by appellants in their attack on B are not pertinent. In Kinnear v. Martinelli, 84 Cal.App. 721, 258 P. 686, there was no proof of the decedent's negligence to rebut the presumption. The case declares the rule that instructions should be based upon evidence or upon reasonable inferences. In the instant case the presumption was overcome. Tower v. Humboldt Transit Company, 176 Cal. 602, 169 P. 227, is not pertinent since A and B merely declare established law.

[10, 11] Instructions C and D are challenged on the ground that they attempt to itemize certain physical factors, namely, the damage to the two vehicles, their weights and sizes, the absence of skid marks, and other physical phenomena. Because of Officer Reed's death the consideration of such evidence was proper upon the issue of the speed of his motorcycle. By C the jury were directed to determine in their deliberations whether the

officer observed the Simpson automobile at any time prior to the accident. By D they were admonished to determine the speed of the motorcycle just prior to the collision and to consider the physical evidences. That part of D directing the jury to weigh the opinion on the speed of the motorcycle and consider it at its worth was not error. The mere opinion of a witness in his direct examination has no weight as against facts stated by him that are contrary to such opinion, and physical facts established by other evidence should be considered in connection with such opinion. See Waizman v. Black, 101 Cal. App. 610, 613, 281 P. 1087. Nothing was said in any of the four instructions that indicated a desire of the court that the other instructions with reference to the negligence and the duties of motorists be ignored.

The sixth instruction assigned as prejudicial is as follows: "You are instructed that a person is not required to anticipate that which cannot be reasonably expected. Thus, in this case if you find that at the time the defendant Simpson began to make his left turn the traffic approaching from the east, including the motorcycle of the deceased, was a sufficient distance away so that a reasonable and prudent person in the same position as Mr. Simpson would not have anticipated that any westbound traffic would approach him so quickly as to create a situation of danger, then you are instructed that Mr. Simpson was not required to expect or anticipate such development and cannot be held to have been negligent because of the fact that the accident to any extent may have resulted from such failure on his part to thus anticipate such developments."

[12] The phraseology used in this instruction is not appropriate but it is not erroneous. Appellants say that it gave Simpson the right to assume that he could make his left turn without the necessity of his exercising ordinary care. The instruction in effect told the jury that if they found that at the time Simpson began his left turn the westbound traffic including Reed's motorcycle was at such a distance that Mr. Simpson as a reasonable and prudent man, that is, while in the exercise of ordinary care, would not have anticipated that such traffic would approach him so quickly as to create a situation of danger, then he was not negligent in failing to expect the sudden approach of westbound traffic. If at the time of his turn the oncoming traffic was so distant that a prudent driver would have calculated himself safe to make the turn, he was not negligent. The instruction does not assume that the westbound traffic was "a sufficient distance away and approaching so quickly as to cause the accident." The authorities cited by appellants in support of their attack on the instruction do not support their contention In Crabbe v. Rhoades, 101 Cal.App. 503, 519 282 P. 10, 16, the court instructed the jury "that defendant Gaston had a right to presume that drivers of other automobiles would not operate them at an unlawful rate of speed." Such language left nothing for the jury's determination concerning the caution required of a motorist who relies upon the due care of others on the highway. In Galway v. Guggolz, 117 Cal.App. 639, 641, 4 P.2d 290, the instruction attempted to advise the jury that the operator of the vehicle had a right to assume that the oncoming car was going at a lawful rate of speed. Likewise in Scandalis v. Jenny, 132 Cal.App. 307, 314, 22 P.2d 545, 548, the jury was instructed that the automobile of defendant "was on the easterly side of Shasta street proceeding northerly." Also, in Goehring v. Rogers, 67 Cal.App. 253, 257, 227 P. 687, the court had instructed the jury in effect that if defendant Rogers did not decelerate his speed he was negligent. The instructions given in Clarke v. Volpa Brothers, 51 Cal.App.2d 173, 124 P.2d 377, related to a factual situation which bears no resemblance to that here involved and they are not in substance or in phraseology similar to the instruction here considered.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

**SILVEIRA et ux. v. OHM et ux. ***
**Civ. 7415.**
**Sac. 5858.**

**District Court of Appeal, Third District, California.**
**Feb. 24, 1948.**
**Hearing Granted April 22, 1948.**

**1. Landlord and tenant ⇐139(1)**

Under lease requiring lessee to plant and harvest beans and deliver one-third of crop to lessors as rent, until such crop was harvested, lessors acquired no interest in and were entitled to receive no portion thereof as rent.

**2. Vendor and purchaser ⇐194**

Title to crop growing on land and unsevered therefrom passes to purchaser upon execution of conveyance of land in absence of written reservation or agreement to the contrary.

**3. Landlord and tenant ⇐197**

Where lease and option to purchase land at any time before expiration of lease, if not in default, expressly stated that entire agreement was contained therein and provided for delivery of one-third of bean crop to lessors as rent, lessors, having conveyed land to lessees before crop was harvested without reservation of interest in growing crop, waived any right thereto and could recover no rent for portion of crop year preceding conveyance, notwithstanding statute requiring payment of portion of hire where hiring is terminated before time agreed upon, since conveyance merged leasehold estate in the reversion. Civ.Code, § 1935.

---

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Antonio G. Silveira and wife against Henry T. Ohm and wife for specific performance of option to purchase realty, wherein defendants filed a cross-complaint for rent. From a judgment in favor of defendants on their cross-complaint, plaintiffs appeal.

Judgment reversed.

* Subsequent opinion 201 P.2d 387.

George Wadsworth, of Tracy, and John H. Machado, of San Jose, for appellants.

Rutherford, Jacobs, Cavalero & Dietrich, of Stockton, for respondents.

ADAMS, Presiding Justice.

On January 30, 1939, the parties to this action entered into an agreement entitled "Agreement of Sale of Real Property Together with Lease and Option to Purchase Additional Property." Said document recited that defendants, the sellers, were the owners of 314.376 acres of land, that buyers desired to purchase 224 acres thereof designated as Parcels I and II, and to lease and have an option to purchase an additional 86.376 acres thereof described as Parcel III, and that sellers desired to retain four acres, referred to as Parcel IV. The whole of said property was said to be subject to a Federal Farm Loan mortgage upon which was due the sum of $23,288.09, and one of the conditions of the transaction was that buyers should assume and pay this mortgage. Regarding Parcel III it was provided that it should be leased to buyers for a term of five years from and after October 24, 1938, that buyers should each year during the term plant same to beans and no other crop; and that as rental for the use of said parcel, "when said crops are matured and ready for harvesting, Buyers will, at their own sole cost and expense harvest the same and deliver one-third (⅓) of the total crop of beans grown upon said premises to the Sellers. * * *" Buyers were obligated to pay costs of irrigation, but sellers were to pay taxes until such time as buyers might exercise an option to purchase. The option provisions were:

"If the Buyers are not then in default, they shall have the right at any time on or before the expiration of the 5-year lease period to said Parcel III herein provided for, to-wit: on or before the expiration of five years from and after October 24th, 1938, to purchase said 86.376 acres of land contained in said Parcel III for a total purchase price of $24,434.60, said purchase price being based upon the figure of $225.-00 per acre for said 86.376 acres, plus an

additional $5000.00 for the buildings and improvements situated upon said Parcel III. Should said Buyers elect to exercise this option to purchase said land * * *, they shall notify the Sellers in writing of said election and shall within fifteen days thereafter deposit said purchase price, in full, with a Title Company in Stockton, San Joaquin County, California, with instructions that said purchase price be delivered to the Sellers upon the delivery by the Sellers to the Buyers of a deed conveying a good and merchantable title to said Parcel III containing 86.376 acres of land, as aforesaid, subject, however, to any and all existing roadways, easements, rights of way and patent reservations and subject also to the bonded indebtedness of the Banta-Carbona Irrigation District.

"It is further agreed and understood that as a specific condition precedent to the exercise of this option to purchase the aforesaid Parcel III * * *, Buyers shall first have paid off in full and completely discharged the aforementioned Federal Farm Loan Mortgage, dated April 1, 1926, executed by Sellers to The Federal Land Bank of Berkeley, a corporation, and recorded April 23, 1926, in 'B' 166/235, San Joaquin County Records, which said mortgage does, upon the date of the execution of this agreement constitute a lien upon the entire tract of land of 314.376 acres owned by Sellers and herein segregated for the purposes of this agreement into Parcel I, Parcel II, Parcel III, and Parcel IV."

The agreement also recited that "it is the desire of the parties hereto to reduce all understandings, agreements and negotiations had between them prior to the date of this agreement to one fixed and permanent understanding between them which will hereafter be deemed to be their entire agreement relative to the matters herein set forth." The agreement is elsewhere referred to as the "entire agreement."

Regarding the provisions of the agreement pertaining to Parcels I and II, the conditions were fully met, and said parcels were duly conveyed to plaintiffs. Also, plaintiffs paid off the Federal Land Bank mortgage, and the present action involves only that portion of the agreement pertaining to Parcel III.

On July 27, 1943, plaintiffs notified defendants in writing of their election to purchase said parcel in accordance with the option agreement, and on July 28th they deposited with a title insurance company the purchase price of $24,334.60, with instructions to deliver same to defendants upon their delivery of a deed.

On August 5, 1943, defendants served upon the plaintiffs a document entitled "Notice of Reservation of Rights" in which they made reference to the agreement and the option provisions regarding Parcel III, declared that they intended to and would execute and deliver a deed to said parcel, but that plaintiffs' liabilities were not to be deemed changed or affected by such deed; and that plaintiffs were obligated, under the terms of the agreement, to pay rental in full for the year October 24, 1942 to October 23, 1943, and to pay $1,200 to one Lewis for brokerage services; and asserting that on payment of the purchase price and said $1,200 they would execute and deliver a deed to said Parcel III.

On August 11th defendants filed with the title company a deed dated August 10, 1943, together with instructions to deliver the same to plaintiffs on being satisfied that the Federal Land Bank loan had been paid, the sum of $1,200 had been paid to Lewis, and plaintiffs had authorized the turning over of the purchase price of the land, $24,434.60. No mention was therein made of any payment for rent. On August 17th plaintiffs filed their action for specific performance, alleging performance on their part, and demanding a deed for Parcel III. On that same day defendants modified their escrow instructions, eliminating therefrom all reference to brokerage fees.

In reply to defendants' "Notice of Reservation of Rights," plaintiffs, on August 21st, executed and served upon defendants a notice in which they denied that any rent was due, asserted that the agreement had made no provision therefor in the event plaintiffs exercised their option to purchase, and denied any obligation on their part to pay a brokerage fee. They asserted fur-

ther that title to all crops growing upon the land passed to the buyers upon delivery of a deed, and that the suit would not be dismissed until defendants renounced their claim to a share of the crops then growing upon the land and their withdrawal of notice that plaintiffs were responsible for a brokerage fee. On August 27, 1943, the title insurance company recorded the deed from defendants to plaintiffs.

Thereafter defendants apparently took no further action in the matter, and they did not file an answer to plaintiffs' complaint until February 20, 1946, at which time they also filed their cross-complaint. In their answer they admitted substantially all of the allegations of plaintiffs' complaint, but denied that plaintiffs had fully performed on their part in that they had not rendered, and refused to tender, the rent due and owing under the agreement for the crop year 1942–1943. In their cross-complaint they sought judgment for $3,680 alleged to be the reasonable value of their share of the bean crop harvested in 1943, or $3,599 as the reasonable rental value of the premises, the cross-complaint being in two counts, the one based on the value of one-third of the bean crop, and the other on the reasonable rental value of the land. In both answer and cross-complaint they alleged that they had already conveyed "all their interest in and to said real property to cross-defendants by good and sufficient grant deed."

Upon trial of the action on November 26, 1946, it was conceded that since defendants had conveyed the land to plaintiffs, the question of specific performance had become moot; and that the only question remaining for determination was that raised by defendants' cross-complaint as to their right to rental. The trial court rendered judgment against plaintiffs for $2,422.04 which it found was the reasonable rental for the property for the portion of the year beginning October 24, 1942, and up to the date of plaintiffs' election to exercise the option, to wit: July 27, 1943. This was computed as three-fourths of one-third of the *selling price* of the crop of beans (which had been harvested in September or October of 1943 after the delivery of the deed), after deducting certain expenses of recleaning the beans.

From that judgment this appeal has been taken by plaintiffs, it being their contention that there was no reservation in the agreement of any interest in a crop that might be growing upon the land at the time the option was exercised, nor any provisions for the apportionment of rents in the event that the buyers exercised the option; that there was no provision for ascertainment of the value of a crop before its maturity and harvest; that the agreement itself specified that it expressed the entire agreement between the parties and did not contain any provision that before they should become entitled to a deed the buyers should tender to seller any interest in a growing crop. They assert that the general rule is that growing crops are a part of the realty until severed, and that, in the absence of an agreement to the contrary, such growing crops pass to the buyer with the title to the land itself; and where a contract of sale makes no reservation of the growing crops, the vendor is bound to convey the land with the crops.

Respondents, on the other hand, contend that this is strictly a landlord-tenant case, and that, though there was a merger of the leasehold with the reversion, the tenants should pay the reasonable value for the use they made of the land up to the time of the merger. They rely upon section 1935 of the Civil Code, and upon the case of Mott v. Cline, 200 Cal. 434, 437, 253 P. 718, in which that section was applied.

Said section 1935 provides that when the hiring of a thing is terminated *before the time originally agreed upon*, the hirer must pay the *due* proportion of the hire for such use as he has actually made of the thing, unless such use is merely nominal, and of no benefit to him.

[1, 2] It is conceded by respondents that they executed their deed to appellants and that such deed merged the leasehold estate in the reversion; that while at the time the deed was executed there was a bean crop growing upon the land, same had not been harvested. The record shows that it was not harvested until late in Septem-

ber. The agreement entered into by the parties expressly stated that it was their entire agreement. It specified that if plaintiffs (buyers) were not in default they had the right "at any time" on or before the expiration of the lease to purchase said parcel for the specified price. No provision was made in said agreement for the payment of the reasonable value of the use of the land as rental should the option be exercised before a bean crop had been planted or, if planted, before the harvesting of same. And it must be conceded that unless and until there was a crop grown thereon and severed therefrom by harvesting, respondents would not, under the agreement, acquire any interest in such crop or be entitled to receive any portion thereof as rental for that particular year. They concede the general rule stated in cases cited by appellants (such as Huerstal v. Muir, 64 Cal. 450, 453, 2 P. 33; Dascey v. Harris, 65 Cal. 357, 4 P. 204; Wilson v. White, 161 Cal. 453, 460, 461, 119 P. 895; Downs v. National Bank of Bakersfield, 101 Cal.App. 712, 714, 282 P. 420; List v. Sandell, 42 Cal.App.2d 505, 507, 109 P.2d 376, and cases there cited; Sweet v. Watson's Nursery, 33 Cal.App.2d 699, 704, 92 P.2d 812) that the title to crops growing upon land and unsevered therefrom passes to the vendee upon execution of a conveyance of the land, in the absence of any written reservation or agreement to the contrary.

No case directly on all fours with the present one has been cited by either party; but Buell v. Simon Newman Co., D. C., 61 F.Supp. 157, affirmed in 9 Cir., 154 F.2d 35, presents a comparable one. There a tenant had an option to purchase property rented to him on a crop sharing basis, and the option was exercised while a crop was growing, but before it was harvested. It was held that the crop passed to the optionee with the title to the premises, and that the landlord seller was not entitled to any rental, the leasehold estate having merged with the reversion prior to the date the crop rental became due, that is, prior to the maturity and severance of the crop from the land. In Cumming et al. v. United States, 57 Ct.Cl. 551, the United States rented certain hotel property, the rental being payable at the end of each month. On December 28th the option to purchase was exercised by the government and a deed executed to it, and plaintiffs' contention that they were entitled to an apportionment of the rental for the 28 days of the month prior to the conveyance was answered by the court which stated, page 566 of 57 Ct.Cl.: "Because the transaction was not closed until the latter part of December, the plaintiffs contend that they should be allowed rent up to the date in December when the defendant made its payment. Another principle intervenes, however, which prevents this. The December installment of rent could not accrue under the terms of the lease before the end of the month, and prior to that time the tenant holding under the lease had succeeded to the fee, by conveyances of title by the landlords. Rent follows the reversion, and before the rent became due the reversion had passed to the United States. In these circumstances, as was said by Chief Justice Richardson in York v. Jones, 2 N.H. 454, 456, 'there is no doubt that the rent passed as incident to the reversion and became extinguished,' or, as said in another case, 'the term for years was drowned or merged in the fee-simple estate and became extinct.' Liebschutz v. Moore, 70 Ind. 142, 147, [36 Am.Rep. 182]. There could not be a right of action until the installment of rent accrued according to the lease, and when that time arrived the plaintiffs had ceased to be owners."

In Clark v. Strohbeen, 190 Iowa 989, 181 N.W. 430, 13 A.L.R. 1419, the question was the effect of a sheriff's deed on sale of certain land on execution against the owner, upon the title to a crop of wheat unharvested and unsevered, which crop had been grown by a lessee of the owner, the lease providing for payment to the lessor of one-fifth of the crop after being harvested and hauled to town. The court applied the rule that matured and uncut grain upon the premises belonged to the tenant and not to the landlord, and therefore did not pass to the substituted landlord on execution of the sheriff's deed. It said, page 433 of 181 N.W.: "It is to be observed that in the application of the foregoing principle to landlord and tenant

cases the maturity of the crops on the leased premises is a controlling consideration. If the crop is fully matured at the time of the voluntary conveyance, or of the execution of the sheriff's deed to the purchaser, it does not pass by the conveyance but belongs to the tenant. Everingham v. Braden, 58 Iowa 133, 12 N.W. 142." Also see Frum v. Kueny, 201 Iowa 327, 207 N.W. 372, 374.

As for the case of Mott v. Cline, the action there was in equity, for specific performance of an option to buy, which option was contained in a lease by Cline to one Ah Chue, and which option, and not the whole lease, had been assigned by Ah Chue to Mott. Mott filed an action to compel specific performance of the option after tendering $4,100, the amount of the sale price provided in the lease. The rental fixed by the lease was, at the time the option was exercised on May 28, 1923, $250 per year, payable on the 20th day of December of each year. Cline, answering Mott's complaint in his action for specific performance, set up that he was entitled to rent for the four months of the rent year prior to the exercise of the option, and objected to the sufficiency of Mott's tender as not including such portion of the rent. Other objections were interposed which are not pertinent here. Cline refused to execute a conveyance, and the court held that the failure of plaintiff to tender a proportionate amount of rent for the use of the premises by the lessee for the period of about four months prior to the offer to purchase furnished a bar and answer to his (Mott's) demand "for specific performance of the option provision," citing section 1935 of the Civil Code. Respondent there contended that Cline, by a failure to object to the insufficient amount of the tender had waived any objection he might have made on that ground, but the court said that there was no evidence of any such waiver, the record being silent as to what actually took place when the insufficient tender was made; that respondent had not sustained the burden imposed upon him to show such waiver.

It is obvious that that case is different in many respects from the case before us. It was a suit in equity, and not an action for rent. It did not involve a crop rental, but a cash rental which was possible of computation and apportionment at the time the option was exercised, as the amount payable to the lessor was definite and not dependent, as here, upon whether a crop of beans was eventually harvested, which crop of beans — not the value thereof—was to be divided between the lessor and lessee when harvested. Nor, in that case, was a conveyance of the land to the optionee executed as in the case here. And it is obvious that at the time the option was exercised and plaintiffs here became entitled to their deed, there were no beans to tender and might never be a crop to harvest should it fail to mature or be destroyed; and there was likewise no way of determining at the time the option was exercised what the year's rental, in cash would be even if it could be said (which the agreement did not provide) that the seller was entitled to cash in lieu of the portion of the crop provided as rental in the agreement. Also, the action before us, as it stands, is not one for specific performance but one by the lessor to recover one-third of the cash value of the crop. Respondents did not, in their conveyance to plaintiffs, reserve any right to the crop which might thereafter be harvested, but by their conveyance vested the title to the land in plaintiffs, thus, as they concede, merging the leasehold estate in the reversion; and thus vesting in plaintiffs the title to the lands and the crop growing thereon. And they state in their brief that they do not contend that their "Notice of Reservation of Rights" was intended to reserve any rents.

[3] As hereinbefore stated, defendants did not file their answer or cross-complaint in this action until February 20, 1946; and there is no evidence that they laid claim to any portion of the beans when they were harvested in September or October, 1943; and they apparently permitted plaintiffs to dispose of them, which indicates that they were not without doubt as to their right to same, and that their subsequent cross-complaint was something of an afterthought. The agreement as executed stated specifically that it was the entire agreement between the parties; it

provided that the option to purchase might be exercised by the buyers *at any time* if they were not in default. It made no provision for payment for use of the land during a rental year in the event that there should be a crop failure, or if the option should be exercised before the harvesting of a crop, or for the ascertainment of and apportionment of the value of any growing crop. By the acceptance of the purchase price fixed in the agreement and their execution of their deed they apparently conceded that plaintiffs, the buyers, were not in default under the terms of the contract; and even if it could be said that section 1935, supra, is applicable to this case, and that under the decision in Mott v. Cline defendants would have been justified in refusing to convey because rental for a portion of the year 1942–1943 was not tendered, the conclusion seems inevitable that when they executed the conveyance, and, as they alleged in their pleadings, conveyed "all their interest in and to said real property to cross-defendants," they effectually waived any possible right they had to any interest in the crop then growing thereon.

Our conclusion in this connection is fortified by a consideration of what would have been the situation had plaintiffs exercised their option and defendants had executed such conveyance to plaintiffs during the rental year beginning in October, 1942, but before any bean crop had been planted thereon; and that plaintiffs had, after the title vested in them, concluded to plant a crop other than a bean crop, as they would have had a right to do on their own land. In such an event it is plain that defendants could not have claimed any rental for the portion of such rental year as had elapsed prior to their conveyance, as there would have been no bean crop to divide, and nothing upon which to compute an apportionment of rental. Recognition of such a situation renders unsound the judgment of the trial court in giving defendants a judgment for three-fourths of one-third of the selling price of the beans based upon the occupancy of the land by plaintiffs for three-fourths of the crop year before the execution of the conveyance, and, we think, necessitates a reversal of the judgment.

As for section 1935 of the Civil Code, respondents cite no case in which apportionment was applied to a crop rental, or where the hiring was terminated by a conveyance of the title to the thing hired before the end of the hiring period in accordance with a written agreement of the parties that it might be so terminated. On the contrary, they cite Donnellan v. Wood, Curtis & Co., 4 Cal.App. 192, 87 P. 235, regarding which case they say that it was there held that section 1935 was not applicable because of the language used in the lease agreement.

Without attempting in this opinion to limit the application of section 1935 beyond the facts of this case, we are of the opinion that it is inapplicable here in view of the terms of the agreement between the parties, and the fact that respondents executed their conveyance of the land without reservation of any rental or any interest in the growing crops upon which their only right to rental was dependent.

The judgment is reversed.

THOMPSON and PEEK, JJ., concur.




83 Cal.App.2d 745

**HOSSOM et al. v. CITY OF LONG BEACH et al.**

**Civ. 16107.**

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1948.

As Corrected on Denial of Rehearing March 9, 1948.

Hearing Denied April 19, 1948.

**1. Taxation ⇐695**

Redemptions from tax deeds are favored in law.

**2. Municipal corporations ⇐980(7)**

Title acquired by municipality at sale of land for delinquent taxes is not of same nature as title vested in private purchaser, since object of purchase is not acquisition of the property but rather the collection of the taxes.

**3. Taxation ⇐695**

The settled policy of a law is to give a delinquent taxpayer every reasonable opportunity compatible with right of state to redeem his property, and to make his burden as light as possible and to return tax deeded property to rolls for further governmental support.

**4. Taxation ⇐696**

The law in force at time of tax sale regulates right of redemption.

**5. Taxation ⇐711**

A formal tender of money to redeem from tax sale is not essential to accomplishment of legal tender when offeree official refuses to tell the amount of taxes and accrued penalties and costs or for any reason refuses to concede redemptive right and accept the money.

**6. Tender ⇐4**

Where tender is necessary to establishment of a right against a party, it becomes unnecessary when it is reasonably certain that payment will not be accepted.

**7. Taxation ⇐514, 711**

Where definite offer to pay tax collector is met with an unqualified refusal to accept the money, lien for the amount offered is discharged and title is ipso facto restored to the would be redemptioner. Civ.Code, §§ 1504, 1512, 2905.

**8. Tender ⇐18**

A tender need not be kept good when it appears that it will not be accepted. Code Civ.Proc. § 2076.

**9. Taxation ⇐514, 527**

An effort in good faith by delinquent taxpayer to pay his taxes is equivalent to payment, and discharges the lien. Civ.Code, §§ 1504, 1512, 2905; Code Civ.Proc. § 2076.

**10. Municipal corporations ⇐981**

Where lawful tender of delinquent taxes, together with penalties and costs, was made by record title holders within less than five years after tax deed to city, by city's rejection of the tender, title to the property was revested in record title holders unless period of redemption had been terminated by valid ordinance. Civ. Code, §§ 1504, 1512, 2905; Code Civ.Proc. § 2076.

**11. Constitutional law ⇐199**

Ordinance of City of Long Beach providing that right of redemption of all property theretofore tax deeded to city should terminate one year from date of enactment of the ordinance, as applied to property which record title holders had attempted to redeem more than a year before enactment of the ordinance, was invalid as an "ex post facto law".

See Words and Phrases, Permanent Edition, for all other definitions of "Ex Post Facto Law".

**12. Municipal corporations ⇐981**

Provision in ordinance of City of Long Beach which provided right of redemption of all property theretofore tax deeded to city should terminate one year from date of such enactment contemplated a valid deed made pursuant to a prescribed form and legalized procedure, and in absence thereof ordinance could not be relied upon to cut off right of redemption of record title holders.

**13. Municipal corporations ⇐980(7)**

Where property had first been sold to city for taxes on July 6, 1925, and no redemption had been made from such sale, a tax deed to city based on a sale of September 2, 1933, was void under ordinance providing that no sale would be made for any assessment levied subsequent to first sale in event land was not redeemed from the first sale.

**14. Municipal corporations ⇐980(4)**

Failure to send notice by registered mail to last assessee of land of intended sale to city for delinquent taxes as provided by city ordinances and statute nullified tax deed to city. Pol.Code, § 3771a.

**15. Municipal corporations ⇐980(7)**

Where recital in tax deed to city that five years had elapsed since tax sale was false in that elapsed period was but four ⅝ years, the misrecital of the facts nullified the deed.

**16. Municipal corporations ⇐980(4)**

Failure of city tax collector to describe property in his addenda to delinquent tax list of 1937 as it was sold in 1925 rendered the 1938 notice void.

17. Municipal corporations ⇐980(7)

Where 1938 addenda of city tax collector did not show after each of the one-third interests of record title holders the amount of "all taxes, penalties and cost due as required," failure to comply with law in such respect nullified tax deed to city issued thereon.

18. Municipal corporations ⇐980(7)

Even if the tax deed to city in 1938 covering lands which city attempted to dedicate to public use had been valid, it would have been without efficacy in vesting full title to city, where state held paramount title by virtue of its acquisition by tax deed in 1932. Pol.Code, §§ 3651–3661, 3773.

19. Municipal corporations ⇐980(7)

City could not become vested with complete title to tax deeded land for public use prior to its agreement with county board of supervisors for purchase of the land. Pol.Code, §§ 3897, 3897d.

20. Municipal corporations ⇐980(7)

Ordinance of City of Long Beach attempting to authorize city manager to occupy and possess tax deeded land for public purpose is invalid as an attempt to invest city with power to operate an enterprise not strictly a municipal affair within purview of constitution and as concerning a state and county affair controlled by statute. Pol.Code, §§ 3897, 3897d; Const. art. 11, § 6.

21. Municipal corporations ⇐980(7)

Failure to comply with city ordinances relating to correction of tax deed to city rendered correction deed void by virtue of doctrine that where a particular form of tax deed is prescribed by law, the form becomes substance.

22. Municipal corporations ⇐980(7)

Correction tax deed to city was not rendered effectual by either tax validation act of 1945, or by city ordinance, where such laws became operative subsequent to redemptive efforts of record title holders and both related to deeds executed prior to their effective dates. Gen.Laws, Act 8443a.

23. Municipal corporations ⇐980(1)

A statute which divests one of the title to realty must be strictly construed, and every requisite having a semblance of benefit to assessee should be strictly complied with.

24. Municipal corporations ⇐981

Correction tax deed to city, even if legal, was ineffective, where its execution followed offers of payment of delinquent taxes together with penalty and costs by record title holders, since refusal of such offers cleared land of the tax lien and effected redemption.

---

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action by Lynn O. Hossom and another against City of Long Beach and F. W. Brejcha, as city tax collector of City of Long Beach, to quiet title against a tax deed issued by city tax collector to City of Long Beach, wherein the defendants filed a cross-complaint. From adverse judgment, the defendants appeal.

Affirmed.

Irving M. Smith, City Atty., and Joseph B. Lamb, Deputy City Atty., both of Long Beach, for appellants.

Lynn O. Hossom and George W. Trammell, both of Long Beach, for respondents.

MOORE, Presiding Justice.

From a judgment quieting title against a tax deed issued by the city tax collector to the city of Long Beach defendants appeal.

The land involved in the action is Lots 7 and 8 of the Alfalfa Land and Water Company's tract comprising ten acres, more or less, in the city of Long Beach. On account of the nonpayment of the assessment for 1924 the property was sold for such delinquent taxes September 2, 1925. A second sale was attempted on September 2, 1933, based upon the delinquent list of 1932. On July 2, 1938, a tax deed was issued by the city tax collector to the city of Long Beach pursuant to the sale of 1932. After efforts had been made in 1940 by re-

spondents' predecessor in interest to redeem the land and later by respondents in 1943 and 1945 this action was filed on August 9, 1945.

On March 16, 1946, the city tax collector issued a deed of correction. Respondents contend that both the first deed and the correction deed were void. On the other hand appellants contend not only are such deeds valid but that if there were an infirmity in either of them it was cured by the state curative act of 1945 and by the curative ordinance C-2443 adopted October 26, 1945, by appellant city. The briefs of the parties abound with arguments with respect to the validity of such deeds and the validity of the curative ordinances. Also, much is said upon the question as to whether the attempts of the city to dedicate the lands to a public use after acquiring the first deed fulfilled the requirements of the statutes and ordinances. In view of the conclusions derived an extended discussion of those questions appears unnecessary.

Conceding (1) that the first tax deed of July 2, 1938, to the city and the correction deed of March 16, 1946, were both invalid, and (2) that their infirmities were cured by the city's curative ordinances, it is nevertheless inescapable that there was an effectual redemption of the land within five years after the tax deed's execution.

In 1924 the land belonged to Caroline C. B. Evans. Upon her decease subsequent to the levy of that year, title to the ten acres was vested in her distributees: Elliott, Evans and Wall. By reason of facts that too frequently befall the lot of mortals they were unable to or did not pay the tax for that year. After the sale in 1925 to the city the inability or inaction of such taxpayers continued until May 31, 1940. On that day one Frank Wall, agent of the delinquent taxpayers, called upon the city tax collector and stated that he wished to redeem the property. In response to such declaration the collector told the agent that it was not redeemable. He testified that he would not have accepted an "amount equal to all delinquent taxes, penalties, assessments and costs against that property"; that "there wasn't any legal way" he could do it.

Such reply of the collector and his testimony will be more readily understood by including in the narrative that prior to Wall's offer to redeem the land the city council had on March 26, 1940, adopted resolution C-7476. Such resolution declared (1) that "the public convenience and necessity requires the use * * * of * * * lots 7 and 8." It instructed the city manager to take possession of the acres in the name of the city and to use them for such general municipal purposes as may be required by the city, and "hereby declares the right of redemption from the aforesaid tax deed to be terminated upon this resolution becoming effective." Such resolution was declared by the collector to have been the paramount hindrance to his acceptance of the amount that would then have been the price of redemption.

Further to demonstrate their sincerity and the good faith of their offer the title owners on May 31, 1940, caused their attorneys to write a letter to the city council requesting that body to grant them a hearing on behalf of the owners in order that they might fully present reasons why a redemption should be allowed. They stated in their letter that their clients were then "in a position and proposed to pay in full the city taxes on this property to date." Pursuant to such request the council permitted Attorney Taubman, a member of the firm representing the owners, to appear on the same day and present reasons for the owners' request that they be permitted to redeem the lots. He urged that it was neither equitable nor good business for the city to deprive them of the right to redeem. The city attorney advised the council that its only action favorable to such request would be to rescind resolution C-7476. Mr. Taubman appeared again before the council on July 9, 1940, and repeated his arguments on behalf of the delinquent taxpayers and again urged the council to rescind the resolution and to allow the owners to redeem. He stated again that he was ready to pay all the taxes, penalties and costs necessary to redemption. That request was also denied.

[1-3] These offers by the taxpayers and their attorney and the rejection thereof by

the collector constitute a sufficient compliance with the requirements of a legal tender. Redemptions from tax deeds are favored in law. The title acquired by a municipality at a sale of land for delinquent taxes is not of the same nature as the title vested in a private purchaser, "since the object of the purchase is not the acquisition of the property, but rather the collection of the taxes." Anglo California National Bank of San Francisco v. Leland, 9 Cal.2d 347, 353, 70 P.2d 937, 939. It is the settled policy of the law "to give a delinquent taxpayer every reasonable opportunity compatible with the rights of the state, to redeem his property, and to make his burden as light as possible" and to return the tax deeded property to the rolls for the further governmental support. People v. Gustafson, 53 Cal.App.2d 230, 234, 127 P. 2d 627, 629.

[4] The redemptive effect of such efforts to pay the delinquent taxes, penalties and interest finds support in the principle that the law in force at the time of the sale regulates the right of redemption (Risso v. Crooks, 217 Cal. 219, 220, 17 P.2d 1001; San Diego v. Childs, 217 Cal. 109, 119, 17 P.2d 734), and in the fact that the city ordinance (No. B-55, sec. 54) then in force provided that property sold for delinquent taxes might be redeemed at any time "before the city shall have disposed of the same."

[5-7] Appellants contend that no legal tender was made to the collector by the agent Wall on May 1, 1940, by reason of the fact that he did not actually offer that official sufficient money to discharge the total taxes, penalties and interest already accrued. In this they ignore the testimony of the collector that he refused to tell the agent the amount required, that he would not accept payment and that he could not do so because the right to redeem had been terminated by resolution (C-7476) adopted since the execution of the first tax deed. But it is the rule pertaining to redemption from a tax sale that a formal tender of money to redeem from such sale is not essential to the accomplishment of a legal tender when the offeree official refuses to tell the amount of taxes and accrued penalties and costs or for any reason refuses to concede the redemptive right and accept the money. 61 C.J., p. 1277, sec. 1762. Where a tender is necessary to the establishment of a right against a party it becomes unnecessary when it is reasonably certain that the payment will not be accepted. 24 Cal.Jur. 514. Also, when a definite offer to pay the tax collector is met with an unqualified refusal to accept the money the lien for the amount offered is discharged (Ibid. p. 535) and title is ipso facto restored to the would be redemptioner (Ibid., p. 338). The same principle is incorporated in Civil Code, section 2905: "Redemption from a lien is made by performing, or offering to perform, the act for the performance of which it is a security, and paying, or offering to pay, the damages, if any, to which the holder of the lien is entitled for delay." Section 1504 also provides that the offer of payment "has the same effect upon all its incidents as a performance thereof." Section 1512 of the same code declares that the debtor is entitled to all the benefits which he would have obtained by the payment of his debt if his payment thereof is "prevented by the creditor."

[8, 9] By section 2076, Code of Civil Procedure, the creditor is required to specify his objections to a tender and if he fails to do so he is "precluded from objecting afterwards." A tender is not necessary where the declarations of the offeree are such as to indicate that the actual offer of money will be rejected; the law does not require a man to do a vain and fruitless thing; a strict and formal tender is not necessary where it appears that if it had been made it would have been refused. Hoppin v. Munsey, 185 Cal. 678, 685, 198 P. 398. Where the tender of payment of the balance due on a chattel mortgage has been unjustifiably refused, such refusal places the mortgagee in default, stops the accrual of interest, discharges the lien and revests title in the mortgagor with full right of possession. Walker v. Houston, 215 Cal. 742, 745, 12 P.2d 952, 87 A.L.R. 937. A tender need not be kept good when it appears that it will not be accepted. Bogue v. Roeth, 98 Cal.App. 257, 262, 276 P. 1071. An effort in good faith by a de-

linquent taxpayer to pay his taxes is equivalent to payment and discharges the lien. Schultz v. Kolb, 189 Wash. 187, 64 P.2d 79, 82.

In a recent Oklahoma decision a lot of the defendant had been sold at a county commissioner's sale to plaintiff for less than the taxes due. Defendant promptly offered to redeem by paying the price paid by plaintiff with interest and costs; the treasurer refused the offer on the advise of the attorney general. After the offer had been repeated a number of times during the succeeding three and a half months the plaintiff as grantee under the tax deed sued in ejectment. The trial court having rejected defendant's cross-petition for a decree quieting title, the Supreme Court reversed the judgment and held that where "a person having the right of redemption has in good faith attempted to redeem by timely offering to pay to the proper officer the amount necessary to redeem, and the rights of innocent third persons have not intervened, he may enforce such right by a cross-petition in an action filed by the holder of the tax deed to recover possession of the land. The failure of the officer to do his duty does not render ineffective such a valid attempt to redeem. * * * The good faith attempt to redeem did not become ineffective and void by lapse of the redemption period * * * but the right was preserved." Koehn v. Fluman, 191 Okl. 71, 126 P.2d 1002, 1004. An analogous holding is found in a case where because the purchaser had repudiated his transaction on the ground of fraud the vendor was relieved of the necessity of tendering a deed as a condition precedent to his suit for the balance due on the contract. Ratterree Land Company, Inc., v. Security First National Bank, 26 Cal.App.2d 652, 658, 80 P.2d 102.

By virtue of such principles, doctrines and holdings, it is definitely established by the testimony of the tax collector that the offer by the delinquent taxpayers was a good faith attempt by the latter to pay in full the amount essential to a redemption. The court's decision contains an implied finding that a tender was made by such first offer by agent Wall. Such implication takes the form of a distinct declaration by the express finding that the total due on May 31, 1940, was $4,392.73 including interest, penalties and costs.

[10] Respondents contend that the appearances and argument of Attorney Taubman before the city council constituted a second tender. Such contention is not an accurate appraisal of the attorney's efforts. Rather should such efforts be classified as further demonstrations of the good faith of agent Wall and his principals in offering to redeem from the collector on May 31, 1940, by offering to pay the amount due. It is a fact worthy of comment that while the city council had the sole power to direct the collector to accept payment from Wall, the failure of Attorney Taubman to display before the council the money required for the redemption did not even provoke an inquiry by any member of that body. It follows that a lawful tender was made on May 31, 1940, within less than five years after the first deed to the city, and that by its rejection the title to the ten acres was revested in the record title holders unless the period of redemption had been terminated by a valid ordinance.

But further proof of the collector's rejection of the offer on May 31, 1940, is disclosed by his second and third refusals of the amount due. On May 19, 1943, the date of his purchase of the acres, Mr. Hossom visited the collector's office and inquired about the amount of delinquent taxes. The officer refused to give "the figure up-to-date" but did furnish from his tax-deeded-lands ledger the amount up to 1940. He stated, however, that he would not accept the tax money and give Hossom a certificate of redemption. Under the authorities cited the collector's declaration to Hossom on May 19, 1943, constituted a second rejection of a tender of the amount required for a redemption. Nevertheless respondents did not rest with that refusal but in July, 1945, after a two years' absence from the county, Mr. Hossom called upon the collector with $6,000 "in cash and currency," exhibited and offered it to the official who "refused to accept it" and again declined to divulge to Hossom the total amount due and stated that "he could not give that information." From such tender and re-

fusal the court might justly have found that a redemption of the land had been thereby effected.

Despite effective tenders made in 1940, 1943 and 1945, as impliedly found by the court below, appellants contend that by virtue of certain city ordinances and resolutions respondents' redemptive right had been defeated and that therefore the land could not be and was not redeemed. Those councilmanic acts were all and severally apparently designed specifically to foreclose the title owners of lots 7 and 8 of their right of redemption, as will appear from the following recitals. At all times after October, 1915, and prior to August 21, 1938, section 54 of ordinance B 55 of the city of Long Beach provided that a redemption of any property sold for taxes might be made at any time after date of sale "to the city, and before the city shall have disposed of the same, by paying to the city treasurer * * * the amount of taxes, penalties and cost due thereon at the time of such sale, with interest on the aggregate amount of said taxes * * * also all unpaid taxes of every description assessed * * * since such sale, with interest. * * *" On August 21, 1938, section 54 was amended by ordinance C-1625, effective as of that date, whereby redemptive rights could be exercised "before the city shall have entered into possession of said property for public use and purposes." By virtue of ordinance C-1625 appellants contend (1) that they had occupied the land for public use and purposes prior to any attempt to redeem; (2) that such ordinance governed the right of redemption. Neither contention is correct as is shown below.

March 26, 1940, the city council adopted resolution C-7476. By its preamble it declared that "the public convenience and necessity requires the use of certain real property for general municipal purposes," and in section 1 it was resolved that such "convenience and necessity requires the use" of Lots 7 and 8 for general municipal purposes. By section 2 the city manager was instructed to take possession of the land and to use it for such general municipal purposes, and the right of redemption from the tax deed was declared to be terminated. By reason thereof appellants contend that respondents' right of redemption was finally frustrated.

By ordinance C-1810 adopted June 18, 1940, section 54 of ordinance B 55 was amended to provide that the right of redemption of all property heretofore tax deeded to the city should terminate one year from the date of such enactment.

By resolution C-7717, adopted September 24, 1940, it was resolved that lots 7 and 8 "which have heretofore been made a part of the park system of the city of Long Beach, be named, designated and known as Veterans' Memorial Park" and the city clerk was instructed to post it in three conspicuous places in the city, whereupon it was to take effect.

By ordinance C-1960, adopted September 2, 1941, the southerly 30 feet of lot 7 were "dedicated to public use" and "shall be known as a portion of Twenty Ninth Street."

It might here be observed that at the times of the adoption of the ordinances C-1625, C-7476, C-7717, C-1960 and C-1810 the city had not received a valid deed to the property, a demonstration of which is not essential to an affirmance of the judgment. The contention that the right of redemption was defeated by such ordinances is contrary to sound public policy, and ignores respondents' established rights. Except ordinance C-1960 and acts pursuant thereto, the enactments of the council were not sufficient to constitute a disposition of the acres as contemplated by ordinance C-7476. The only possession of any part of the lands (as established by the findings) was the occupancy by the city of those portions of lots 7 and 8 improved and used as a street. Inasmuch as the city did there at considerable expense install streets, curbs and gutters, by the doctrine of inverse condemnation that area was correctly adjudged to be properly dedicated to public use and under the city's control, subject to respondents' claim for damages as in condemnation proceedings.

[11-18] Ordinance C-1810 was ineffectual to terminate the right of redemption for three reasons: (1) It was an ex post facto law. Consequently, procedural due process was violated. The original provision of section 54 of B 55 was in full force at the

time of the sale in 1925 and governed the right and time of redemption. C-1810 took effect immediately but allowed one year to redeem, the effective date being June 18, 1941, more than a year after the tender by the original assessees. The law in force at the time of the tax sale governs the redemptionary period. Risso v. Crooks, 217 Cal. 219, 220, 17 P.2d 1001. (2) But if ordinance C-1810 signifies anything not expressly declared, it clearly implies the redeemability of the title to the ten acres by the provision therefor at any time after sale and "before a deed thereto shall have been made to the city in accordance with the provisions of its ordinances or other applicable laws." Such language contemplates a valid deed made pursuant to a prescribed form and legalized procedure which was not true as to the tax deed[1] here involved. (3) The city was powerless to dedicate the land to public use. If its deed had been in all respects valid it would have been without efficacy investing full title in the city for the reason that at the time of the attempted dedication to public use the

[1] Some Defects of Tax Deed.

1. The first sale was July 2, 1925. The sale which is recited in the tax deed as the basis thereof was made on September 2, 1933. From the first sale until the second ordinance B 55 provided as follows:

"Sec. 66. That, in case property assessed for taxes is purchased by the city pursuant to the provision of this ordinance, it shall be assessed each subsequent year for taxes until a deed is made to the city therefor in the same manner as if it had not been purchased.

"Sec. 67. That, in case an assessment is made under the provision of Section 66 of this ordinance and the land is not redeemed from the previous sale had under the provisions of this ordinance, no sale shall be had under the assessment authorized by Section 66."

There had been neither a redemption from the first sale nor payment of the taxes assessed in years 1924 to 1930. Therefore the second sale was void. Jones v. Sturzenburg, 59 Cal.App. 350, 351, 210 P. 835.

2. While the sale of 1925 should have constituted the basis of any tax deed, the instrument recites a sale September 2, 1933, which was only four years and ten months prior to the date of the first deed.

On July 6, 1925, date of the first sale, ordinance B 55 required that property sold to the city for taxes would be assessed yearly until a deed was made to the city, and in the event the land was not redeemed from the first sale no sale would be made for any assessment levied subsequent to such first sale. Therefore, the sale of September 2, 1933, was void as no redemption had been made from the 1925 sale. Jones v. Sturzenberg, supra.

3. No notice was sent by registered mail to the last assessee of the land of the intended sale as provided by both the city ordinances and section 3771a of the Political Code. Failure to send such notice nullified the tax deed. Jones v. Walker, 47 Cal.App.2d 566, 570, 118 P. 2d 299.

4. The recital that five years had elapsed since the sale in 1933 was false. The elapsed period was only 4⅝ years. Since this was a misrecital of the facts it nullified the deed. Henderson v. De Turk, 164 Cal. 296, 298, 128 P. 747; Carter v. Chevalier, 100 Cal.App. 567, 570, 280 P. 706; 24 Cal.Jur., p. 365. If it referred to the sale in 1925, as appellants contend, 13 years had elapsed. Bernhard v. Wall, 184 Cal. 612, 621, 194 P. 1040.

5. The publication of the delinquent tax list in 1938 for the 1937 assessment set forth the addenda which should have contained the legal description of lots 7 and 8 with the notice that it would be sold on July 2, 1938, unless sooner redeemed. But instead of showing such legal description as it appeared in the delinquent tax list of the 1924 and 1932 assessments, that is lots 7 and 8, each assessed separately, such addenda attached to the 1938 notice of the delinquent tax list refers to three separate undivided one-third interests in lots 7 and 8. This is not the same description as that found in the assessments of 1924 and 1932. The failure of the tax collector to describe the property as lots 7 and 8, Alfalfa Land and Water Company's Tract, in his addenda to the delinquent tax list of 1937–38 as it was sold in 1925 rendered the 1938 notice void. Galbreath v. Dingley, 43 Cal.App.2d 330, 333, 110 P.2d 697.

6. The addenda of 1938 did not show after each of one-third interests the amount of "all taxes, penalties and costs due." Failure to comply with law in both respects nullified the first tax deed. Gottstein v. Kelly, 206 Cal. 742, 747, 276 P. 347; Kipp v. Danielson, 108 Cal. App. 624, 626, 292 P. 155.

state held the paramount title by virtue of its acquisition by tax deed in 1939. Pursuant to Political Code, section 3773, which on February 1, 1941, became sections 3651, 3652 and 3653, Revenue and Taxation Code, the state owned the paramount title and the state controller was in constructive possession of the ten acres.

[19, 20] Alienation of the land by the city was impossible by reason of the state's paramount right to exclusive possession after 1935 under its tax deed executed in 1939. Pol. Code, sec. 3773, now Revenue and Taxation Code, secs. 3651–3661. Also the city could not take the land for public use prior to its agreement with the board of supervisors of Los Angeles County for the purchase of the land. Revenue and Taxation Code, secs. 3775 and 3791, formerly Pol. Code, sec. 3897d; La Mesa Lemon Grove and Spring Valley Irrigation District v. Hornbeck, 216 Cal. 730, 17 P.2d 143; Monheit v. Cigna, 28 Cal.2d 19, 168 P.2d 965, 167 A.L.R. 995. At no time prior to redemption, May 31, 1940, did Long Beach have an ordinance in conflict with the last mentioned section of the Political Code, and not until February 28, 1941, when it enacted Ordinance C-1887. By section 6.20 et seq. thereof an abortive attempt was made to authorize the city manager to occupy and possess such tax deeded land. The ordinance was not only an ineffectual attempt to invest the city with power to operate an enterprise not strictly a municipal affair within the purview of Article XI, section 6 of the Constitution, but it also concerned a state and county affair which is controlled by section 3897 of the Political Code. Brewer v. Feigenbaum, 47 Cal.App.2d 171, 175, 117 P.2d 737. See also Smith v. Addiego, 54 Cal.App.2d 230, 129 P.2d 953, holding that the lien for street improvement bonds is extinguished by a tax deed to the State. It follows that the city could not become vested with complete title until it had first agreed with the board of supervisors for a purchase of the state's interest. Pol. Code, sec. 3897d, now Revenue and Taxation Code, sec. 3791.

[21] The correction deed did not avail appellants. Its execution and recordation on the eve of the trial of this action lessened its efficacy. It was an attempt to exercise the procedural provisions of various ordinances including ordinance C-1887 which had repealed section 2 of ordinance B 55. By C-1887 the council adopted a curative ordinance patterned after the legislative enactment whereby (sec. 8.030) misstatements or clerical errors in a tax deed may be corrected by the city tax collector on the order of the city council with the written consent of the city attorney directing such correction, "by the issuance of a new or amended tax deed, when it can be determined from the assessment and subsequent proceedings what was originally intended." Section 8.035 of the same ordinance provides that such amended deed "shall contain a statement giving the reason for the issuance of a new or amended deed." Despite such language the correction deed did not contain a statement of the reason for the deed. Neither was it made upon the order of the city council, entered upon its minutes, with the written consent of the city attorney. Failure to comply with such ordinances rendered the correction deed void by virtue of the doctrine that where a particular form of tax deed is prescribed by law the form becomes substance. Hinds v. Clarke, 173 Cal. 49, 52, 159 P. 153; Tilton v. Russek, 171 Cal. 731, 739, 154 P. 860; Henderson v. De Turk, 164 Cal. 296, 298, 128 P. 747; 24 Cal.Jur. 364; Carter v. Chevalier, 100 Cal.App. 567, 570, 280 P. 706.

[22, 23] Neither was the correction deed rendered effectual by the tax validation act of 1945 (Statutes 1945, chapter 1134; Deerings General Laws, Act 8443a) or by city ordinance C-2443. These laws became operative respectively in September and October, 1945, which was subsequent to all the redemptive efforts, and both related to deeds executed prior to their effective dates. A statute which divests one of the title to real estate must be strictly construed, and every requisite having a semblance of benefit to the assessee should be strictly complied with. Carter v. Chevallier, supra.

[24] Finally, a material basis for the correction deed as declared therein was that "no person has redeemed the said property." The correctness of the trial court's decision that it had been redeemed has been demon-

strated above. Even though the correction deed had been in all respects legal, its execution followed all the offers of payment whose refusals cleared the land of the tax lien and effected redemption.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

Hearing denied; TRAYNOR, J., dissenting.




84 Cal.App.2d 1

**BURNAND et al. v. NOWELL et al.**

**Civ. 15873.**

District Court of Appeal, Second District, Division 1, California.

Feb. 24, 1948.

Rehearing Denied March 12, 1948.

Hearing Denied April 22, 1948.

**1. Appeal and error ⇐863**

Where judgment has been rendered for defendants on the pleadings, the sole question on appeal is whether the complaint states a cause of action.

**2. Pleading ⇐345(1), 350(3)**

In passing upon motion for judgment on pleadings, nothing may be considered but complaint itself, the truth of its allegations being assumed, and nothing de hors the complaint nor any defense thereto set up in the answer taken into account; and if the pleading alleges ultimate facts which disclose the existence of a cause of action, the motion must be denied.

**3. Reformation of Instruments ⇐23**
**Vendor and purchaser ⇐166**

Where purchaser at time deed to land was tendered, had knowledge of a deficiency in area of land conveyed and failed to object, purchaser could not later reform option agreement and escrow instructions constituting the agreement of sale and purchase and recover thereon a judgment on account of the alleged deficiency. Code Civ.Proc. § 2076.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by A. A. Burnand, Jr., and Clara B. Burnand against Leon M. Nowell and Frances L. Nowell for reformation and for money due on an implied contract. From the judgment, plaintiffs appeal.

Affirmed.

Albert W. Leeds, of Los Angeles, for appellants.

John W. Preston, of Los Angeles, for respondents.

YORK, Presiding Justice.

The original complaint herein sought a money judgment for $5,250 on account of an alleged deficiency in the area of land sold by defendants to the plaintiffs. Defendants answered and pleaded three special defenses. At the beginning of the trial after plaintiffs' first witness was sworn, the court sustained defendants' objection to the introduction of evidence on the ground that the complaint did not state a cause of action, and granted plaintiffs leave to amend their complaint. Accordingly plaintiffs filed an amended complaint seeking reformation of an option agreement and of both the buyers' and sellers' escrow instructions, constituting the agreement of sale and purchase herein, and also sought a judgment for $5,250 on account of an alleged deficiency in the area of the lands described in these three documents.

When the cause came on for further hearing upon the amended complaint and the answer thereto, defendants renewed their objection to the introduction of evidence on the ground that such amended complaint did not state a cause of action, and moved for a judgment on the pleadings, which motion was granted.

Plaintiffs have perfected this appeal from such judgment.

[1, 2] It is well settled that where judgment has been rendered for defendants on the pleadings, "the sole question is whether the complaint states a cause of action; that in passing upon such motion for judgment on the pleadings nothing may be considered but the complaint itself. Nothing dehors the complaint, nor any defense thereto set up in the answer, can be taken into account in disposing of such a motion. The truth of the allegations contained in the complaint must be assumed and, if the pleading alleges ultimate facts which disclose the existence of a cause of action in favor of the plaintiff, then the motion for judgment on the pleadings must be denied." North Side etc. Ass'n v. Hillside etc. Park, 70 Cal.App.2d 609, 613, 161 P.2d 618, 620.

The amended complaint herein alleges that defendants, as owners of the west one-half of section 15, and the southeast one-quarter of section 21, Township 10 South, Range 6 East, S. B. B. M., situate in San Diego County, entered into an agreement with Harry Woods, who was acting as agent for the plaintiffs, whereby defendants gave to said Woods an option to purchase said property at $50 per acre; that said agreement was reduced to writing but through mutual mistake of the parties thereto said agreement did not truly express their intention in that they assumed that said property consisted of 480 acres and computed the purchase price upon such mistaken assumption, the total purchase price being stated in said agreement as $24,000; that on January 1, 1945, said Woods assigned his interest in said agreement to plaintiffs, who thereupon exercised the option therein contained and on January 29, 1945 entered into a written agreement whereby "plaintiffs agreed to purchase, and defendants agreed to sell, the real property hereinabove described for a purchase price of Fifty ($50.00) Dollars per acre"; that said agreement of purchase and sale was in the form of buyers' and sellers' escrow instructions executed by plaintiffs and defendants respectively and deposited with the escrow holder, and provided for a total purchase price of $24,000, payable $10,000 in cash and a purchase money trust deed for $14,000; that said real property was described in both documents as the "W½ of Sec. 15, T 10 S, R 6 E, containing 320 acres and the SE¼ of Sec. 21, T 10 S, R 6 E, S.B.B., containing 160 acres, in the County of San Diego, State of California."

It is further alleged that on February 26, 1945, plaintiffs ascertained that said real property which they agreed to buy and defendants agreed to sell for the purchase price of $50 per acre did not consist of 480 acres, but on the contrary consisted of not more than 375 acres, "in that the West ½ of Section 15, Township 10 South, Range 6 East, S.B.B.M., contains not more than Two Hundred Fifteen (215) acres" (instead of 320 acres, the normal acreage in a half section). It is also alleged that the purchase price which plaintiffs agreed to pay and defendants agreed to accept under said option and agreement was $18,750, but by reason of the mutual mistake of the said parties, "the purchase price set forth in said option agreement and said purchase and sale agreement was Twenty-four Thousand ($24,000.00) Dollars"; that plaintiffs have duly performed all their obligations under said agreement and pursuant to such mutual mistake they paid to defendants on April 28, 1945, $10,000 cash and delivered their promissory note for $14,000, "and on or about June 12, 1945, plaintiffs paid to defendants the full amount of said note"; that although plaintiffs advised defendants of such mutual mistake and demanded the return of sums which they paid in excess of the amount of the purchase price of said property, as mutually agreed upon, defendants have failed and refused to return said excess sum, to-wit: the sum of $5,250. The prayer of said amended complaint is for the reformation of the three instruments hereinabove referred to so that they shall truly express the intention of the parties; and for an award of $5,250.

None of the documents, hereinabove mentioned which constituted the agreement of sale and purchase, specified that the price agreed upon was $50 per acre, the only clue that that sum might have been the basis of the sale price is the specification of acreage in the description of the

land sold, to-wit: "W ½ of Sec. 15, T 10 S, R 6 E, containing 320 acres, and SE¼ of Sec. 21, T 10 S, R 6 E, S.B.B.M., containing 160 acres * * *", the aggregate price thereof being $24,000.

However, appellants urge that "As a general proposition, where in a sale of land at a specified rate per acre or other area unit the parties are mistaken as to the quantity of the land sold, in that it contains a lesser quantity than that contemplated by the parties, and such mistake affects the computation of the purchase price, a vendee who has fully paid the purchase price may recover compensation for the deficiency in an action for money had and received, or for damages, or for restitution of part of the purchase price. 153 A.L.R. 39."

Respondents assert that "Plaintiffs' payment of the entire purchase price and acceptance of deed, without objection, after knowledge of the alleged deficiency in the acreage conveyed, produced two legal results:

"(1) The contract thereby became merged in and was extinguished by the deed; and (2) plaintiffs are estopped from claiming reformation of the contract, or from recovering any part of the purchase price."

In support of this stand respondents cite, among other cases, that of Smiley v. Read, 163 Cal. 644, 646, 126 P. 486, 487, in which plaintiff and defendants entered into an agreement for the sale and purchase of land described as "the 10.90 acres" of a certain tract. The purchaser there accepted the deed and paid the balance of the purchase price with knowledge that the land conveyed comprised only 9.676 acres, and then made demand for a conveyance of the difference in acreage, which was refused. He then sued for specific performance, or, if that were no longer possible, for damages arising from breach. The defendants contended that plaintiff was estopped by reason of his payment of the purchase price and acceptance of the deed.

The court there stated: "Section 2076 of the Code of Civil Procedure provides that 'The person to whom a tender is made, must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and, if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards.' It makes no difference how soon after the consummation of the sale plaintiff made his objection. His duty was to assert his unwillingness to accept the land offered at the time of the tender. Failing to do this, he was estopped from demanding the fraction of an acre representing the difference between the amount of land mentioned in the contract and that specified in the certificate of title. Montgomery v. De Picot, 153 Cal. [509] 515, 96 P. 305, 126 Am.St.Rep. 84; Gregg v. Von Phul, [1 Wall. 274], 68 U.S. 274, 17 L.Ed. 536. * * * There is nothing in Cavanaugh v. Casselman, 88 Cal. [543] 545, 26 P. 515, which is at all in conflict with the cases cited herein or with our determination of this appeal. * * * In the (last) cited case a deed and bill of sale had been offered in satisfaction of the agreement between the parties to the action, and had been refused. Plaintiff then prepared and offered to defendant for execution a deed and bill of sale accurately conforming to the contract, but defendant declined to execute these instruments. Later, because of his anxiety to comply with a contract of lease made with third parties, plaintiff accepted the deed and bill of sale offered by defendant, and (we quote from the findings as set out in the decision), 'the defendants then delivered the said deed and bill of sale to the plaintiff with full understanding that they were not accepted as a full performance of said contract, but that plaintiff reserved the right to sue defendant for said breach.'" See, also, 25 Cal.Jur. 588, sec. 100; and 84 A.L.R. 1030.

[3] Appellants have cited no authority wherein a purchaser has been permitted to recover for a deficiency in the area of land conveyed, where he had knowledge of such deficiency at the time the deed thereto was tendered and failed to object.

Under the authorities above cited, the amended complaint failed to state a cause of action for the relief prayed for, and there was no error in granting the motion for judgment on the pleadings.

For the reasons stated, the judgment is affirmed.

DORAN and WHITE, JJ., concur.

Hearing denied; SHENK, J., dissenting.




84 Cal.App.2d 34

## BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. SUPERIOR COURT IN AND FOR CITY & COUNTY OF SAN FRANCISCO et al.

Civ. 13663.

District Court of Appeal, First District, Division 1, California.

Feb. 27, 1948.

Rehearing Denied March 27, 1948.

Hearing Denied April 27, 1948.

**1. States ⇐190**

Statute requiring dismissal of action where not brought to trial within five years from time when filed operates against the state. Code Civ.Proc. § 583.

**2. Parties ⇐18, 29**

Where trial court finds, or record indisputably shows that complete determination of controversy cannot be had without presence of other parties, such parties become "necessary and indispensable parties", and statute requiring court to bring them in is mandatory, and question then becomes one of jurisdiction. Code Civ.Proc. § 389.

See Words and Phrases, Permanent Edition, for all other definitions of "Indispensable Parties" and "Necessary Parties".

**3. Parties ⇐51(1)**

Generally, new parties defendant will not be brought in against will of plaintiff, unless presence of such new parties is necessary to determination of action. Code Civ.Proc. § 389.

**4. Parties ⇐53**

Until reversed on appeal, trial court's determination that additional parties were not necessary to determination of the action must stand. Code Civ.Proc. § 389.

**5. Dismissal and nonsuit ⇐60(2)**

The time in which counsel had doubt as to jurisdiction of court because of possibility of bringing in additional parties but took no action thereon, could not be subtracted from five year period under statute providing for dismissal of action not brought to trial within five years from time when filed. Code Civ.Proc. §§ 389, 583.

**6. Dismissal and nonsuit ⇐60(2)**

Whether time actually consumed in presenting, briefing and determining motion to bring in additional parties could be subtracted from actual time after action was filed until brought to trial for purpose of determining whether action was subject to dismissal under statute providing for dismissal of action not brought to trial within five years from time when filed would not be determined, where subtraction of such period did not bring the interval from date of filing complaint until date of trial within five year period. Code Civ.Proc. §§ 389, 583.

**7. Dismissal and nonsuit ⇐60(6)**

Claim of estoppel based on defendant lulling plaintiff into sense of security did not constitute proper ground for making exception to statute providing for dismissal of action unless brought to trial within five years from time when filed. Code Civ.Proc. § 583.

**8. Dismissal and nonsuit ⇐60(2)**

In fixing five year period under statute providing for dismissal of action unless brought to trial within five years from time when filed, the period between actual setting of case for trial and date of trial could not be excluded. Code Civ.Proc. § 583.

**9. Dismissal and nonsuit ⇐60(2)**

Whether period of eight days for holidays of which court could take judicial notice, and which were excluded in computing time under Code of Civil Procedure, should be excluded in computing five year period

under statute providing for dismissal of action unless brought to trial within five years from time when filed would not be determined, where exclusion of the eight days would not establish compliance with statute. Code Civ.Proc. §§ 12(a), 583.

**10. Dismissal and nonsuit ⇐60(1)**

Lack of jurisdiction or because it would be futile to proceed to trial may be considered in determining applicability of statute providing for dismissal of action unless brought to trial within five years from time when filed. Code Civ.Proc. § 583.

**11. Dismissal and nonsuit ⇐60(3)**

Whether action shall be dismissed for failure to bring it to trial within five years as provided by statute depends upon whether plaintiff has had reasonable opportunity to bring the action to trial. Code Civ.Proc. § 583.

**12. Mandamus ⇐43**

Mandamus would issue to compel superior court to dismiss complaint in action by State Employment Commission against present petitioner on ground that action was not brought to trial within five years after filing of complaint, where period of five years, four months and eighteen days had intervened between the date of filing complaint and date set for trial, and it appeared that plaintiff had had reasonable opportunity to bring case to trial within the five year period. Code Civ.Proc. § 583.

---

Original proceeding by the Bank of American National Trust & Savings Association, against the Superior Court of the State of California, in and for the City and County of San Francisco, and another, to compel named respondent to dismiss action before it was brought by California Employment Commission against present petitioner.

Peremptory writ granted.

G. D. Schilling and R. I. McCarthy, both of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and Chas. W. Johnson, Deputy Atty. Gen., for respondents.

WARD, Justice.

An alternative writ of mandate was issued in this proceeding to test the right to dismiss the complaint in an action by California Employment Commission (formerly Unemployment Reserves Commission), against petitioner herein, Bank of America National Trust and Savings Association, a national banking association. The ground of the petition is that the action was not brought to trial within five years after filing the complaint. (Code Civ.Proc., sec. 583.)

The complaint was filed February 6, 1942 and the cause set for trial June 24, 1947, leaving an intervening period of five years, four months and eighteen days. The date of the filing of the motion to dismiss was June 19, 1947, just five years, four months and thirteen days after the date of the filing of the complaint. Mandate was sought after petitioner's motion had been denied.

[1] Code of Civil Procedure sec. 583 operates against the State of California. Superior Oil Co. v. Superior Court, 6 Cal. 2d 113, 56 P.2d 950. The section, so far as the present facts are concerned, provides that "Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have [filed a stipulation] in writing that the time may be extended and except where it be shown that the defendant has been absent from the State or concealed therein, and his whereabouts unknown to plaintiff and not discoverable to said plaintiff upon due diligence, in which event said period of absence or concealment shall not be a part of said five-year period." Note that in 1947 the section was amended to provide that any stipulation of continuance shall be filed. There are other provisions of the section, but they are not pertinent to the facts presented.

[2-4] Respondent urges that from the period of five years plus, there must be ex-

cluded two years and three days during which there was some doubt as to the jurisdiction of the court because there was some discussion relative to the possibility of bringing in additional parties. It is not incumbent upon this court in the present mandate proceedings to determine that question. Whatever the merits of that motion may be the superior court had jurisdiction to proceed to a trial of the case when at issue from the date of the filing of the action, February 6, 1942, until respondent bank filed a motion, on October 28, 1943, to bring in other parties. It is apparently true that "when the trial court finds, or the record indisputably shows, that a 'complete determination of the controversy cannot be had without the presence of other parties,' such parties become necessary and indispensable parties and the section [Code Civ.Proc. 389] is mandatory and the question then becomes one of jurisdiction in that the court may not proceed without bringing them in." Ambassador Petroleum Co. v. Superior Court, 208 Cal. 667, 671, 284 P. 445. However, "'the general rule is that the court will not order new parties defendant to be brought in against the will of the plaintiff, unless the presence of such new parties is necessary to the determination of the action.'" East Riverside, etc., District v. Holcomb, 126 Cal. 315, 320, 58 P. 817, 818, quoted in the Ambassador Petroleum case, 208 Cal. page 671, 284 P. page 447. Until reversed on appeal, the trial court's determination that additional parties were not necessary to the determination of the action stands.

[5] The two years and three days, in which counsel had doubt as to the jurisdiction but took no action thereon, has nothing more to do with the present motion to dismiss under sec. 583 than the period consumed in determining a demurrer or one of the many motions that may be made before the case is brought to trial. Breakstone v. Giannini, 70 Cal.App.2d 224, 160 P.2d 887; Rosefield Packing Co. v Superior Court of San Francisco, 4 Cal.2d 120, 47 P.2d 716. To the same effect, though upon the two year period mentioned in sec. 583, see Smith v. Wiget, 75 Cal.App.2d 591, 171 P. 2d 563.

[6] This court will refrain from determining that, as applicable to the present case, the time—three months and twelve days—actually consumed in presenting, briefing and determining the motion to bring in additional parties as petitioner herein concedes may be subtracted from the period of five years, four months and eighteen days. This subtraction of the last stated period does not bring the interval from the date of filing the complaint until the date of trial within the provisions of section 583.

[7] There is a reference to a period during which the respective attorneys either personally or by letter attempted to agree on a statement of facts upon which the case should be submitted, but there is no contention that defendant lulled plaintiff into a sense of security or practiced fraud in agreement on continuances for trial. If sound, this contention would give ground to a claim of estoppel. This does not appear to be a proper ground for making an exception to Code of Civil Procedure sec. 583. In Christin v. Superior Court, 9 Cal.2d 526, at pages 529, 530, 71 P.2d 205, at page 207, 112 A.L.R. 1153, the court considers the contention made by respondent that petitioners' acts "inducing the plaintiff to allow the cause to go off calendar pending negotiations for settlement, justifies the application of the doctrine of estoppel. * * * But estoppel resulting from such conduct does not appear to be a proper ground for creating an exception to the terms of the statute. See Miller & Lux v. Superior Court, 192 Cal. 333, 339, 219 P. 1006."

[8] It is contended that the period between the actual setting of the case for trial and the date of trial should be excluded from the five year period. This would require a holding that the date of setting a case is the date of trial. The section requires that the action be "brought to trial" within the five years. There is no contention here that when the motion to set was made the plaintiff called the attention of the presiding judge to the fact that the five year period was about to expire. It may be that if a plaintiff moves to set well within the five years and requests that the cause

be set for trial before the expiration of that period a failure to so set the cause for trial might be an abuse of discretion and such period might be excluded on the theory that it falls within the rule of those cases excluding periods where it is practically impossible to proceed. We do not have to and do not decide that question in this case simply because the plaintiff made no such showing or request.

[9] Respondent contends that the "period of eight days, being holidays, of which this court may take judicial notice and which, by force of section 12(a) of the Code of Civil Procedure, are excluded in computing time under the Code of Civil Procedure. These holidays are: November 26, 1942, Thanksgiving Day; December 26, 1942, Saturday following Christmas, by proclamation of Governor Olson; November 25, 1943, Thanksgiving Day; November 23, 1944, Thanksgiving Day, August 15, 1945 VJ Day by proclamation of Governor Warren; November 22, 1945, Thanksgiving Day; June 16, 1946, Bear Flag Day; and November 28, 1946, Thanksgiving Day." The eight days added to the time conceded by petitioner would not change the result and therefore will not be given consideration.

[10, 11] It has been held that lack of jurisdiction or because it would be futile to proceed to trial may be considered in determining the applicability of sec. 583. Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 61, 168 P.2d 665; California Employment, etc., Comm. v. Guernewood, etc., Tavern, 70 Cal.App.2d 245, 160 P.2d 581. The fair test is whether plaintiff in view of statutory provisions has had a reasonable opportunity to bring the action to trial. Ojeda v. Municipal Court, 73 Cal.App.2d 226, 166 P.2d 49; Hunt v. United Artists Studio, 79 Cal.App.2d 619, 180 P.2d 460.

[12] In conclusion, respondent cites California Employment, etc., Comm. v. Guernewood, etc., Tavern, supra, where the motion for dismissal was filed and heard on the day of trial, just one day short of the five-year period, and (page 251 of 70 Cal. App.2d page 584 of 160 P.2d) "within the period in which the court in the exercise of its discretion had the power to grant or deny appellants' motion to dismiss the action." In affirming a denial of the motion to dismiss the court stated (page 251 of 70 Cal.App.2d, page 584 of 160 P.2d): "A cursory reading of the previously mentioned chronological history of the case is sufficient to show, as the trial court stated, that not only did the respective parties and their counsel contribute to the delay but that death and war also directly intervened." Such facts do not appear in this case. The record shows that petitioner has established as a matter of law that under the provision of sec. 583 the facts presented demand that the action be dismissed. It is so ordered.

PETERS, P. J., and FINLEY, J. pro tem., concur.




83 Cal.App.2d 707

**PEOPLE v. RAMSEY.**

**Cr. 4141.**

District Court of Appeal, Second District, Division 2, California.

Feb. 18, 1948.

Rehearing Denied Feb. 27, 1948.

Hearing Denied March 18, 1948.

**1. Abortion ⇦11**

Evidence sustained conviction for abortion. Pen.Code, § 274.

**2. Abortion ⇦11**

A person cannot be convicted of abortion on testimony of woman on whom offense was committed unless she is corroborated by other evidence, but corroborating evidence need not establish precisely the same facts recounted in the woman's testimony and it may consist of inferences from the circumstances surrounding the criminal transaction. Pen.Code, § 1108.

**3. Abortion ⇦11**

Evidence corroborating testimony of woman on whom abortion was committed was sufficient to sustain conviction. Pen. Code, § 1108.

**4. Abortion ⇐6**

In abortion prosecution, it is not necessary to prove that woman on whom operation was performed was pregnant at time of commission of offense. Pen.Code, § 274.

**5. Abortion ⇐1**

The performing of operation with intent on part of accused to produce or procure a miscarriage constitutes "abortion," even though the woman on whom operation is performed is not in fact pregnant. Pen. Code, § 1108.

See Words and Phrases, Permanent Edition, for all other definitions of "Abortion".

**6. Abortion ⇐11**

In abortion prosecution, non-necessity of operation to preserve life of woman on whom operation was performed may be shown by circumstantial evidence. Pen. Code, § 1108.

**7. Abortion ⇐11**

In abortion prosecution, evidence was sufficient to establish that preservation of life was not object of operation. Pen.Code, § 1108.

**8. Abortion ⇐11**
**Criminal law ⇐1159(6)**

The rule that if corroborating circumstances standing alone while generating a suspicion of guilt are as compatible with innocence as they are with guilt, corpus delicti of abortion is not proved, is to be followed by trier of facts but not by a reviewing court. Pen.Code, § 1108.

**9. Criminal law ⇐472**

In abortion prosecution, physician's testimony concerning vials, cartons and other containers found in defendant's residence and regarding effect that drugs named on labels would have on human being was admissible, even though physician had not made an analysis of contents, since defendant's possession of drugs was circumstance which jury had right to consider in determining her guilt or innocence.

**10. Criminal law ⇐404(4)**

In abortion prosecution, where bottles and containers were found in defendant's room and labels thereon designated drugs which might be used in committing an abortion, they were admissible.

**11. Criminal law ⇐363**

In abortion prosecution, admission of surgical instruments found by officers in defendant's residence while she was present and at or near place where she had operated on a prosecuting witness was not error, since instruments were part of the res gestae.

**12. Criminal law ⇐412(1)**

In abortion prosecution, testimony of deputy sheriff that when she arrived at defendant's residence the defendant said "What, you here again?" and that later when asked why she was doing the abortions, defendant replied that she "was supposed to quit two weeks ago" and that she had been "shaken down in this blackmail" was admissible.

**13. Criminal law ⇐448(12)**

In abortion prosecution, testimony of witness that no violence was used on defendant and that no promise of immunity or hope of reward was held out to her was not objectionable as a conclusion, especially where defendant's statements were not in nature of a confession and it was not necessary to lay foundation as to the voluntary character thereof.

**14. Criminal law ⇐444**

In abortion prosecution, looseleaf notebook found in defendant's cupboard beside telephone containing hour of appointment with full name and address and telephone number of prosecuting witness was properly admitted notwithstanding absence of proof as to how long book had been in cupboard, who placed it there or who wrote notations in it.

**15. Criminal law ⇐387**

In abortion prosecution, testimony of special agent of State Board of Medical Examiners that defendant's name did not appear as a registered physician, surgeon, or chiropractor but who admitted that he had not examined records themselves but last printed directories was admissible. Pen.Code, § 274.

**16. Criminal law ⇐459**

In abortion prosecution, cross-examination whether prosecuting witness passed any fetus after the operation was properly excluded, since witness was not qualified

to answer question and pregnancy was not an element of the offense. Pen.Code, § 274.

**17. Abortion ⇐9**

In abortion prosecution, admitting prosecuting witness' testimony that her purpose in going to defendant's residence was to have an abortion was not error.

**18. Criminal law ⇐407(1)**

In abortion prosecution, testimony that officer asked defendant where her tools were, that she replied "probably out in the garage", that officer stated that he was not looking for that kind of tools and that when he found instruments and bottles he asked "What about this?" and defendant said "Can you imagine that?" was admissible as accusatory statements that defendant did not deny. Pen.Code, § 274.

**19. Criminal law ⇐338(1)**

In abortion prosecution, cross-examination of prosecuting witness as to whether she thought it was right and lawful and whether any one had told prior to her testifying that she would be guilty of a crime if she had done the acts that she described was properly excluded. Pen.Code, § 274; Code Civ.Proc. § 2051.

**20. Witnesses ⇐344(2)**

A witness cannot be impeached by evidence that he had committed wrongful acts other than the conviction of a felony. Code Civ.Proc. § 2051.

**21. Abortion ⇐2**

Knowledge on part of witness that she was violating the law in submitting to an abortion could not exculpate defendant from criminal responsibility for illegal acts she was charged with having committed. Pen.Code, § 274; Code Civ.Proc. § 2051.

**22 .Criminal law ⇐507(6)**

Woman who submitted to abortion was not an "accomplice". Pen.Code, §§ 274, 1108.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

**23. Criminal law ⇐706**

In abortion prosecution, prosecutor was not guilty of misconduct in exhibiting to jury instruments found by officers in defendant's residence. Pen.Code, § 274.

**24. Constitutional law ⇐268**
**Criminal law ⇐721(1)**

In abortion prosecution, prosecutor's comment on defendant's failure to testify and to deny or explain evidence given against her and statutory and constitutional provisions permitting such comments did not deny defendant due process of law. Pen.Code, § 1323; Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

**25. Criminal law ⇐720(1)**

Prosecutor has right to comment on any and all evidence properly admitted.

**26. Criminal law ⇐720(6)**

The comments permitted to a prosecutor are not limited to matters that are in evidence but reasonable inferences may be drawn from the evidence by counsel in argument.

**27. Criminal law ⇐829(3)**

In abortion prosecution, refusal of defendant's requested instructions was not error where every element thereof was contained in instruction given. Pen.Code, § 274.

**28. Criminal law ⇐829(1)**

When a matter is covered by an instruction, a defendant cannot complain because court refuses to reiterate its substance in different words or in a different arrangement of words.

---

Appeal from Superior Court, Los Angeles County; Joseph N. Maltby, Judge.

May Ramsey was convicted of having committed an abortion and she appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Frank Richards, Deputy Atty. Gen., W. E. Simpson, Dist. Atty., Jere J. Sullivan and Robert Wheeler, Deputies Dist. Atty., all of Los Angeles, for respondent.

WILSON, Justice.

Appellant and Winifred Howard were charged with two counts of abortion and appellant was charged in addition with three prior convictions of felonies, one being for

conspiracy to commit abortion and the other two for abortions. Both defendants pleaded not guilty; appellant admitted the three prior convictions charged against her.

Upon the conclusion of the introduction of evidence count 1 was dismissed for lack of sufficient evidence, the complaining witness not having appeared at the trial, and the jury was instructed to disregard the evidence offered concerning that charge.

The jury returned a verdict of guilty against appellant as charged in count 2 and failed to agree on a verdict as to defendant Winifred Howard.

Appellant was sentenced to imprisonment in the California Institution for Women for the period prescribed by law. She has appealed from the judgment and as grounds for reversal has raised four issues: (1) Insufficiency of the evidence to sustain conviction; (2) alleged errors in the admission of evidence; (3) alleged misconduct of the district attorney; (4) refusal to give instructions requested by appellant.

[1] 1. *The sufficiency of the evidence.* An outline of the evidence will demonstrate that it was ample to sustain the conviction.

The complaining witness, who will be referred to as "Anne," testified that her residence was in Los Angeles and that on October 29, 1946, the date on which the crime was committed, she was in good health but that she was pregnant and not menstruating; about September 28 or 29 previously she felt that she was pregnant because she at that time had missed one menstrual period; she had missed another period just prior to October 29; for seven or eight years she had menstruated regularly every 28 days; on October 29 she went to Wilmington where she was "picked up" by a girl named Lois (last name unknown to the witness), who took her to the residence of appellant. Lois drove the witness alongside the house, which she entered through the back door, not meeting any one until she was inside. After she was seated in the den Mrs. Howard, appellant's codefendant, had a conversation with her, asking the time of her appointment, to which Anne replied that it was for 12 o'clock. Mrs. Howard asked Anne if she had the money with her, to which she answered "Yes," and handed Mrs. Howard $150. Mrs. Howard then left the room and on her return gave Anne two green pills and one yellow pill which she swallowed at the direction of Mrs. Howard. Anne remained seated and in a short time began to feel slightly "groggy." The witness was shown a green vial containing some yellow pills and a large bottle labeled "Skphengel No. 2, 1000 Tablets" containing green pills and stated that the pills of both colors were similar to those that were given to her. The vial and the bottle, containing pills similar to those described by the witness, were later identified as having been found by the officers in appellant's residence.

Mrs. Howard conducted Anne to a bedroom where she remained for 25 or 30 minutes lying down. There was another girl in the room on another bed. Anne was then taken into the kitchen by Mrs. Howard and was instructed to lie upon a white table, which she did. There were stirrups on the end of the table, one on each side. Anne was lying on her back with her feet in the stirrups and her legs were spread apart. She saw appellant at that time, the latter being between Anne's legs. Anne closed her eyes; she felt something inserted into her private parts and felt some one touching them but did not know what was used; she heard a "vacuumy" sound— "kind of a suction," something like a carpet sweeper but not quite so loud; she was on the table about 20 minutes with appellant between her legs; she was taken back to the bedroom by Mrs. Howard; she was put to bed where she stayed for over an hour. Mrs. Howard gave her an injection which she said was penicillin, also gave her some pills to be taken later on—not that day. Anne was still in bed at the time the officers arrived.

After they arrived Dr. Nichols, who is licensed to practice medicine in California and who at that time was a resident physician in obstetrics and gynecology at the Los Angeles County General Hospital, made a bimanual examination of Anne; she was bleeding at the time and told the doctor that she thought an abortion had been performed upon her.

Dr. Nichols testified concerning the examination made by him and stated that as a result of the examination his impression was, at that time, that this was a pregnant uterus of approximately six weeks and that there was some bleeding from the uterus, suggesting that she was possibly threatening to abort or could have already aborted. The condition he found could have led to either diagnosis. He stated that a threatened abortion is one where the abortion has not taken place—the fetus is still in the uterus at the time of the threatened abortion. About two weeks later he again examined Anne at the General Hospital and found that her uterus was about half the size that it was at the time of his previous examination.

An investigator from the district attorney's office, on the date on which the offense is alleged to have taken place, found in appellant's home a notebook in a cupboard beside the telephone. In the book was the notation "Tues 29" and on the back of the same page "12 00 Ann ———," giving her full name, her address in Los Angeles and telephone number.

On the same day Mrs. Harman, a deputy sheriff, in the course of her duties went to the house in which the offense had taken place, where she saw appellant and said, "Hello, Mrs. Ramsey," and the latter said, "What? You here again?" On the evening of the same day Mrs. Harman had a conversation with appellant in the district attorney's office. At that time Anne was passing them with one of the officers. Appellant said, "Poor thing, I feel sorry for her." Mrs. Harman asked appellant why she was doing these abortions, to which the latter replied, "Well, I was supposed to quit two weeks ago, and Wally had asked me to sever all relations with Dr. Buffum at a particular time." Mrs. Harman then asked if she didn't have enough money without resorting to such things. "No, I haven't," appellant replied, and made the further statement, "I certainly have been shaken down in this blackmail." Mrs. Harman asked by whom, and appellant replied, "Well, I didn't talk before and you know I won't talk this time." Mrs. Harman then asked if appellant didn't think a holdup that she had reported to the sheriff's office had been by some one trying to get money back from some of the abortions, and appellant said, "Yes, I think so; there's been a lot going on; you'd be surprised if you really knew, Mrs. Harman."

There was evidence that appellant was not registered in California as a licensed physician and surgeon or as a chiropractor.

The property on which the offense was committed was assessed in the name of Leola M. Ramsey.

Mr. England, a deputy sheriff, arrived on the premises with several other officers, where he saw appellant and her codefendant in the hallway and found Anne sitting on a davenport in the den. He heard Mrs. Ramsey say to another officer, "I am glad that you called on me, boys; I have been working very hard lately, and I need a rest." England asked her where were her tools, to which she replied that they were probably in the garage. He said, "I don't mean that kind of tools. You mind if I look around a bit?" Mrs. Ramsey said, "Help yourself." Mr. England identified a flour sack containing a number of surgical instruments which he found in a cupboard connected with the kitchen. The sack when he found it contained rubber tubing, a hypodermic syringe and 19 nickel plated or chromium instruments of different types; also several metallic objects appearing to be holders for hypodermic needles. In addition to the instruments England also found various bottles. He said to appellant, "What about these? This is what I meant." Appellant said, "Can you imagine that?" Nothing further was said. England also found the white table and the stirrups which Anne described in her testimony, the latter being in a cupboard approximately ten feet from the table. England also found in the kitchen cupboard a suitcase containing pieces of bark, and instrument with rubber tubing attached, an instrument similar to a large pair of scissors, and a small pair of scissors. He found numerous vials, boxes and bottles in various cupboards in the kitchen, more in the icebox, one of the bottles being labeled "Penicillin"; a carton labeled "Sodium Squibb" containing three small bottles, and three small cartons labeled "300,000 Units." There were also rolls of cotton,

two boxes labeled "Flexible Kone Pessary, Medic Supply Company," a pair of rubber gloves, five or six boxes labeled "Mercurophen," a large bottle labeled "Quinine Sulphate," a green vial containing yellow capsules, a package of Vim stainless steel hypodermic needles, and some Lily distilled water, 20 cartons marked "Novocaine," cartons labeled "Procaine hydrochloride," a can marked "Ether," a vial marked "Ergotrate, 1/320 gr.", a box labeled "Donnatal," grasping forceps, sponge holders, a uterine tenaculum, curettes, and various other instruments.

Dr. Newbarr, who received his medical degree in 1917 and had been licensed to practice in California in 1933, testified that he had done obstetrical work for about 11 years. At the time of the trial he was Chief Autopsy Surgeon of Los Angeles County. He was shown the various instruments, bottles, and other containers that had been found in appellant's premises. He testified that he was familiar with the various pharmaceuticals mentioned on the labels of the bottles and other containers; that some were ordinary drugs used in the practice of medicine, some were sedative, some analgesic, and some were stimulating. He stated that the administration upon a female person of Anne's age of one yellow tablet and two green tablets such as were administered to her would have a sedative and more or less pain-relieving effect—in lay language, the person would be made "groggy." He testified that penicillin is used to combat infection; mercurophen is a germicide often used in sterilization; rubber gloves are used in surgery in an effort to keep the hands sterile; procaine hydrochloride induces local anaesthesia—it is a little stronger than novocaine; ether is a general anaesthesia; salt solution is used as treatment for a shock, principally intravenously; a flexible kone is a type of stem pessary which is not used any more; it was once thought that it had a value in correcting the position of the uterus when inserted into the cervex; if it were inserted as a foreign body it would set up uterine contractions; its effect would be nature's effort to expel whatever is in the uterus; ergotrate sets up contractions of smooth muscle tissue, such as the uterus, and the quinine sulfate stimulates such tissue; the stirrups are attached to an examining table and the patient's heels are placed in the stirrups for the purpose of making a vaginal examination; this would be the logical position in which to place a person for the purpose of performing an abortion; a speculum is used in any vaginal surgery; a cervical dilator is used for dilating the cervex previous to any operation on the uterus and could be used in performing an abortion; the tenaculum likewise can be used in performing an abortion; the rubber tubing is attached to a faucet and has an aspirating effect, meaning suction. Other various instruments found on the premises were described by Dr. Newbarr as those used in the performing of abortions.

Anne had testified that she did not know whether or not she had passed the fetus. Dr. Newbarr testified that "when an abortion occurs the fetus doesn't pop out as a separate unit. There is an expulsion of clots, tissue, fetus, the embryonic sac, all in one ball you might say." He stated that in the hospital all parts of the expelled matter are retained and the clots and tissue are separated with an instrument in order to find the fetus.

The foregoing evidence stands uncontradicted. Neither appellant nor Mrs. Howard testified at the trial and neither of them offered any evidence in their defense.

We need not engage in speculation or conjecture as to what was done or who did it. When Anne was lying on the table she saw appellant sitting between her legs; she felt an instrument within her vagina and heard a "vacuumy" sound. It would be the height of absurdity to assume, as suggested in appellant's brief, that while appellant was occupying that position some other person performed the operation.

That Anne went to appellant's residence for the purpose of having an abortion performed is demonstrated by these facts: (a) She placed a telephone call while at her home in Los Angeles; (b) she was met at the railroad station by a girl who was unknown to her and was taken to appellant's home; (c) Anne was asked by Mrs. Howard if she had the money and she produced $150; (d) there was no conversation as to

the purpose of her visit or as to the price she was to pay, indicating that arrangements concerning both matters had been made previously; (e) the notebook found in the closet bore Anne's name, address, telephone number, and the hour of her appointment.

*Corpus delicti.* Anne's testimony is sufficient to establish the corpus delicti if it is adequately corroborated by competent facts, circumstances or reasonable inferences to be drawn from the evidence. People v. Thompson, 69 Cal.App.2d 80, 85, 158 P.2d 213.

[2, 3] *Corroboration.* While a person cannot be convicted of the crime of abortion upon the testimony of the woman upon whom the offense was committed unless she is corroborated by other evidence (Penal Code, sec. 1108) the corroborating evidence need not establish precisely the same facts recounted in the woman's testimony but it may consist of inferences from the circumstances surrounding the criminal transaction. People v. Collins, 80 Cal.App.2d 526, 534, 182 P.2d 585; People v. Wilson, 25 Cal.2d 341, 346, 153 P.2d 720; People v. Lorraine, 28 Cal.App.2d 50, 53, 81 P.2d 1004. The evidence of Dr. Nichols, to which we have referred, is a sufficient corroboration of Anne's evidence. People v. Pierson, 69 Cal.App.2d 285, 299, 159 P.2d 39. The statements made by appellant to the officers likewise furnish corroboration. People v. Garner, 60 Cal.App. 2d 63, 65, 140 P.2d 146. Furthermore, the presence in appellant's home of a girl occupying a bed in the room in which Anne was placed, of the numerous instruments that are used in producing abortions, hypodermic needles and large quantities of sedative, pain-alleviating and sterilizing drugs, demonstrate that appellant was prepared to perform abortions and was no doubt operating an abortion "mill."

[4, 5] *Proof of pregnancy not necessary.* Since the amendment to section 274 of the Penal Code in 1935 it has not been necessary to prove that the woman on whom the operation was performed was pregnant at the time of the commission of the offense. Rinker v. State Board of Medical Examiners, 59 Cal.App.2d 222, 224, 138 P.2d 403; People v. Emery, 79 Cal. App.2d 226, 231, 179 P.2d 843. The performing of the operation with the intent on the part of the accused person to produce or procure a miscarriage constitutes the offense even though the woman on whom the operation is performed is not in fact pregnant.

[6, 7] *Necessity to preserve life.* There is no intimation in the evidence that the operation was necessary to preserve Anne's life. Nonnecessity may be shown by circumstantial evidence. People v. Malone, 82 Cal.App.2d 54, 185 P.2d 870. It is uncontradicted that Anne traveled from Los Angeles to Wilmington alone and required no assistance in entering appellant's residence. There is no evidence that she had or needed any aid in walking or in attending to her affairs after the operation. In addition there is her evidence that she was in good health,—normal except for her pregnancy. Dr. Nichols found nothing wrong with her except that her condition indicated that she had been aborted or was about to abort. She had no medical attention for any purpose prior to the operation and none thereafter other than the examination by Dr. Nichols. This evidence, together with all the other evidence which we have outlined, is sufficient to establish that preservation of life was not the object of the operation. People v. Emery, supra; People v. Knowles, 7 Cal. App.2d 398, 401, 46 P.2d 788; People v. Card, 40 Cal.App. 22, 24, 180 P. 53; People v. Brewer, 19 Cal.App. 742, 746, 127 P. 808.

[8] The undisputed and uncontradicted evidence which we have outlined establishes beyond a reasonable doubt every element necessary to constitute the offense charged. The facts are compatible only with the guilt of appellant and since they are not, as the court found to be the case in People v. Murphy, 60 Cal.App.2d 762, 772, 141 P.2d 755, 761, "as compatible with innocence as they are with guilt" we need not give further consideration to that opinion. However, the statement in the Murphy case (60 Cal.App.2d at page 772, 141 P.2d at page 761) to the effect that if the corroborating circumstances standing alone, while generating a suspicion of guilt, are as com-

patible with innocence as they are with guilt, the corpus delicti of the crime is not proved, is a rule to be followed by the trier of facts but not by a reviewing court. As applicable to appeals it is contrary to the holding of the Supreme Court in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, and in the cases there cited.

The Murphy case contains the further statement (60 Cal.App.2d at page 770, 141 P.2d at page 760) that unless the accused had "actual knowledge * * * of the pregnancy of the woman, or a belief * * * that [she] was pregnant" the required and necessary intent to procure her miscarriage could not exist. Proof of such knowledge or belief has not been necessary since the 1935 amendment to section 274 of the Penal Code which omits "pregnant" before the word "woman" formerly in the statute. People v. Emery and Rinker v. State Board of Medical Examiners, supra.

[9] 2. *Alleged errors in the admission of evidence.* (a) Appellant's first asserted error has reference to the evidence of Dr. Newbarr concerning the vials, cartons and other containers found in appellant's residence. The statement in appellant's brief that he testified "as to the contents" of bottles and other containers, without having analyzed the drugs and without knowledge of their character, is not borne out by the record. He was not asked and he made no statement at any time concerning their "contents." In answers to questions he repeatedly stated that he was reading the labels on the containers and that his evidence was directed solely to the effect that the drugs named on the labels would have on a human being, and in particular the effect of some of the drugs on a female of Anne's age and on a pregnant woman. The pills which Anne described as having been given to her and which made her "groggy" were stated by Dr. Newbarr to be of a sedative nature.

There is a fair inference that such pills were "used in the case" in the commission of the offense charged. There is no evidence that any drugs given to Anne while she was in appellant's residence came from any source other than the bottles which she described. Appellant's possession of these pills and of the other drugs was a circumstance which the jury had a right to consider in determining her guilt or innocence. People v. Marineau, 55 Cal.App.2d 893, 907, 132 P.2d 22; People v. Pierson, 69 Cal.App.2d 285, 298, 159 P.2d 39; People v. Gilman, 43 Cal.App. 451, 455, 185 P. 310; People v. Scott, 24 Cal.App. 440, 450, 141 P. 945.

[10] Since the bottles and other containers were found in appellant's residence and the labels thereon designated drugs such as might be used in committing an abortion they were properly received in evidence. People v. Salas, 17 Cal.App.2d 75, 77, 61 P.2d 771. It will not be presumed that appellant had in her possession this vast array of containers, bearing the labels which have been described, unless (1) they contained the drugs designated on the labels and (2) she intended to use the drugs in producing miscarriages and did so use them.

[11] (b) We find no error in the admission in evidence of the surgical instruments found by the officers in appellant's residence while she was present and at or near the place where she had operated on Anne. They were such as are used in the commission of abortions. A sedative drug and an injection had been given to Anne and instruments had been used on her. When the instruments were shown to appellant her only remark was "Can you imagine that?" She did not deny ownership. The instruments were a part of the res gestae. People v. Sieber, 201 Cal. 341, 353, 257 P. 64; People v. Green, 13 Cal.2d 37, 43, 87 P.2d 821.

There is no merit in appellant's argument that she was injured in the eyes of the jury because the instruments and drugs found in her home might have been used in the commission of the abortion for which she had been convicted in 1941—the prior convictions charged in the information. (1) Her admission of the prior convictions was made out of the presence of the jury and they had no knowledge of her past criminal record. (2) Her continued possession of the instruments and drugs after she had been released from her previous imprisonment is not compatible with her innocence.

It is presumed that if she had intended to lead and had led an upright life after her former incarceration she would have disposed of the instrumentalities that no doubt assisted in her previous conviction. It is puerile to argue that it was necessary for the prosecution to prove that they had been procured by appellant since the commission of the prior crimes.

Notwithstanding appellant's repeated assertion that it was not shown that she touched Anne, the latter testified to the contrary and there was no attempt to contradict her evidence. It was not necessary to prove that any one of the instruments introduced in evidence was actually used in the commission of the crime. Anne testified that an instrument was inserted into her vagina; the instruments in evidence were such as are used in producing abortions; they were in appellant's residence when the crime was committed; they were found by the officers in appellant's presence; she offered no explanation of her possession of them. Need more be said!

For the reasons which we have stated the evidence of Dr. Newbarr concerning the instruments was properly admitted, hence there was no error in denying appellant's motion to strike out his testimony.

The cases of People v. Hill, 123 Cal. 571, 56 P. 443, and People v. Muhly, 11 Cal.App. 129, 104 P. 466, cited by appellant, are not abortion cases and are so factually dissimilar to the instant case that they need not be discussed except to say that in neither case was any connection shown between the defendant and the object offered in evidence.

Since (1) these surgical instruments are of a character that may be used in the commission of an abortion, (2) were in the possession of appellant at the time of the offense, and (3) there is circumstantial evidence justifying the inference that they were so used, they are admissible in evidence against her even though there is no positive evidence that they were used on Anne. People v. Gilman, 43 Cal.App. 451, 455, 185 P. 310.

[12] (c) The evidence of Cloisea Harman, a deputy sheriff, concerning statements made by appellant, was properly received. When Mrs. Harman arrived at appellant's residence she said, "Hello, Mrs. Ramsey," and the latter said, "What, you here again?" At the district attorney's office Mrs. Harman asked appellant "why she was doing these abortions." Appellant replied that she "was supposed to quit two weeks ago." Objection is made to this evidence and also to the evidence of appellant's statements which we have related regarding a "shake down" and blackmail. This evidence is no more objectionable than that given in People v. Coltrin, 5 Cal. 2d 649, 658, 55 P.2d 1161, where the deputy sheriff testified that when he went to the defendant's office and asked him to go to the district attorney's office the defendant asked why he was wanted; he was told that it was in regard to an abortion and he replied "Which one?" The court said that this was in the nature of an admission and tended to show a consciousness of guilt. In the instant case each of appellant's statements repeated by Mrs. Harman tended to show that appellant knew she was guilty of the offense for which she was under arrest.

[13] (d) The further objection is made to the ruling of the court admitting Mrs. Harman's evidence that no force or violence was used on appellant and that no promise of immunity or hope of reward was held out to her. The objection to the evidence was on the ground that it called for a conclusion of the witness. The trial court did not err in admitting the evidence. (1) Appellant's statements were not in the nature of a confession and it was not necessary to lay a foundation as to the voluntary character thereof. People v. Ramirez, 113 Cal.App. 204, 207, 298 P. 60; People v. Hamby, 55 Cal.App. 37, 40, 202 P. 907; People v. Peete, 54 Cal.App. 333, 353, 202 P. 51. (2) The testimony of the witness that the statements were voluntarily made was not a conclusion. People v. Bannon, 59 Cal.App. 50, 59, 209 P. 1029.

[14] (e) Objection is made to the reception in evidence of a looseleaf notebook. Anne testified that in response to Mrs. Howard's question when she arrived she stated that her appointment was for 12 o'clock. She had been met at the rail-

road station at a time when she would arrive at appellant's residence at about that hour. The notebook was found in appellant's cupboard beside the telephone, a place where an appointment book is usually kept. The notation on the first page was "Tues. 29." (The crime was committed on October 29.) On the back of the same page was "12 00" (the hour of the appointment) followed by Anne's full name, and a Los Angeles address and telephone number which she identified as hers. She also testified that before making her trip to Wilmington she had put in a telephone call. Immediately after her arrival at the time noted in the book she was aborted. The notebook had a direct bearing on the matter of appellant's having performed the abortion and was properly admitted. People v. Wade, 71 Cal.App. 2d 646, 655, 163 P.2d 59; People v. Stoerkel, 87 Cal.App. 336, 339, 342, 262 P. 825. It was not necessary to prove, as contended by appellant, how long the book had been in the cupboard, who placed it there, or who wrote the notations in it.

[15] (f) A special agent of the State Board of Medical Examiners testified that he had access to the records of that board and to the list of licentiates of the osteopathic and chiropractic boards and that appellant's name did not appear therein as a registered physician, surgeon or chiropractor. On cross-examination he stated that he had not examined the records themselves but had looked at the last printed directories issued annually by those boards. They were issued in 1946. (The crime was committed in October, 1946.) Appellant moved to strike the evidence on the ground that no proper foundation had been laid and that it was a conclusion of the witness. The motion was denied. It is argued that the directory would be inadmissible as evidence and could not serve as a foundation for the testimony of the witness unless the person who compiled it had first identified it and had testified (a) as to the mode of its preparation, (b) that it was a correct compilation, and (c) that it had been made in the regular course of business.

The court did not err in denying the motion to strike. (1) The printed directory of the licentiates of each board is issued as an official document of such board. (2) The crime does not depend on whether or not the person committing it is licensed. Section 274 of the Penal Code provides that "*every* person" who performs any act described in that section with intent to procure the miscarriage of a woman "unless the same is necessary to preserve her life" is punishable, etc. The crime is of no higher degree if performed by an unlicensed person than if by a regularly licensed practitioner. (3) If a license were necessary the burden was not on the prosecution to show that she did not possess one but was on appellant to prove that she held a valid unrevoked license. People v. Boo Doo Hong, 122 Cal. 606, 608, 55 P. 402; People v. T. Wah Hing, 47 Cal.App. 327, 331, 190 P. 662; People v. Fortch, 13 Cal.App. 770, 775, 110 P. 823; People v. Goscinsky, 52 Cal.App. 62, 64, 198 P. 40; People v. Saunders, 61 Cal.App. 341, 345, 215 P. 120.

[16] (g) On cross-examination Anne was asked whether she passed any fetus after the operation, to which an objection by the district attorney was sustained. Appellant contends that the ruling was error and that the question was essential to determine whether appellant could have had the requisite intent to commit an abortion and to test Anne's credibility concerning her statement that she was pregnant. The answer to this contention is twofold: (1) Pregnancy is not an element of the offense and the intent to commit an abortion is not dependent on the pregnancy of the woman on whom the operation is performed. Penal Code, sec. 274; People v. Emery, 79 Cal.App.2d 226, 231, 179 P.2d 843. (2) Anne was not qualified to answer the question. The medical testimony is that when an abortion occurs a mass is expelled in one ball, consisting of clots, tissue, fetus and embryonic sac, and it is necessary to separate this mass in order to find the fetus.

[17] (h) Error is assigned to the ruling of the court permitting Anne to testify that her purpose in going to appellant's residence was to have an abortion. The purpose of the visit is directly connected

with the crime and the evidence shows that such purpose was communicated to and known by appellant. Anne placed a telephone call before going to Wilmington; she was met by an unknown girl and was taken directly to appellant's home; the notebook showed that she had an appointment at approximately the hour of her arrival; Mrs. Howard asked her the hour of her appointment and when she said that it was at 12 o'clock Mrs. Howard immediately gave her a sedative; appellant then performed the operation. There was no error in allowing the witness to answer the question.

[18] (i) The admission of a conversation between an officer and appellant regarding the bottles and instruments found in her home is assigned as error. One of the officers asked where her tools were. In an attempt at facetiousness in a serious situation appellant replied "Probably out in the garage." The officer said he was not looking for that kind of tools. When he found the instruments and bottles he asked "What about this?" Appellant said "Can you imagine that?" She never at any time asserted that the instruments and bottles did not belong to her. She did not even feign ignorance of their presence in her home. Her answers and conduct were evasive and equivocatory. Not only did they fail to comport with an attitude or claim of innocence but in the circumstances existing at the time they indicated a consciousness of guilt. As accusatory statements they were admissible, especially when the accused failed to act as an innocent person would be expected to act in such an environment. People v. Gordon, 61 Cal.App. 98, 100, 214 P. 276; People v. Willmurth, 77 Cal.App.2d 605, 616, 176 P.2d 102. She never did deny having made the statements, as did the defendant in People v. Teshara, 134 Cal. 542, 544, 66 P. 798, nor did she repel the implied accusation.

[19] (j) While under cross-examination Anne was asked whether when she went to appellant's house to have an abortion performed she knew that she was committing a criminal offense, and she answered, "I did not know it at that time." She was then asked whether she thought she was doing anything wrong, whether she thought it was right and lawful to do that sort of thing, and whether any one had told her prior to her testifying that she would be guilty of a crime if she had done the acts that she described. Objections to all such questions were sustained. The matters referred to were immaterial and the rulings of the court were correct. The questions did not in any manner test the credibility of the witness. They did not tend to prove or disprove her truthfulness in her statement that she was pregnant when she visited appellant at the latter's home and did not prove or indicate a bias, prejudice or hostility against appellant. That (1) she believed she was pregnant, and (2) she was actually pregnant, is shown by uncontradicted evidence. She found in appellant a willing aid (for a consideration of $150) to relieve her of her condition. Moreover, it is not to be believed that she would have expended that amount of money or that she would have been willing to suffer the pain and anxiety attendant on such an operation if she had not believed that her condition was as she described.

[20, 21] A witness cannot be impeached by evidence that he had committed wrongful acts other than the conviction of a felony. Code Civ.Proc. sec. 2051; People v. Buyle, 22 Cal.App.2d 143, 150, 70 P.2d 955. Knowledge on the part of the witness that she was violating the law in submitting to an abortion "could not exculpate appellant from criminal responsibility for the illegal acts she was charged with having committed." People v. Pappens, 5 Cal.App.2d 544, 547, 43 P.2d 371, 372.

[22] Appellant's contention that in sustaining the objections to the questions above outlined the court unreasonably or erroneously limited the cross-examination of the witness is without merit. The contention that the evidence sought was admissible for the purpose of showing whether or not Anne was an accomplice of appellant is likewise without merit. She was not an accomplice although section 1108 of the Penal Code required corroboration of her testimony. People v. Clapp, 24 Cal.2d 835, 839,

151 P.2d 237; People v. Wilson, 25 Cal.2d 341, 346, 153 P.2d 720; People v. Alvarez, 73 Cal.App.2d 528, 531, 166 P.2d 896.

3. *Alleged misconduct of the district attorney.* Appellant charges prejudicial misconduct on the part of the prosecutor.

[23] (a) The deputy district attorney displayed to the jury the instruments to which we have referred while showng them to a witness, a deputy sheriff who had found them in appellant's residence, in order that he might identify them. Appellant, Anne and others were present when they were found; they were identified by the officer as those that were on appellant's premises; the doctor testified that they could be used to perform an abortion; Anne testified to the use of an instrument inside her; they were received in evidence. Since they were relevant evidence in the case (People v. Baillie, 133 Cal.App. 508, 514, 24 P.2d 528; People v. Pierson, 69 Cal.App.2d 285, 297, 159 P.2d 39) and tended to connect appellant with the offense (People v. Wilson, supra) the prosecutor was not guilty of misconduct in exhibiting them to the jury. People v. Mundt, 31 Cal.App.2d 685, 689, 88 P.2d 767.

[24] (b) In his argument to the jury the deputy district attorney commented on appellant's failure to testify and to deny or explain the damaging evidence given against her. Appellant contends that such comment, together with section 13 of Article I of the Constitution of California and section 1323 of the Penal Code permitting the same, denied her due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. Appellant admits, as she must, that prior to the filing of her brief the same objection had been made in reviewing courts and had been overruled. People v. Adamson, 27 Cal.2d 478, 486, 165 P.2d 3; Adamson v. People of State of California, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903; rehearing denied, 68 S.Ct. 27, 92 L.Ed. 367. We have examined the prosecutor's argument to the jury and find nothing in it that transcends the bounds of legitimate argument on the evidence and on appellant's failure to testify in her own behalf.

[25] In this connection appellant repeats at unnecessary length all her previous arguments relating to the sufficiency of the evidence to prove the requisite elements of the offense and her objections to the admission of certain evidence. Since we have held that the evidence is sufficient to prove all the elements of the crime and to sustain the judgment and that there was no error in the reception of the evidence the district attorney had a right to comment on any and all of it.

[26] The comments permitted to a prosecutor are not limited to matters that are in evidence. People v. Eggers, 30 Cal.2d 676, 693, 185 P.2d 1; People v. Kynette, 15 Cal.2d 731, 732, 757, 104 P.2d 794; People v. Molina, 126 Cal. 505, 508, 59 P. 34. Reasonable inferences may be drawn from the evidence by counsel in argument. People v. Hoyt, 20 Cal.2d 306, 318, 125 P.2d 29; People v. Burdg, 95 Cal.App. 259, 269, 272 P. 816.

4. *Alleged errors in refusing instructions to the jury.* Appellant requested several instructions that were refused by the court by reason of which she assigns error. The instructions were to the effect (1) that it must be shown that the operation was performed with the intent of producing an abortion, and that it must be proved that the accused believed that the woman was pregnant at the time; (2) that the jury should acquit if they had a reasonable doubt (a) as to whether defendant believed that Anne was in fact pregnant, (b) as to whether instruments were used, (c) if used, whether they were used to produce a miscarriage; (3) that the belief by defendant of the pregnancy of Anne must be proved with the same degree of precision as every other material fact; (4) that if defendant administered drugs to the girl or used instruments on her she would not be guilty if she did not know or believe that the girl was pregnant; (5) that specific intent to procure a miscarriage must be proved to the exclusion of every reasonable doubt.

At the request of appellant the court gave an instruction to the effect that the gist of the offense charged against defendant is

that she used an instrument with the intent thereby to procure the miscarriage of the woman named in the information; that unless defendant had actual knowledge of the pregnancy of the woman or a belief that she was pregnant the required intent to procure the miscarriage of the woman could not exist; that the question arising was whether there was evidence other than that of the woman of sufficient substantiality to warrant a conclusion by the jury of the requisite guilty intent on the part of defendant; that if the prosecution failed to establish such requisite guilty intent on the part of defendant the jury must acquit her.

[27, 28] Every element of the refused instructions is contained in the instruction that was given, and the court did not err in declining to repeat the same theme. When a matter is covered by an instruction a defendant cannot complain because the court refuses to reiterate its substance in different words or in a different arrangement of words. The court is under no necessity to emphasize a point by repetitive statements in several separate instructions.

We have examined the entire set of instructions given by the court and find that on the whole they are liberal in setting forth all the points on which appellant relied at the trial and on which she relies on this appeal—in some respects more favorable than she had a right to expect.

An examination of the entire record shows that the trial judge was meticulous in rejecting all evidence offered against appellant concerning which there appeared to be a reasonable objection, in allowing the most liberal and extensive cross-examination of the witnesses for the prosecution, and in fully covering in the instructions all points raised by appellant in her defense. We find no error in the record.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

On Petition for Rehearing

PER CURIAM.

Appellant has filed a petition for rehearing insisting, as she did in her opening brief, that Dr. Newbarr's evidence concerning the bottles, cartons and other containers found in her home was incompetent because his testimony related to their contents without his having made an analysis thereof. On the contrary his evidence is replete with statements that he had no knowledge of the contents of the various containers but that his testimony referred only to the purpose and effect of the drugs named on their labels. (The emphasis indicated in the following quotations of questions and answers is added.)

(1) With reference to one of the containers the witness was asked: "From an examination of the label can you tell me what that drug is?" An objection to the question was properly sustained, after which these questions and answers appear:

"Q. Can you read the label? A. Yes, sir.

"Q. Will you do so, please? * * * A. It says 'Phenobarbital 1½ grain; acetylsalicylic acid (aspirin) 5 grains; caffein alkaloid ¼ grain; and tincture of gelselseminum 3 mins." * * *

"Q. Are you familiar with this particular drug, Doctor, *described on that label?* A. Yes, sir."

(2) Referring to another container: "Q. You have said as to the ingredients *shown on the label,* is that correct? A. Yes, sir."

(3) When asked concerning a box he was interrogated by counsel for appellant as follows: "Q. You are merely *reading from the label,* aren't you? A. Yes, sir.

(4) "Q. Doctor, what is that name? Will you pronounce it? A. Mercurophen, M-e-r-c-u-r-o-p-h-e-n.

"The Court: Those eight are next?

"Mr. Keeler: That is the eight, and all the cartons *are labeled* 'Mercurophen.'"

(5) "Q. Directing your attention to three only of what appears to be 20 tubes *labeled* 'Amp, 'ampule, 'Novocaine, 1 per cent solution.' Do you recognize that as a medicine, Doctor? * * * A. Yes."

(6) "Q. I show you here a pasteboard carton *labeled* 'Procaine hydrochloride, 2 per cent solution.' Do you recognize that, Doctor, as a form of medication? A. Yes, sir. * * *

"Mr. Lavine: Just a minute, Doctor. Are you reading from the label? A. That is right. *I am reading from the label.*"

(7) With reference to a bottle which the witness referred to as containing ergotrate:

"Mr. Lavine: Are you reading from the *label* only? A. Yes, sir.

"Mr. Lavine: Have you made any examination of the contents of the bottle itself? A. No, sir."

(8) Concerning another exhibit:

"Mr. Lavine: Just a minute, Doctor. I must inquire if he is just reading—are you just *reading from the label?* A. Yes sir, and looking at the capsules.

"Mr. Lavine: Without making an examination of the contents? A. That is right.

"Mr. Lavine: That you have before you, and you have not made any examination of the contents? A. No, sir."

(9) "Q. Here is a box *labeled* 'Donnatal' or however you pronounce it. Do you recognize that as a medical product, Doctor? A. Not the name; however, the ingredients are common.

"Q. You are indicating the ingredients *from the label,* are you? A. Yes, sir.

"Q. And what are those ingredients *given on the label?* A. It is phenobarbital, hyoscyamine, sulfate, stropine sulfate, and hyoscine hydrochloride."

(10) "Q. Doctor, would you be just kind enough to enumerate what else is in the box just in order that we may complete the exhibits? A. There are some ampules of distilled water. An empty bottle *with a label* of 'Rostigmin bromide.' This is an empty bottle with directions, but it doesn't state what is in it. Benzadrine sulfate, empty bottle, a half a tablet.

"Mr. Lavine: *You are just reading now from the label?* A. That is right. And a box of antiphlogistine. And a piece of rubber sheeting. One ampule of procaine hydrochloride, 2 per cent."

(11) Concerning a bottle which the witness said contained penicillin:

"Mr. Lavine: You are just reading from the label, are you, Doctor? You mean—no—reading from the label when you are examining the preparation, Doctor?

"The Witness: Looking at the ampule.

"Mr. Lavine: Did you examine the contents of the ampule?

"The Witness: No, sir.

"Mr. Lavine: Don't know whether it contains penicillin or not, then?

"The Witness: *No, sir, except for the label.*"

These are sufficient examples of the evidence to demonstrate that the witness was testifying concerning the various drugs which were named on labels of containers and that he did not claim to have any knowledge whatsoever of the contents of the bottles, boxes and cartons that were exhibited to him.

The only other point made on the petition for rehearing is that there was no evidence that appellant at any time touched the complaining witness. Anne testified that when she was taken into the room where the table was located appellant "was sitting there when I sat on the table"; that when the witness was on the table with her feet in the stirrups appellant was at her feet, "she was right between my legs"; the witness said that she closed her eyes and heard a "vacuumy" sound and "heard a faucet running"; that while appellant was in that position the witness felt something in her private parts and that she felt something inserted inside. There is no intimation in the record that any person other than appellant performed or could have performed the operation.

The petition for rehearing is denied.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

84 Cal.App.2d 177

## PEOPLE v. SHELDON.

Cr. 654.

District Court of Appeal, Fourth District, California.

March 2, 1948.

Rehearing Denied March 15, 1948.

Hearing Denied March 30, 1948.

1. Assault and battery ⇐91

Evidence sustained conviction of battery as against contention that defendant acted in self-defense and used only such force as was necessary to make an arrest as a special deputy sheriff.

2. Criminal law ⇐406(6)

The corpus delicti of the offense of battery was sufficiently established by evidence other than defendant's extra-judicial statements that he struck complaining witness to render such statements admissible.

3. Criminal law ⇐1170½(5)

Denying cross-examination of defendant's companion whether she pled guilty to a charge of being intoxicated at the time incidents occurred concerning which she testified in prosecution resulting in conviction of defendant of battery and admonishing jury to disregard the question was not prejudicial to defendant.

4. Criminal law ⇐798½

Where court submitted forms of verdict of guilty and not guilty of charge of assault by means of force likely to produce great bodily injury and a third form of verdict of guilty of battery, an included offense, failure to submit additional form of verdict of not guilty of battery was not error.

5. Criminal law ⇐1170½(6)

District attorney, claiming surprise at testimony of a prosecution witness and receiving negative reply to inquiry as to whether she had any bias against district attorney's office, did not commit prejudicial error by asking her whether district attorney's office had not prosecuted her husband on a charge of assault with a deadly weapon, where objection to question was sustained and jury instructed to disregard it.

6. Criminal law ⇐1039

Defendant could not for the first time on appeal from conviction of battery rely on alleged misconduct of juror as ground for reversal in absence of showing that such conduct was called to attention of trial judge either at the time or on motion for new trial.

---

Appeal from Superior Court, San Bernardino County; Stanley Mussell, Judge.

Fred Sheldon was convicted of offense of battery and he appeals.

Judgment affirmed.

Fred Sheldon, in pro per.

Fred N. Howser, Atty. Gen., and Wm. E. James, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant and appellant was charged in two counts with assault with a deadly weapon upon one George Woodhams, and in the third count, with an assault upon him, by means of force likely to produce great bodily injury, by violently striking him about the face. Defendant entered pleas of not guilty. At the conclusion of a jury trial, on motion of the district attorney, counts one and two were dismissed. Defendant was then found guilty of battery, a lesser offense included within the charge. Defendant was sentenced to 60 days in the county jail. No motion for new trial was made. This appeal is from the judgment.

The testimony of the complaining witness, if believed by the jury, clearly establishes defendant's guilt. He testified generally that he was an entomologist for a pest control association, and lived in Ontario; that on the night of January 11, 1947, he attended a show in San Bernardino; that while driving through Fontana on his way home, at about 1 a. m. he noticed a spotlight being flashed on the road just ahead of him; that it was later flashed in his eyes; that he turned his car around to obtain the number of the car flashing the light; that there was a man and woman in it; that he proceeded on his way and that that car proceeded to follow him and struck his car in the rear; that shots were fired; that they proceeded until the com-

plaining witness reached Upland; that he stopped his car and defendant was right behind him; that defendant got out and had a shotgun in his hand and flashed a light on him and yelled: "You stand still and don't move or I will shoot you"; that he noticed defendant had on some kind of a uniform; that he said to him: "If you are an officer why don't you show a red light or use a siren?"; that the defendant said he did not have that privilege (he was a night patrolman for the Sheldon's Detective Service, with a special deputy sheriff's badge); that defendant approached him all crouched over and pointed his gun at him and started to curse; that defendant threatened to handcuff him; that he heard a squeaking of leather and he felt an object "jammed in the middle of his back" and defendant said: "If you move I am going to shoot you". Defendant was carrying a revolver on his person at the time. He then testified that handcuffs were placed on him by defendant; that he felt himself being suddenly whirled around and that was the last he remembered until he "came to" in that police station. He testified that at that time his left eye was swollen badly and was bleeding; that his head pained him terrifically and his lower teeth were cracked on the inside; that he had had glasses on and there were glass cuts all around his eye; that the doctor removed a considerable amount of glass from his eye and that it was later "sewed up". These injuries were verified by a physician who attended him. A photograph of the complaining witness clearly shows the results of his eye injuries, as described by him. He then stated that he smelled liquor on defendant's breath.

Witnesses, who came out of a near-by building, corroborated his story in many respects, i. e. that the defendant used loud obscene language and that the complaining witness was inquiring what authority defendant had to arrest him; that after the handcuffs were "clicked" on the complaining witness there was heard a "terrific pop"; that they observed Woodhams fall to the ground; that defendant remained standing and ordered Woodhams to get up; that defendant picked him up by the collar and the police then arrived; that they told defendant: "That is no way to treat a prisoner, to handcuff him and then sock him"; that Sheldon said he was sorry that the witness "didn't see the law the way he saw it."

The police found bent glass frames, a broken lens, and drops of blood on the grass where the scuffle ensued. A shotgun was found on the grass about 12 feet south of the broken glass, with blood stains on it. One witness said he saw defendant pick up the gun and put it in his car, although he did not see Sheldon "tackling Woodhams". Defendant and the complaining witness were taken to the police station and questioned. Sheldon told the chief that he guessed he was in "quite a jam"; that he saw Woodhams, leaning against the door of the Hobby Knobby Store, one of the places he was to inspect in his nightly rounds; that he got out of his car to question him and that Woodhams started to leave in his car; that he pursued him thinking he was a burglar; that he cornered him in Upland and took him into custody; that Woodhams bit him on the thumb and that at that time he struck the complaining witness; that he knew he was wrong in so doing. Sheldon said he never had the shotgun out of the car; that he could not account for the blood on the gun. The chief smelled the odor of alcohol on defendant's breath and defendant admitted he had had "a few shots" but claimed that he was not drunk. The chief then testified that they examined the shotgun and it had an odor of burnt powder; that Sheldon had a revolver on him that night and he found two empty shells and four loaded ones in it; that the chamber of the gun showed indications of recent firings; that Woodhams was still wearing the handcuffs when he arrived at the station; that defendant said he was licensed under the state law and had a license to carry a "shotgun and a machine gun" and was also deputized as a deputy in Los Angeles and San Bernardino counties. The next day defendant told the chief that he fired two shots in the air to stop the complaining witness; that he did strike him while he had the handcuffs on him and signed a written statement to this effect. However, defendant claims some one inserted the last clause (about striking the complaining witness) therein after he had signed it.

The proprietress of the Hobby Knobby Store, who lived in the rear, testified that she had two dogs; that on the night in question they barked; that she got up but did not see any one; that the complaining witness came to her home two days later and asked her: "What kind of thugs she had to guard her place", stating that they were drunk and had shot at him. She testified that Woodhams told her that he was in her yard that night and was fired at twice. A deputy sheriff testified that he went to her property within an hour or so after the arrest of defendant and investigated the premises and found no signs of an attempted "break-in", and that no dogs barked. Other close neighbors testified that they heard no unusual noises about the premises that night. One testified she heard shots fired down the highway about one a. m.

The woman occupant of defendant's car, Mrs. Jones, was arrested for being intoxicated. She claims she entered a plea of guilty under coercion of the police and was fined $25. She told the officers that she was defendant's common-law wife. She signed a statement as "Mrs. F. S. Sheldon". On the witness stand she corroborated the defendant's story.

Defendant, after producing several character witnesses, testified that he observed an automobile in the driveway of the Hobby Knobby Store and saw a person in the shadows and that he spoke to him and the complaining witness asked him: "Who are you?"; that the suspect got in his car and backed into defendant's car and then started off; that he shot his revolver two times in the air to stop him; that pursuit followed and he stopped him in Upland and attempted to place him under arrest; that the complaining witness struggled with him when he tried to put handcuffs on him and that they both got hold of each other and fell to the ground; that the complaining witness bit him. He admitted he had had a cup of coffee and "one shot" to drink.

Mrs. Lenore Sheldon, wife of defendant, testified that she operated the Sheldon Detective Agency and Patrol; that her husband assisted her; that she had requested Mrs. Jones to go with her husband that evening as a witness.

Although defendant was represented by able counsel at the trial, he was unsuccessful in obtaining them or another attorney to represent him on this appeal. He has appealed in propria persona. As we analyze his briefs, his points on appeal are: (1) That the evidence is insufficient to sustain the verdict of guilty of battery in this: (a) that there was no evidence, except the extrajudicial statements of the defendant, that defendant struck Woodhams; (b) that if he did in fact strike him, it was in self-defense; (c) that whatever force was used by him was used in making the arrest as a special deputy sheriff.

[1] We have examined the entire record and have related, in detail, certain portions of the evidence bearing on these questions. It seems clear to us that the complaining witness was in fact injured about his face and eye. His glasses were broken and particles of glass were removed from the eye. He had cuts about the face. It does not seem logical to us that such injuries were self-inflicted. Other eye witnesses saw the defendant and the complaining witness and testified that after the handcuffs were "clicked" on the complaining witness there was heard a "terrific pop". The circumstances related, when considered with defendant's admissions, justify the conclusion of the jury that a battery was committed and might well have supported a more serious charge. People v. Bumbaugh, 48 Cal.App.2d 791, 120 P.2d 703; People v. Hinshaw, 194 Cal. 1, 227 P. 156.

A copy of the instructions given to the jury were left with this court by the defendant, accompanying his opening brief, for our consideration. It appears therefrom that a proper instruction on the question of self-defense was given. That issue of fact was decided by the jury adversely to the defendant.

It also appears that an instruction was given at defendant's request as to the amount of force defendant was entitled to use in making a lawful arrest. The subject was fully covered.

[2] It is next contended that since there was no evidence that defendant struck Woodhams and therefore no corpus delicti

established, the trial court erred in admitting his extra judicial statements. We see no merit to this contention for the reasons above expressed. No objection was made to the introduction of those statements at the trial.

[3] Mrs. Jones, on cross-examination, admitted signing the name of Mrs. Sheldon to her statement. She testified that she was not intoxicated that night and claimed that she did not say the things set forth in the statement. She was then asked if she did not plead guilty to a charge of being intoxicated at the time. Objection was made to the question by the prosecutor which was, after some argument, sustained and the jury admonished to disregard it. We see no prejudicial error in this respect.

[4] The next point arises out of the forms of verdict submitted. Three forms were given to the jury, one "guilty" and one "not guilty" verdict as to count three, and one "guilty of battery an included offense". It is argued that the trial court should have given the jury an additional verdict of "not guilty of battery an included offense." There is no merit to this argument. Under the charge, as submitted to the jury, it was not necessary for the jury to be furnished with such a verdict.

[5] Error is claimed in reference to a question asked by the district attorney of a prosecuting witness, Mrs. Bono, proprietress of the Hobby Knobby Store. To the claimed surprise of the district attorney, she testified that although she told Woodhams she heard no commotion or disturbance the night of January 11th, she now would say she heard a commotion. The district attorney then asked her if she had any bias or prejudice against the district attorney's office. She answered: "No, sir". He then propounded the question whether it was not a fact that the district attorney's office had prosecuted her husband on a charge of assault with a deadly weapon. Objection was made. The court sustained the objection and instructed the jury to disregard the question. No prejudicial error resulted.

[6] Lastly defendant, for the first time on appeal, raises a question as to the alleged conduct of some of the jurors. Attached to defendant's opening brief are several purported affidavits reciting that a certain witness for the prosecution remarked to one of the jurors during recess: "We have got to get a conviction on this or George will be sued." It does not appear from the record that such a happening was called to the attention of the trial judge either at the time or on a motion for new trial. No opportunity has been afforded the people to admit or refute the charges.

The last charge of misconduct of a juror is reflected in affidavits appended to defendant's brief reciting that one juror was sleeping during the reading of the instructions. This claimed fact was also raised for the first time on appeal and in the manner indicated. Defendant is now precluded from raising, for the first time, such claimed conduct as ground for reversal. People v. Emmons, 7 Cal.App. 685, 702, 95 P. 1032; People v. Averett, 54 Cal.App.2d 625, 129 P.2d 739; People v. Galloway, 202 Cal. 81, 259 P. 332. There may be other persuasive arguments advanced why the claimed conduct was not prejudicial error. There is no proper showing that the juror was not merely resting his eyes and did not at all times hear the instructions being read, nor if he was asleep, as claimed, is it shown who caused him to fall asleep or whether it was during the reading of the people's instructions or the reading of the defendant's instructions that he fell asleep, or that the attention of the court was called to the fact, or, as indicated by defendant's own statement, it would have made any difference in the verdict rendered if he had been awake. Defendant recites that he did call his own attorney's attention to the fact and his attorney made no objection but replied: "He is just along for the ride and will vote either way."

In view of the fact that the defendant is representing himself on this appeal we have thoroughly examined the instructions refused and given and the entire record of the evidence. Our conclusion is that the defendant had a fair and impartial trial and that the evidence fully justifies the verdict and punishment inflicted.

Judgment affirmed.

BARNARD, P. J., concurs.

## CALVERT v. STONER.

## STONER et ux. v. CALVERT et al. *

Civ. 16121, 16122.

District Court of Appeal, Second District, Division 2, California.

March 3, 1948.

Rehearing Denied March 19, 1948.

Hearing Granted April 29, 1948.

**1. Appeal and error ⇐1071(1)**

Where trial court found that matters referred to in a particular paragraph in amended complaint had been fully adjudicated in a specified probate proceeding and, in a second finding, found that paragraph of affirmative defense which averred that relief sought in amended complaint was previously adjudicated in such probate proceeding was untrue, a reversal was required on ground that findings were irreconcilable.

**2. Appeal and error ⇐1071(1)**

Where there are irreconcilable findings upon a material issue a reversal is required.

**3. Appeal and error ⇐1172(1)**

Where two actions were consolidated for trial and the judgment of one was dependent upon the judgment in the other, and a reversal of one judgment was required because of irreconcilable conflict in the findings, judgment in other case was likewise reversed.

---

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Samuel C. Stoner and Bessie M. Stoner, husband and wife, against Maud Sarah Amy Calvert and others for partition, which was consolidated for trial with an action by Maud Sarah Amy Calvert against Samuel C. Stoner and others to have defendants declared constructive trustees of the interests which they claimed in such real estate, and for other relief. From a judgment for the plaintiffs in the partition action defendants appeal and from a judgment for the defendants in the trust action, plaintiff appeals.

Judgment in each action reversed.

Avery M. Blount and William J. Clark, both of Los Angeles, for appellants.

Everett H. Smith and Marvin Wellins, both of Los Angeles, for respondents.

McCOMB, Justice.

Plaintiffs brought suit in the superior court against defendants for the partition of certain real properties in the city and county of Los Angeles. The fractional interests of plaintiffs in the properties had been obtained as a fee for certain legal services rendered by plaintiff Samuel C. Stoner for defendant Maud Sarah Amy Calvert. Thereafter defendant Calvert filed suit in the superior court of Los Angeles county against plaintiffs to have them declared constructive trustees of the interests which they claimed in the properties and which were the basis of the partition suit, and for other relief arising out of the alleged fraud of the plaintiff Samuel C. Stoner in obtaining interests in the property mentioned in the partition suit.

The cases were consolidated for trial, and after trial before the court without a jury, judgment was rendered in favor of plaintiffs in the partition suit and in favor of defendants in the action to have a constructive trust declared.

So far as material here the essential facts are these:

Plaintiff Samuel C. Stoner was retained as attorney for defendant Maud Calvert to represent her in certain probate litigation involving the will of her father. Mr. Stoner was retained by written agreement which provided that he would handle the case on a contingent fee of one third of anything which she should receive from the estate of her father over and above twenty-five dollars per month bequeathed to her in his will. Thereafter, on June 17, 1942, said plaintiff and said defendant entered into a supplemental agreement whereby Stoner agreed to pay one third of the court costs involved in the litigation, and at the same time defendant Maud Calvert executed an assignment in favor of Stoner of an undivided one-third interest in and to all of her share of the property of her father's estate to which she might be entitled.

In due time a decree of distribution was entered distributing the real property in litigation, one third to Mr. Stoner and

* Subsequent opinion 199 P.2d 297.

two thirds to defendant Maud Calvert, as joint tenants.

A

Pleadings

Paragraph XI of the amended complaint to have a trust declared read as follows:

"That in truth and in fact there was no necessity or reason for contesting the Will or any portion thereof as the defendant then and there well knew; that in truth and in fact an application for Letters of Administration was a proper step to be taken in plaintiff's behalf as the defendant then and there well knew in truth and in fact there was no danger whatever that defendant would not be fully compensated out of the assets of the estate of said decedent for any services which he might render to plaintiff in connection with said estate as he, the defendant, then and there well knew; that in truth and in fact there were numerous ways in which the invalidity of said Will could be brought to the attention of the court without a contest of said Will as he, the defendant, then and there well knew."

Paragraph XI of the answer to the amended complaint read as follows:

"Denies generally and specifically each and every and all of the allegations contained in paragraph XI of plaintiff's amended complaint, and in this behalf defendant refers the Court to the hereinbefore mentioned probate file in the matter of the Estate of Frank Eli Keller, being case number 213350, and specifically avers that solely by reason of the steps and proceedings taken by defendant herein, all of the matters referred to in paragraph XI of plaintiff's amended complaint have been and are fully executed as to the contract of and for compensation, and fully adjudicated in said Probate Proceedings and fully adjudicated in another action heretofore tried in this Court."

And as a second and separate affirmative defense, defendant alleged:

"III

"Defendant further avers that the relief sought in plaintiff's amended complaint has heretofore been adjudicated by judgment in that certain action number 495724, in which said judgment has become and is now final, and plaintiff's amended complaint herein attempts to restate a cause of action upon the same ground as that in which said judgment has heretofore been rendered, and is now final."

B

Findings

In response to the issues thus created the court found:

(1) "The Court finds the allegations of paragraph XI to be untrue, and in this behalf the Court further finds that in the matter of the estate of Frank Eli Keller, being Probate No. 213350, all of the acts and things to be done and performed by defendant as attorney for plaintiff were fully executed by defendant and fully adjudicated and determined in said Probate Proceedings and in said Superior Court Action No. 495724."

(2) "As to the defendant's second separate and affirmative defense * * *

"The Court finds the allegations of paragraph three to be untrue."

This is the sole question necessary for us to determine:

*Are the foregoing findings irreconcilable?*

[1] This question must be answered in the affirmative. The trial court has found that the relief sought in plaintiff's amended complaint has heretofore been adjudicated by judgment in that certain action numbered 495724 (finding (1) supra). It has likewise found that the relief sought in plaintiff's amended complaint has not been adjudicated by judgment in action numbered 495724 (finding (2) supra).

If the first finding of the trial court is correct then plaintiff was not entitled to any relief under the amended complaint. On the other hand, if the relief sought in plaintiff's amended complaint had not been previously adjudicated the issues had not been determined from the evidence presented to the probate court and the trial judge in the present case should have determined the issues upon the evidence before him.

[2] The rule is settled that where there are irreconcilable findings upon a material issue an appellate court can do nothing but reverse the case. (Mohun v. Timm, 20 Cal. App.2d 136, 139, 66 P.2d 701; Hill v. Donnelly, 43 Cal.App.2d 47, 52, 110 P.2d 135.)

[3] In view of the hopeless conflict in findings the judgment in the action to have a constructive trust declared must be reversed. If on a retrial judgment should be entered in favor of plaintiff, then the judgment in the partition action should be in favor of the defendant in such action and not the plaintiff. Hence the judgment in the partition action must also be reversed.

The judgment in each action is reversed.

MOORE, P. J., and WILSON, J., concur.




83 Cal.App.2d 534

**In re LLEWELLYN'S ESTATE.**

**LLEWELLYN v. CHEESEWRIGHT et al.**

**Civ. 15789.**

District Court of Appeal, Second District, Division 1, California.

Feb. 9, 1948.

Rehearing Denied March 8, 1948.

Hearing Denied April 6, 1948.

See 191 P.2d 419.

**1. Wills ⇐386**

Where verdict in will contest is attacked as not supported by substantial evidence, province of appellate tribunal begins and ends with determination of whether there is any substantial evidence, contradicted or uncontradicted, which will support verdict, and when two or more inferences can reasonably be deduced from facts, reviewing court may not substitute its deductions for those of jury.

**2. Wills ⇐324(1)**

In will contest, weight of evidence and credibility of witnesses were for jury and jury could accept as true all evidence of contestants and reject all contradictory evidence of proponent.

**3. Wills ⇐53(2), 164(7)**

In will contest based on mental incompetency and undue influence, evidence concerning condition of testator before and after actual date and time when will was executed was admissible only in so far as it tended to show testator's condition at very time will was made.

**4. Wills ⇐45, 47**

Feeble health, disease, age and infirmity do not establish testamentary incapacity unless condition is such at time of executing will that testator is unable to understand nature and situation of property and the disposition thereof intelligently. Probate Code, § 20.

**5. Wills ⇐52(1)**

Presumptively, testator was of sound mind at time of executing will and burden is upon contestants to show affirmatively and by preponderance of evidence incapacity which affected disposition of property.

**6. Wills ⇐52(6)**

Presumption of testamentary capacity is destroyed only when by substantial evidence it is shown that testator was unable to understand and carry in his mind the nature and situation of his property, his relations to his relatives and those around him, incapable of understanding the act he was performing, and the relation in which he stood to the objects of his bounty.

**7. Wills ⇐55(5)**

In will contest, evidence that testator had been deteriorating physically and mentally both before and after executing will, that at times he talked irrationally and that his memory was poor, was insufficient to sustain finding of mental incompetency.

**8. Wills ⇐166(5)**

A will may not be held invalid for undue influence however unnatural it may appear to be or however much at variance with expressions by testator as to his intentions with regard to relatives or natural subjects of his bounty, unless there be an actual showing of pressure which overpowered the mind and mastered the volition of testator at very moment of executing will.

**9. Wills ⇐163(2)**

One who unduly profits by will as beneficiary thereunder, who sustains confidential relation to testator, and who actually participates in procuring execution of will, has burden of showing that will was not induced by coercion or fraud.

**10. Wills ⇐163(2)**

Proof of confidential relationship between testator and beneficiary, and of ac-

tivity by beneficiary in preparation of will creates presumption of undue influence.

**11. Wills ⇐157**

"Confidential" and "fiduciary relations" are synonymous, and exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another, as respects undue influence of testator.

See Words and Phrases, Permanent Edition, for all other definitions of "Confidential Relations" and "Fiduciary Relations".

**12. Wills ⇐157**

Blood relationship is important and material circumstance in considering whether confidential relationship exists between testator and another.

**13. Wills ⇐166(2)**

In will contest, evidence that testator had characterized proponent as "stingy", "greedy" and "grasping", that testator had refused to give proponent his "lock box keys" upon request, and that testator had refused to sign a will presented to him by proponent, negatived any inference that trust and confidence was reposed by testator in integrity of proponent, his brother, as would establish existence of a confidential relationship between them.

**14. Wills ⇐163(1), 324(3)**

Before there is imposed upon proponent of a will obligation of presenting evidence of volition and before question of undue influence becomes one of fact for jury, there must be evidence, probative force of which establishes relations between one charged with exercising undue influence and decedent affording the former an opportunity to control the testamentary act, that decedent's condition was such as to permit subversion of his freedom of will, that there was activity by person charged with exercising undue influence, and that such person unduly profited as beneficiary under the will.

**15. Wills ⇐166(1)**

In will contest, evidence of undue influence must show that pressure was brought to bear directly upon the testamentary act.

**16. Evidence ⇐54, 595**

The right of courts and juries to draw inferences is not arbitrary and unrestrained and inference must not only be founded on a fact legally proven but on such deduction from that fact as is warranted by consideration, among other things, of the propensities of people and course of nature. Code Civ.Proc. § 1960.

**17. Wills ⇐163(1)**

Undue influence on testator could not be assumed in absence of evidence since it is necessary to presume innocence of wrongdoing. Code Civ.Proc. § 1963, subd. 1.

**18. Wills ⇐155(1)**

Mere opportunity, even if coupled with motive to influence testamentary act, is not sufficient to invalidate such act.

**19. Wills ⇐166(1)**

Evidence of undue influence must indicate more than general influence and must show pressure overpowering mind and bearing down volition of testator at very time will was made.

**20. Wills ⇐165(5)**

In will contest, declarations of testator that he intended to take care of contestants were admissible only to show relations between them and state of testator's mind with reference to contestants.

**21. Wills ⇐155(1)**

Contracting, at request of testator, the attorney who prepared will, and procuring attendance of a witness at request of attorney did not constitute "participation", as element of undue influence.

See Words and Phrases, Permanent Edition, for all other definitions of "Participation".

**22. Wills ⇐163(6)**

Claimed unnatural provisions of will may be considered as an element supporting inference of undue influence. Probate Code, § 20.

**23. Wills ⇐163(6)**

Will in favor of brother was not unnatural so as to support inference of undue influence because not containing provision for nephew and niece, notwithstanding will was at variance with prior wills in their

favor where ample provision had otherwise been made for them.

**24. Wills ⇐166(1)**

Where there are facts explanatory of conflict between will offered for probate and prior wills and circumstances disclose an adequate reason for a departure from the prior will, the fact of conflicting intention must be deemed to be without probative force.

**25. Wills ⇐82**

A will cannot be characterized as "unnatural" even though those not remembered therein are the natural objects of testator's bounty, where the evidence shows that such persons were in no need of funds, aid or assistance.

See Words and Phrases, Permanent Edition, for all other definitions of "Unnatural Will".

**26. Wills ⇐166(4)**

In will contest, evidence that over a period of several years proponent had suggested to testator that he change terms of will, that from time testator entered hospital proponent visited him two or three times a day, that proponent was instrumental in having attorney who prepared will go to the hospital, that proponent suggested certain individual as witness and took him to testator's hospital room, and that proponent obtained copy of will was insufficient to sustain finding of undue influence.

---

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Proceeding in the matter of the estate of William Llewellyn, deceased, wherein will offered for probate by David E. Llewellyn was contested by Gwendolyn M. Cheesewright, and another. Judgment for contestants and the proponent appeals.

Reversed and cause remanded with instructions.

Joseph Scott, Edward R. Young, J. Howard Ziemann and Cuthbert J. Scott, all of Los Angeles, for appellant.

Jones, Thompson & Kelly, of Los Angeles, for respondent, Gwendolyn M. Cheesewright.

Irving M. Walker, of Los Angeles, for respondent Reese L. Milner.

WHITE, Justice.

This appeal is from a judgment entered on the special verdicts of the jury that the document offered for probate as decedent's last will and testament was executed while he was (1) mentally incompetent to execute such an instrument, and (2) acting under the undue influence of the proponent and appellant herein.

Motions were appropriately made by appellant for a directed verdict, for judgment notwithstanding the verdict, and for a new trial, all of which were denied.

The decedent, William Llewellyn, at the time of his death was about 78 years of age and had resided in this community practically all of his life. He came from a large family — five boys and one girl. All of the brothers and their sister lived in the family home in Berkeley Square, Los Angeles, save and except David Llewellyn, appellant herein, who had married and lived in his own residence. The only sister married John Milner and with her husband continued to reside in the Berkeley Square home. The contestants herein are the issue of the marriage of said sister, Winnie Llewellyn and John Milner. They were raised in the Berkeley Square home with their uncles, other than appellant herein. Gwendolyn continued to live there until her marriage in 1932 and Reese L. Milner continued to live in this house up to the time of the trial.

For some years prior to 1920 the Llewellyn brothers and their sister's husband were engaged in the manufacture and fabrication of steel and iron, as directors and officers of the Llewellyn Iron Works. In January of 1928, Llewellyn Iron Works was merged with or absorbed by Consolidated Steel, and the assets of the former were divided up between the members of the Llewellyn family. All of them except appellant David Llewellyn established an office and functioned as a group. Other than appellant, they continued to live together and with them lived respondents, the children of the sister Winnie and her husband. Prior to the execution of the will here in question, all of the members of the Llewellyn family had died except the testator William Llewellyn, his brother David, appellant herein, and the two contestants and respondents, children of Winnie Llewellyn Milner. Upon the demise

of Mrs. Milner in 1942, her husband having predeceased her, the decedent and his nephew Reese Milner, respondent, were the sole occupants of the old family home. However, decedent did not remain there constantly, the record indicating that in 1942, 1943 and 1944 he resided for certain intervals at the Jonathan Club in Los Angeles.

In the latter part of 1944 decedent's health was failing and he made complaint thereof to the physical director at the Jonathan Club who recommended that he consult with a doctor. Subsequently, decedent contacted a physician who found it impossible to secure accommodations at any Los Angeles hospital. However, a registered nurse was engaged who reported to decedent at his Brekeley Square residence. At the trial this nurse testified that she treated decedent for a rectal impaction which required frequent flushings and other medical care.

About March 3, 1945, decedent was removed to the Good Samaritan Hospital in Los Angeles, where he remained until his death on September 11 of the same year. While at the hospital decedent was constantly under the care of three special nurses, each working on an eight-hour shift. He was also treated by three physicians, only one of whom was called as a witness at the trial, and who testified that an examination made of decedent immediately upon his entry to the hospital disclosed an abdomen greatly distended with fluid, apparently caused by a liver condition. The fluid was removed from time to time by tapping. Decedent was also treated for his rectal trouble, which seemed to increase as time went on. He also suffered from hardening of the liver, an atrophic cirrhosis of the liver which means a destruction of the liver cells. Decedent was also afflicted with stones in the gall bladder and an ulcer in the rectum. Though decedent's illness never made him bedridden, in the early part of September he became progressively worse until on the 11th of that month he succumbed.

Concerning the circumstances surrounding the execution of the will, the record reveals that some three or four days after decedent's arrival at the hospital, he was visited by his brother, appellant herein. During the visit decedent stated that he desired to see three old friends, namely, Oscar Mueller, Sheriff Biscailuz, and Ernie Rivers; that he wished to see Mr. Mueller "to discuss my affairs and make out a new will". About 5 o'clock on the morning of March 9, decedent's nurse telephoned appellant and said that the decedent "had something very important to talk to him about, to please come up". Appellant went to the hospital, arriving there about 6:30 o'clock and spent about an hour with his brother. Nobody else was present. Decedent asked his brother if accommodations could not be secured elsewhere as he was not happy at the hospital. Appellant brother replied that he was going to try the Biltmore Hotel and also the Beverly Hills Hotel, although they were both filled at that time. For the stated reason that decedent had once before requested him to do so, appellant telephoned Attorney Mueller later that morning, stating that his brother wanted to see the attorney about drawing a will. Mr. Mueller, a practicing attorney in Los Angeles since 1898, although semi-active since 1928, had known the Llewellyn family, including the decedent, for some fifty years. However, at no time had he ever represented appellant herein. The latter made arrangements to meet Attorney Mueller after a symphony concert which he and his wife had planned to attend that afternoon, and take them to the hospital. Pursuant to the aforesaid plans, appellant, Attorney Mueller and the latter's wife, proceeded to the hospital at the appointed time. Appellant and Mrs. Mueller remained in one of the downstairs reception rooms while the attorney went upstairs to see the decedent. According to Attorney Mueller, he and the decedent then discussed current affairs for some time and engaged in reminiscences about early days in Los Angeles and other past events. The decedent reminded Attorney Mueller of an incident at a ranch once owned by the Llewellyn family when the lawyer drew a will for him. Decedent told Attorney Mueller he would like to have a will drawn, to which the attorney replied,"Well, I said, 'Bill, if you want a will, I will be willing to draw it if it is a short will; but if there is anything like a lengthy will that you want I am not in a po-

sition to do it because I don't employ a stenographer.' He said, 'That is all I want; I just want a short will.'

"Shortly thereafter decedent said, 'I have a brother and I have a nephew and I have a niece, Bud and Gwen.' He never referred to them as Reese and Gwendolyn. I knew them fairly well, not as well as I knew the brothers. And he said, 'I take it this way—I went through hell and dynamite with my brothers to make this money and I am going to leave the money to my brother Dave; both Gwen and Bud have received over a million dollars from the Llewellyns'; and he said, 'That ain't hay, is it'?"

Thereupon, Attorney Mueller made a short memorandum in pencil and told the decedent that it would be necessary to have a witness to the will. The decedent suggested Sheriff Biscailuz but the attorney suggested it was pretty late in the day to obtain the presence of that official. Decedent then suggested Mr. Arthur Brown, an old friend whose wife was a patient in the hospital. Thereupon, Attorney Mueller went in search of Mr. Brown and when the latter was found he expressed a willingness to act as a witness. Attorney Mueller then went downstairs and wrote out the will in longhand on a form which he had previously secured. Upon the conclusion of this task he was unable to locate Mr. Brown, so he asked his wife, who had known the decedent over a long period of years, whether she would agree to act as a witness to the will. She acquiesced and accompanied her husband upstairs, where they both chatted with decedent for a few moments, and then Attorney Mueller handed decedent the will he had written out in longhand. After signing the same, decedent stated he was not satisfied with his signature and asked the attorney if it would be too much trouble for him to come back and draw another will. Decedent stated at that time he might want to make another change. Attorney Mueller agreed to this suggestion and thereupon with his wife left decedent's room.

On the afternoon of Monday, March 12, Attorney Mueller took a taxi to downtown Los Angeles and arrived at the hospital a little after 4 o'clock. Upon arrival at the hospital, he met the appellant "downstairs someplace, either in the reception room or someplace". The attorney asked appellant to ascertain if Mr. Arthur Brown was in the hospital visiting his wife, and thereupon went upstairs to see the decedent. Upon arrival in the decedent's room he found the latter sitting by the window smoking a cigarette. Decedent, when asked if he wanted to make any change in the will drawn three days previously, replied, "No, it is just the same, I want Dave to have everything". Attorney Mueller then went downstairs, where he located Mr. Brown in the company of appellant in one of the reception rooms. Accompanied by Attorney Mueller, Brown thereupon went upstairs, where the attorney took a printed form, similar to the one he had filled out on March 9, filled it out in the presence of the decedent and Mr. Brown. He then read the will out loud and handed it to the decedent. After decedent had read the will, Attorney Mueller said, "Is this the way you want the will, Bill?", to which the decedent replied, "Yes, that's the way I want it." The document was executed; decedent told Attorney Mueller to put the same in the latter's safety deposit box. This is the will involved in this litigation.

In the course of the conversation preceding execution of the will, decedent again brought up the fact that respondents had received over a million dollars from the Llewellyn family, adding, "I think that is enough for young people, don't you think so?"

It further appears, from the record, that either on this occasion or on the afternoon of March 9, decedent had this to say with respect to the extent of his property: "Now you know, Oscar (referring to Attorney Mueller), I haven't a large estate to leave; my estate is comparatively small if you are going to compare it to Bud's and Gwen's (respondents herein), * * * Theirs is very large and mine is comparatively small."

There was also testimony reflected by the hospital records that on March 8, at 11:45 p.m., the patient (decedent) was "cursing and swearing and seems very dissatisfied." On March 9, at 12:45 a.m., one and one-half grains of nembutal were administered. At 1:30 a.m. decedent was

awake and "talking mean and demanding", and that he would not keep the binder and dressing on his abdomen. At 3 a.m. the patient was restless and talking a lot. At 3:40 a.m. he was calmer and asking for his brother, appellant herein. At 6:30 a.m. appellant visited his brother. At 12 o'clock noon decedent awakened or was awakened for lunch and seemed relaxed and comfortable. At 12:30 p.m. he fell asleep, and at 3 p.m. was still asleep. The hospital records contain a notation that at 5 p.m. "patient's brother and Mr. Mueller here for about forty minutes". This was the day on which the will of March 9 was executed. We mention the circumstances surrounding the execution of both wills, although only the will of March 12 was offered for probate, because both wills were practically identical. Respondents direct our attention to the fact that while appellant testified that on March 9 he was not in his brother's room at any time while Attorney Mueller was there, that Mr. Brown, one of the subscribing witnesses, testified that when he went to decedent's room to act as a witness to the will "Dave Llewellyn (appellant) took me in there". This testimony, argues respondents, entitled the jury to disregard the testimony of appellant and Attorney Mueller that the former was not in his brother's room when the will of March 9 "was discussed or signed" and warrants an inference by the jury that appellant was also in the room and participated actively in the execution of the will of March 12, here under attack.

In urging a reversal of the judgment herein, appellant asserts:

"1. There is no substantial evidence to sustain the specific finding of the jury that the decedent was not of sound and disposing mind and memory at the time he executed the will in question.

"2. There is no substantial evidence to support the specific finding of the jury that the instrument offered for probate as the last will and testament of the decedent was procured by and through the undue influence of the proponent, David E. Llewellyn."

[1, 2] When an attack is made upon a verdict rendered in a will contest on the ground that it is not supported by substantial evidence, the province of an appellate tribunal is the same as in any other civil case. And the power of a reviewing court "begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. And when two or more inferences can reasonably be deduced from the facts, a reviewing court is not authorized to substitute its deductions for those of the triers of fact". Estate of Russell, 80 Cal.App.2d 711, 715, 182 P.2d 318, 321. Since our duty begins and ends with a determination of whether there is adequate evidence to support the findings of the jury and the judgment of the trial court, we shall not attempt to analyze the evidence given by witnesses produced on behalf of the appellant. Because we are authorized only to consider the evidence and not to weigh the same, it would be but an idle act to attempt a review of evidence in conflict with that offered by respondents. The weight of evidence and the credibility of witnesses are functions of the jury, which had the right to accept as true all of the evidence in support of the claims of respondents and to reject all of the evidence offered in behalf of appellant which was in any way contradictory to that of respondents, or otherwise impeached.

Adhering to the rules just announced, we come now to a consideration of such evidence as was offered in support of the verdicts and judgments predicated thereon, to determine therefrom whether it is of such substantial character as to justify the verdicts and judgment.

There was testimony that decedent was very much devoted to his deceased sister, the mother of contestants, one of whom, Mrs. Cheesewright, testified, "My Uncle Will adored my mother". And that after the death of her mother decedent would tell the witness, "Little dear, you mean so much to me and you take your mother's place". The witness Mary Somers Pfaff, employed by the Llewellyn family, other than appellant, in a confidential business capacity, testified that decedent was "devoted" to his sister. With reference to the relationship existing between decedent and

respondent Reese L. Milner, the latter's sister testified that, except for short periods when decedent would "become very provoked with my brother, and then the next hour or the next day he would be feeling very solicitous about him again", that the relationship between the two "was almost a father-and-son relationship".

Following the death of the mother of respondents in 1942, decedent took his nephew Reese Milner on short trips, and as late as November, 1944, spent some time with him at a ranch. Mrs. Pfaff testified that the decedent "was very proud of Mr. Milner, the fact that he was as successful in business as he was and spent so much time taking care of his business". This witness also testified that on several occasions while decedent was in the hospital he told her that "Mr. Milner, or Bud (one of respondents) and David Llewellyn were both pestering him to find out what was in his will * * * but he was not going to tell anybody." That very often decedent said, "* * * that Reese Milner was grasping but Dave (appellant) was much more grasping". Barclay Shields, employed by the decedent from 1941 to 1943 as a nurse and companion, testified that the testator's relationship with his nephew Reese Milner "was a combination of very friendly and very stormy at times". When asked to explain, the witness said, "Well, Mr. Llewellyn was very fond of Bud, but he would become irritated quite often because Bud didn't or would not stay home and play dominoes and he promised to do something and didn't do it. That was the stormy part of it." The witness also stated that this attitude of irritation toward Reese Milner did not last "very long", and that after it had passed, decedent "would be very proud".

Asked to explain what decedent said to him, indicating that he was "very proud" of Reese Milner, the witness replied, "Well, it was sort of like a father talking about his son, as near as I could say—proud of his build or what he did in business, or things of that kind". The witness also testified that the attitude of Reese Milner towards his uncle was "very friendly". We find no contradiction in the record of the testimony given by the witness Shields who epitomized the attitude of decedent towards his niece, respondent Gwendolyn Cheesewright, as follows: "She was like a daughter. He (decedent) had known her since she was a little baby and been in the house with her"; that decedent always referred to his niece as "a little dear", saying that she was as nice as her mother whom he "dearly loved".

Also introduced into evidence by respondents were two former wills executed by decedent, entirely inconsistent with the wills of March 9 and March 12, 1945. The first was a holographic will dated October 1, 1942; the circumstances of its execution are not disclosed. By its terms Reese Milner was appointed executor, without bond. The decedent's diamond ring was bequeathed to Reese Milner and the balance of the estate was divided equally between him and his sister, Mrs. Cheesewright, with a provision that if either of them predeceased the testator, the entire estate should go to the survivor.

The second will, dated March 11, 1943, was drawn by Attorney Paul Nourse, at the request of the testator, in the former's office, after a full discussion with the testator as to the various items of his property and what disposition he desired to make of the same. This will bequeathed to appellant herein the testator's diamond ring, his shares of stock in the Recreation Gun Club and $10,000 in United States defense bonds. It gave to Barclay Shields, the aforesaid nurse and companion of the testator, the latter's automobile, and to Theresa Hoelvl, described as "the faithful servant of my sister and myself for more that sixteen years" the sum of $1,000. The residue of the estate was divided equally between respondents herein. Mrs. Pfaff, confidential secretary of the Llewellyn family, was appointed executor, without bond. This will of March 11, 1943, contains the following statement, "I make the division of my property between my brother and my nephew and niece above mentioned for the following reasons: I have a great affection for my brother, but he is amply provided for and while younger than I am will not have need of any gift from me, and while my nephew and my niece are amply provided for through inheritance from others, they were born and raised in the household while

I was a member and have been as close to me as if they were my own children."

Respondents concede that on March 11, 1943, when this will was executed, the testator was of sound and disposing mind and not acting under duress.

Thus far we have devoted ourselves to testimony which presents a picture of the relationship existing between the testator, appellant and respondents herein, something of the circumstances surrounding the execution of the will of March 9 and the one here under attack, dated March 12, 1945, and in general, the physical condition of the testator when he entered the hospital and during his stay therein.

We shall now give consideration to the testimony which respondents earnestly assert possesses sufficient substantiality to support the specific finding of the jury that the testator was bereft of testamentary capacity at the time he signed the will of March 12, 1945, which was denied admission to probate.

The hospital records pertaining to decedent were introduced into evidence by respondents. They included notations made by the attending physicians and the bedside notes made by the nurses. We quote from some of such records to which respondents direct our attention. These records all refer to dates in March, 1945:

| Report of Medicine Given | Nurses' Bedside Notes | Doctors' Records |
|---|---|---|
| 8:30 p.m. Seconal | March 3rd | |
| 1:45 a.m. Seconal 8:00 p.m. Nembutal | March 4th<br>7:00 a.m. Makes remarks that are completely irrational. "Did not stay to dance" (Nickerson)<br>3:00 p.m. Mind more confused. (Nickerson) | Restless and confused after seconal—to try nembutal (Hawkins) |
| | March 5th<br>3:15 a.m. Patient confused Sleeping on nembutal (Nickerson) | |
| | March 6th<br>3:30 p.m. Somewhat confused | |
| | March 8th<br>11:45 p.m. Patient cursing and swearing; seems very dissatisfied. (Anderson) | March 8th<br>Abdomen full of fluid |
| March 9th<br>12:45 a.m.<br>Nembutal 1½ gr | March 9th<br>1:30 a.m. Patient awake and talking mean and demanding. Would not keep binder and dressing on abdomen. (Anderson)<br>3:00 a.m. Restless and talking a lot, up on chair, smoking. (Anderson ) | March 9th<br>Pretibial oedema and swelling of scrotum; also set oedema lower abdomenal wall. 20 c. c. completed and catheterization attempted c success. |

March 9th

9:30 a.m.
Has slept soundly until now. Turning and jerking in sleep.
9:35 a.m.
Patient is still sleepy but in good spirits.
12 m.
Awakened for lunch. Fair appetite. Relaxed and comfortable.
12:30 p.m.
Is tired and sleepy. Wants to go to bed again. Sleeping at once.
1:20 p.m.
Slept nearly all day.
3:00 p.m.
Patient sound asleep

9:00 p.m.
Phenobarbital

March 11th
12:40 a.m.
Awake, having discomfort around swollen scrotum.

3:40 a.m. Patient is much calmer, asking for brother. (Anderson)

6:30 a.m. Visiting with brother. (Nickerson)

5:00 p.m. Patient's brother and Mr. Mueller here for about 40 minutes.

(Will of March 9 executed)

March 10th

7:30 p.m. Phenobarbital for nervousness.

11:00 p.m. Patient seems distressed or rather worrying about something.

11:25 p.m. Mind quite clear.

March 11th

2:45 a.m. Awake. Seems not so depressed.

7:00 a.m. Pulse a little weaker than usual.

8:20 a.m. Is very groggy (Nickerson)

3:30 p.m. Brother visiting.

March 12th

12:20 a.m. Sleeping short intervals

Liver remains about the same size but there has been a change. It is definitely more nodular and rouch. (Hawkins)

1:45 a.m. Awake. Discomfort in scrotum and rectum.

2:50 a.m.
Phenobarbital.

10:00 a.m. To bed. Brother visits.

3:00 p.m. Has had good day generally, seeming somewhat weaker at times.

4:00 p.m. Mentally very clear.

4:30 p.m. Mr. Mueller and Mr. Brown with patient.
(Will under attack executed)

5:00 p.m. Brother visited for 20 minutes.

March 13th

6:30 a.m.
"Did not sleep hardly any all night" (Anderson)

There was also testimony that after his admission to the hospital on March 3, 1945, and prior thereto, the testator was suffering considerable physical pain practically all all the time; that he found it increasingly difficult to sit up. Respondent Gwendolyn Milner Cheesewright testified that when she saw the testator in the hospital his mental condition was "considerably worse * * * his memory was poorer, he seemed much more ill"; that on different occasions he "thought he was on a ship"; that from the time he entered the hospital the testator "seemed to be disoriented the greater part of the time".

Mrs. Pfaff, the confidential employee of the Llewellyn family, testified that during the latter part of 1944 and the early part of 1945, the testator "lost a lot of ground both physically and mentally", that "he was very hazy about a great many things; his orientation was very bad; he was very weak", that "his memory was very bad for a long period, the last two or three years before his death". When asked to give the jury examples of what she based the foregoing observation upon, the witness testified, "Almost every time I went to the hospital to see Mr. Llewellyn, he would ask where I was living at that time and what car I was driving. He always seemed surprised when I told him I was still driving the same car and still living in the same place.

"Q. What about his memory of stocks and things? Do you recall anything about matters of that kind? A. Yes, whenever he would look at the operations statement and see that he had any dividends received from any stocks he was nearly always surprised at the dividends he received. He was interested in very few of the items except the Recreation Gun Club. He generally remembered he owned that. He was very much interested in the bank balance. He always asked about what his bank bal-

ance was: and he was interested in his government bonds; but otherwise, he did not remember he owned any stock or didn't remember the names of any stocks."

This witness saw the testator two or three times a week while he was in the hospital. On March 10, 1945, which was two days before execution of the will here under consideration, the witness took to the testator his income tax return for his signature and testified that on that occasion he was "somewhat confused about it. I really don't think he understood his income tax return, he knew that it was an income tax return. He was quite willing to sign it if I told him—".

When asked with reference to the condition of the testator on March 10, 1945, "How would you describe Mr. Llewellyn at that time?" the witness replied, "I would say that Mr. Llewellyn was a tired, sick, senile old man". When asked on cross-examination to explain what she meant by describing the testator as a "senile old man" Mrs. Pfaff replied, "I think he was in his second childhood". Pressed for a further explanation, she said, "He was very childish about many things". Interrogated further on cross-examination as to whether "it was his age that to your mind makes senility, or what is it?" the witness replied, "It was mostly mentality, I believe. From the time I knew Mr. Llewellyn in 1929 until his death, he never was vigorous mentally or physically I could see. The last few years of his life he deteriorated quite rapidly."

This witness further testified that on March 7, 1945, she presented to the testator for his signature a power of attorney made out to the respondents herein. This instrument was prepared by an attorney upon the suggestion of the witness, who testified, "* * * I felt he would not be able to attend to his affairs". When the power of attorney was presented to the testator, the witness testified, he did not sign it, "he asked me if I would bring it the next time I came, he would be glad to sign it. He wanted to think about it". The witness further testified that the testator did not read the document but that she explained to him what it was, that it was never signed, that "I did not want him to sign it. I did not urge him to; he did not seem to be interested in it".

Marguerite Tracy, a registered nurse, first met decedent at the hospital on April 10, 1945 (approximately one month after execution of the contested will of March 9, 1945). She remained on the case up to the time of the testator's death. Her hours of duty were from 7 o'clock in the morning until 3:30 in the afternoon. The witness gave it as her opinion that decedent was confused after he had been given certain drugs and that this confusion would last for from 12 to 16 hours; that "this confusion caused the decedent to be disoriented, he did not know where he was and he would think he was some place else"; that he would not recognize his own personal belongings and would be suspicious of people who came to see him, even though he knew them. According to the witness, the decedent often thought he was on an ocean voyage and referred to the room as a ship. On other occasions, he thought he was setting the bed on fire while he was smoking a cigarette and the nurse would have to show him that the cigarette was not lighted. In the opinion of the witness "he seemed to have illusions about that quite a lot."

According to Miss Tracy, her patient was "sort of childish about his personal effects; for instance, he had all his cigarettes counted and we would have to account for everything that was his; that it had to be in a certain place, he was more or less, I would say, childish about his personal things." When asked for examples of these alleged "childish" habits, the witness stated that when decedent went into the bathroom she had to bring him his cigarettes and put them right beside him where he could see them. Because his teeth were made of gold, he was likewise concerned as to them and he was also in the habit of saving "every little thing, string or bits of paper that came into the room". When decedent's meals were brought to his room, he would keep the small piece of cardboard supporting the menu card, even though it was just a blank piece of paper.

As to decedent's memory, the witness testified that the same was very poor; that he

could not remember things that happened at present or the day before as well as he could remember the long past. His memory was good as far as 25 or 30 or even 40 years ago was concerned, but for the present he was confused.

Clara McElroy was a registered nurse who first met the decedent on June 17, 1945, when she went on the case. She testified that the decedent would have spells of being irritable and that he was confused and disoriented on several different occasions. He would often question the witness as to whether he was in his right room, and one month after she went on the case decedent had the impression that he was taking a sea voyage and wanted to be sure he would return to the same room when he came back from that trip. Oftentimes, according to the witness, decedent would wake up and think there was a cigarette burning his bed and she had quite a time convincing him to the contrary.

[3] Except for the hospital records, all of the testimony produced in behalf of the contestants and respondents, as hereinbefore narrated, concerned the condition of the testator before and after the actual date and time when the will was executed, and the same was admissible only in so far as it tended to show the testator's condition at the very time the will was made. As was stated by this court in Estate of Russell, 80 Cal.App.2d 711, 721, 182 P.2d 318, 324: "Before a solemnly executed will may be set aside, the claimed infirmities of mind or body must be shown to have had a direct bearing upon the testamentary act, and the evidence must establish the fact that the deceased devised or bequeathed her property in a manner which, except for the claimed infirmities, she would not have done. (Estate of Schwartz, 67 Cal.App.2d 512, 519, 155 P.2d 76, and cases therein cited.)"

The only evidence offered by respondents as to the physical and mental condition of the testator on the afternoon of March 12, 1945 when the will now under consideration was executed, is that furnished by the hospital records, from which we again quote the following:

"3:00 P.M. Has had good day generally, seeming somewhat weaker at times.
"4:00 P.M. Mentally very clear.
"4:30 P.M. Mr. Mueller and Mr. Brown with patient.
"5:00 P.M. Brother visited for 20 minutes."

Thus it will be seen from the hospital records offered in evidence by respondents themselves, that one-half hour before the execution of the testamentary document the testator was "mentally very clear". To this may be added the fact that while at that time the decedent was hospitalized, he was not bedridden, but would sit up at times practically daily.

[4, 5] The following language used by this court in Estate of Russell, supra, 80 Cal. App.2d at page 719, 182 P.2d at page 324, seems peculiarly applicable to the facts of the case now before us: "While in the instant case, the testatrix was in feeble health, suffering from disease, aged and infirm, these facts are not sufficient of themselves to establish testamentary incapacity unless it be shown by a preponderance of the evidence that her condition of mind and body at the time of the execution of the will was such that she was unable to understand the nature and situation of her property and the disposing of it intelligently. In other words, it must be shown that her weakened and enfeebled condition had a direct influence upon the testamentary act. Section 20 of the Probate Code empowers every person of sound mind, over the age of 18 years, to dispose of his separate property by will. And the property being his to dispose of as he wills, he is not called upon to consult or satisfy the wishes or views of juries or courts. The presumption is always that a person was of 'sound mind' at the time of execution of his will, and the burden therefore always rests upon the contestants to show affirmatively and by a preponderance of the evidence, the incapacity of the testator and the further fact that, because of the mental or bodily infirmities with which the testator was afflicted, he devised or bequeathed his property in a way which, except for the existence of the aforesaid infirmities, he would not have done."

And again in Estate of Rich, 79 Cal.App. 2d 22, 30, 179 P.2d 373, 378, the rule was stated by this court as follows:

" 'Every mental departure from the normal will not destroy a testamentary disposition, otherwise valid, of the testatrix' estate. It is not the rule of law that no person who is insane may make a valid will. The real rule is that the will of a person, who by reason of insanity is incapable of making valid testamentary disposition of his estate, shall not be upheld. Estate of Chevallier, 159 Cal. 161, 113 P. 130; Estate of Wasserman, 170 Cal. 101, 148 P. 931.'

"The same case is authority for the statement that in order to invalidate a will mental derangement must be insanity in one of two forms: '(1) insanity of such broad character as to establish mental incompetency generally, or (2) some specific and narrower form of insanity under which the testator is the victim of some hallucination or delusion.' And furthermore, it must be shown that the abnormality of mind had a direct influence upon the testamentary act. Conceding that the testatrix understood her physical condition and was greatly worried, nervous and disturbed about it, such worry and concern was but natural and not an evidence of mental infirmity. In the instant case there is not even a suggestion that the decedent was the victim of any hallucinations or delusions."

Respondents urge that no determination of the testator's mental capacity can be predicated upon what he said or did or failed to do on March 9 or March 12th, 1945, or on any given day or at any given hour. That he did not suffer at some particular moment a mental collapse, but rather experienced a long period of mental limitation, followed by a period of some months (just prior to his entry into the hospital in early March of 1945) during which mental and physical deterioration was very definite and rapid, and that finally his condition culminated in a state of such irresponsibility that on March 9th and March 12th he did not have testamentary capacity. But this contention is in contravention of long and well established principles of law, which hold that testamentary incapacity must be shown by a preponderance of the evidence to exist at the time of the execution of the will, and that any infirmities of body or mind had a direct influence upon the testamentary act. The question is not what may have been the testator's mental state at the time of the testamentary act, but what it actually was. It is true of course that evidence of the condition of the testator's mind before and even after the date of the testamentary act was admissible, but it assumes importance only in so far as it bears upon that condition at the very time of the execution of the will. As was said by this court in Estate of Schwartz, 67 Cal. App.2d 512, 520, 155 P.2d 76, 81: "What others than the testator may think as to the justice or injustice of a will is simply a matter of opinion and therefore, before the law will permit judges or juries to make disposition of a decedent's property irrespective of his or her desires, substantial evidence is required to show lack of testamentary capacity at the time of the execution of the will."

Again, in Estate of Johanson, 62 Cal.App. 2d 41, 50, 144 P.2d 72, 77, it was stated: "Peculiar and unusual conduct and the possession of false beliefs frequently accompany physical afflictions, but something more than that is required to render one incapable of making a valid will. The right to dispose of one's estate by will is not confined to those whose mental powers are unimpaired and whose conduct and beliefs are normal and, from a medical viewpoint, sane. Testamentary capacity is not destroyed by mere false beliefs or departure from normal thought or action, nor even by insane delusions or hallucinations that do not bear directly upon and influence the terms of the will."

The evidence in the case now engaging our attention is very much weaker than that held insufficient to justify the setting aside of the wills in other cases decided by the appellate tribunals of this state. For support of this statement it is necessary to do no more than to cite the following authorities: Estate of Perkins, 195 Cal. 699, 235 P. 45; Estate of Clark, 170 Cal. 418, 149 P. 828; Estate of Chevallier, 159 Cal. 161, 113 P. 130; Estate of Purcell, 164 Cal. 300, 128 P. 932; Estate of Casarotti, 184 Cal. 73, 192 P. 1085; Estate of Finkler, 3 Cal.2d 584, 46 P.2d 149; Estate of Garvey, 38 Cal.

App.2d 449, 101 P.2d 551; Estate of Schwartz, 67 Cal.App.2d 512, 155 P.2d 76; Estate of Kendrick, 130 Cal. 360, 363, 62 P. 605; Estate of Rich, 79 Cal.App.2d 22, 179 P.2d 373; Estate of Russell, 80 Cal.App. 2d 711, 182 P.2d 318.

The presumption always is that a person was of "sound mind" at the time of the execution of his will, and the burden therefore always rests upon the contestants to show affirmatively, and by a preponderance of the evidence, the incapacity of the testator, and the further fact that except for alleged infirmities of mind or body, he bequeathed his property in a manner that he otherwise would not have done.

[6, 7] Giving a consideration to all of the foregoing evidence introduced by contestants and respondents, we must hold that it falls far short of constituting what the law regards as a rebuttal of the presumption of testamentary capacity at the time of the execution of the will, the existence of which is destroyed only when by substantial evidence it is shown that a testator was unable to understand and carry in his mind the nature and situation of his property, his relations to his relatives and those around him, incapable of understanding the act he is performing, and the relation in which he stands to the objects of his bounty if any.

We shall now proceed to a review of the evidence which respondents urge supports the specific finding of the jury that the instrument dated March 12, 1945, offered for probate was the product of the undue influence of appellant. In narrating such evidence, we shall not repeat testimony hereinbefore set forth, but shall have the same in mind and refer thereto in applying the law to the facts relied upon by respondents to support the last above-named specific finding of the jury.

Other than such evidence as has been hereinbefore recited, we find in the record testimony that appellant, decedent, and their sister Mrs. Milner, owned property in what was called the Santa Monica Syndicate, in connection with which appellant advised with his brother, the decedent. The sister, Mrs. Milner, died early in 1942, and prior to her death appellant had not been active in the affairs of his brother. Some time in 1942 appellant sold decedent's shares of stock in a gun club. During the latter part of 1942 decedent told Barclay Shields, his nurse and companion, that appellant "was there with a will and asked him to sign it and he told me he refused". That in the early part of 1943 decedent told the witness that "he wanted to make his will the way he wanted it and he did not want any interference or anying of that sort". That "Dave (appellant) and Bud (one of respondents) were both after him to change his will", but that "he was going to make a will of his own". Respondent Mrs. Cheesewright testified that following the death of her mother (Mrs. Milner, sister of decedent and appellant), and particularly from about December 10, 1944, until decedent entered the hospital on March 4 of the following year, the latter was "unhappy and disturbed"; that she saw him approximately once a week at his Berkeley Square residence, at which times he would say to her, "Little dear, Dave (appellant) and Bud (one of respondents) keep bothering me all the time about my will and about my property".

Mrs. Pfaff, confidential secretary of the Llewellyn family, testified that toward the end of the year 1942 and the early part of 1943, the decedent stated to her, "that both David Llewellyn and Mr. Milner were pestering him about his will; he said they were only interested in his money". That on one occasion when decedent took her with him to his safety deposit box to look at his bonds and coupons he said, "* * * that Mr. Milner and Mr. Llewellyn were both pestering him about his will and wanted to know what was in it, and wanted to know what disposition he made of his property"; that "they both felt that they should—that he should make a disposition that was favorable to them". That decedent also told her that appellant "felt that he should change some of his policies at least in favof his (appellant's) daughter".

There was also testimony that on October 30, 1944, appellant met his brother, the decedent, at the Jonathan Club and took him to the office of the Equitable Life Assurance Society where appellant told repre-

sentatives of the company that decedent wished to change the beneficiaries from respondents herein to appellant's daughter Dorothy. That the company's representative made out the change of beneficiary forms and decedent executed them in the presence of appellant. Subsequently, these changes were countermanded by decedent. That in the latter part of October, 1944, appellant and decedent went to the office of an insurance broker and there discussed a change in decedent's insurance. That two or three days later, at decedent's request, the insurance broker went to the Jonathan Club where he was told by the decedent to change two of his insurance policies so as to make appellant's daughter Dorothy the beneficiary. That the policies were so changed. Prior to this change, the beneficiaries were respondents herein. That subsequently, however, decedent requested that respondents be reinstated as the beneficiaries. That when decedent received statements of his finances and assets from Mrs. Pfaff he would discuss them with his brother.

That appellant, decedent and other members of the family had an interest in what was known as the Vernon property, which consisted of about twenty-five acres. That appellant had a 5/28 interest and decedent had the same. In February of 1944 appellant bought his brother's 5/28 interest in the twenty-five acres for $6,000 and in the same month sold 3/65 acres of the property, through which appellant realized $4,462 on the interest purchased from his brother.

That in January of 1945, 14.898 acres of this Vernon property were sold and, on the interest which appellant had acquired from decedent, he realized through such sale about $41,000, indicating that in about 11 months after he had purchased his brother's interest for $6,000, appellant realized thereon, through the two sales, in excess of $45,000. After the foregoing two sales, 6.86 acres of the Vernon property remained unsold. This remainder was subsequently sold for a price that gave appellant $17,075 from the interest which he had acquired from his brother. That through these three sales appellant obtained about $62,540 for the property he had acquired from his brother, the decedent, for $6,000.

That appellant, in response to questions by his counsel, testified that when the deed from decedent to appellant covering the former's interest in the Vernon property had been prepared, it was executed at the Citizens National Bank while appellant and his brother were with the president of the bank; that appellant read the deed to his brother in the presence of the bank president and that decedent was willing to sign the deed. That on cross-examination appellant admitted that the deed was drawn by his son-in-law (an attorney); that he merely took decedent to the bank and with him, talked to the president and that, although appellant had the deed in his pocket while he and his brother were talking to the bank president, and although appellant knew the bank president had been decedent's banker for a great many years, there was no discussion of the transaction with him and that decedent obtained no advice from his banker.

There was also testimony that from the time decedent became quite ill in January, 1945, until he was hospitalized on March 3, of that year, appellant visited his brother "a great many times". According to appellant's own testimony, from March 3, 1945 to March 15, 1945, while his brother was in the hospital, he visited him two or three times a day. This was the period during which the testamentary instruments of March 9 and March 12, 1945, were executed.

There was testimony that some time about June, 1945, which was subsequent to the execution of the will here in question, appellant went to the hospital and asked decedent for the keys to his "lock box", stating that he desired to "see if he (decedent) didn't have the deeds to the property, because oil had been discovered, and it would mean a lot of money to William Llewellyn (the testator)", that he (appellant) "would like to get in there and see what stock or deeds he (decedent) had because if he did not maybe Bud (one of the respondents) would". That decedent replied, "No, you don't get those keys, Dave; later on when I am out of the hospital, if

you want to see what is in the lock box I will go down with you." That shortly before the testator's demise, appellant came to the hospital one morning, at which time the decedent was "really in a semi-conscious state" and asked the nurse on duty if she would get the keys to decedent's lock box, that the latter had asked him to take them and wanted him to have them. That both the nurse and appellant talked to the decedent, the nurse asking him if he wanted appellant "to have his keys and watch", to which decedent replied, "No."

The physical and mental condition of the testator, both before and while at the hospital, upon which respondents rely to support their claim of undue influence, has heretofore been narrated and will not now be repeated. Nor will we now refer to the testimony concerning decedent's relationship with the contestants, all of which has been hereinbefore recited, other than to observe that as to contestant Milner, the evidence does not reflect that deep and abiding affection which decedent at all times, according to the record, cherished for his niece, one of respondents herein, Gwendolyn Cheesewright. The inconsistencies of the wills of October 1, 1942, and March 11, 1943, with the testamentary documents of March 9 and 12, 1945, has also been heretofore detailed. Statements made prior to and inconsistent with provisions contained in the documents executed on March 9 and 12, 1945, have also heretofore been referred to.

There was also testimony as to the testator's physical and mental condition during the time commencing about a month after the execution of the wills of March 9 and 12, 1945, and the time of his death. We fail to perceive the value of this evidence except insofar as it may tend to prove the infirmities of decedent prior to and at the time he performed the testamentary act here in question, and thereby throw some light on the likelihood that his mind was subjugated to the will of appellant. This comment we make because respondents themselves insist that the testator's mental condition was a progressively deteriorating one. The testimony in question was that about April, 1945, decedent was being given phenobarbital, described as a hypnotic drug, but according to the testimony of Marguerite Tracy, a nurse who went on duty April 10, 1945, "when I went on the case we were getting him away from hypnotics". Asked as to the effect of hypnotic drugs, the witness stated, "they tended to keep him confused * * * he would get a 'hangover' from them, and he was more or less in a confused state" for from 12 to 16 hours after the drug was administered. That when decedent was in such a "confused state", he was often disoriented, and thought he was in a different room. Other testimony given by this witness has heretofore been set forth as well as that given by another nurse, Miss McElroy.

There was also testimony given by another attending nurse that decedent "never seemed to greet Dave (appellant) with as much friendliness as he did his niece and nephew (respondents)". The decedent spoke of his brother, appellant herein, as "Oh Dave is grasping", and that he was "tight", "he is stingy".

We are also directed by respondents to testimony that Doctor Crispin, one of decedent's attending physicians, had told Mrs. Pfaff about June 1, 1945 that decedent "had the nurses and doctor's worn out, that he had to discharge them all that morning, stating that he had his bag all packed and was leaving the hospital" and that Doctor Crispin had stated to her that the decedent "was in very bad condition and not responsible for his actions"; that this conversation occurred about June 1, 1945, subsequent to the execution of the will. It should, however, be observed that when testifying as a witness, Doctor Crispin was asked, "from your observation of William Llewellyn, in your opinion, during the month of March, 1945, and particularly on the 12th of March, 1945, would you say that he was of sound mind?" to which the physician replied, "I would. It did not occur to me that he was not, or that there was anything out of the way. He apparently was able to know what he had in mind and what he wanted to do on everything that came up in connection with him."

In support of their claim that appellant was active in procuring the execution of the challenged testamentary document, re-

spondents direct our attention to testimony that over a period of several years he had suggested to decedent that he change the terms of his will; that from the time decedent entered the hospital on March 3, 1945, until March 12, 1945, appellant visited him two or three times a day, notwithstanding that the testator was suffering great physical pain and at times was under the influence of hypnotic drugs; that appellant was instrumental in having the attorney who prepared the documents of March 9 and 12, 1945, go to the hospital; that appellant suggested Arthur Brown as one of the witnesses and took him to the testator's room; that appellant obtained copies of both the aforesaid wills.

[8-10] The authorities in this state are numerous and harmonious to the effect that however unnatural a will may appear to be, or however much at variance with expressions by the testator as to his intentions with regard to relatives or the natural objects of his bounty, it may not be held invalid on the ground of undue influence unless there be an actual showing of some sort of pressure which overpowered the mind and mastered the volition of the testator at the very moment of execution of the will. Estate of Clark, 170 Cal. 418, 424, 149 P. 828; Estate of Carithers, 156 Cal. 422, 428, 105 P. 127; Estate of Gleason, 164 Cal. 756, 765, 130 P. 872; Estate of Lavinburg, 161 Cal. 536, 543, 119 P. 915. However, there is a well established exception to this settled general rule, upon which respondents rely, to the effect that where one who unduly profits by the will as a beneficiary thereunder sustains a confidential relation to the testator, and has actually participated in procuring the execution of the will, the burden is on him to show that the testamentary document was not induced by coercion or fraud. When proof of the existence of a confidential relationship between the testator and such a beneficiary, coupled with activity on the part of the latter in the preparation of the will, is offered, a presumption of undue influence arises therefrom. Estate of Higgins, 156 Cal. 257, 261, 262, 104 P. 6.

[11] The question first arises, was there a confidential relationship existing between the testator and his brother, appellant herein? Confidential relationships are thus defined in Estate of Cover, 188 Cal. 133, 143, 204 P. 583, 588:

"Confidential and fiduciary relations are, in law, synonymous, and may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another." And, in Herbert v. Lankershim, 9 Cal.2d 409, 483, 484, 71 P.2d 220, 257, in dealing with the question of a confidential relationship, the court approves of an instruction which contains, among other statements, the following:

"The law defines a confidential relation as any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another."

[12, 13] While asserting, and we think correctly, that blood relationship is an important and material circumstance in considering the question whether in fact, a confidential relationship exists, respondents concede that the relationship existing as here, between brothers, is not in itself a fiduciary relationship. Odell v. Moss, 130 Cal. 352, 356, 62 P. 555. We are persuaded that the evidence proferred by the respondents in the case at bar affirmatively and effectively establishes the fact that no such relationship existed between the testator and his brother. In his brief, Reese Milner states "that Dave (appellant) did not stand very high in Bill's (testator) esteem". The record is replete with testimony offered by respondents that both before and after the execution of the will here under consideration, decedent had characterized appellant as "stingy", "greedy" and "grasping". There is also testimony that on one occasion appellant presented to the testator a will but the latter refused to sign it and when appellant requested decedent to give him his "lock box keys" the latter refused so to do, stating that when he recovered from his illiness he would take appellant with him to the bank and show him certain deeds which appellant expressed a desire to see. There

is no evidence that at any time appellant handled decedent's business affairs, which is more than can be said of respondent Milner who handled certain investments for him. The evidence negatives any inference that such trust and confidence was reposed by decedent in the integrity and fidelity of his brother as would establish the existence of a confidential relationship between them. However, in the absence of a confidential relationship between decedent and his brother, if the evidence shows that the instrument here under attack represented the will of the appellant and not the wish or the desire of the testator, it must be rejected. We, therefore, proceed to a discussion of the sufficiency of the evidence to support the specific finding of the jury that the will of March 12, 1945 was executed while the testator was acting under the undue influence of his brother (appellant herein).

[14, 15] Before there is imposed upon the proponent of a will the obligation of presenting evidence of volition, and before the question as to undue influence becomes one of fact for determination by a jury, there must be evidence, the probative force of which establishes (1) the relations between the one charged with exercising the undue influence and the decedent affording the former an opportunity to control the testamentary act; (2) that the decedent's condition was such as to permit of a subversion of his freedom of will; (3) that there was activity on the part of the person charged with exercising undue influence; and (4) that such person unduly profited as beneficiary under the will. Estate of Graves, 202 Cal. 258, 262, 259 P. 935; Estate of Hampton, 39 Cal.App.2d 488, 498, 103 P.2d 611. It is also the law that evidence must be produced that pressure was brought to bear directly upon the testamentary act. Estate of Arnold, 16 Cal. 2d 573, 577, 107 P.2d 25.

[16, 17] Respondents emphasize the fact that prior to 1942 appellant took very little, if any, interest in his brother William or the latter's affairs, and was not associated in either a business or social way with the Llewellyn family group which included respondents, at the family home on Berkeley Square. That it was not until the death of the sister, Mrs. Milner, that appellant took much, if any, interest in his brother the decedent. That he then became a frequent visitor to his brother and commenced a systematic campaign to unduly influence the latter against respondents and to obtain the property and estate of decedent. We perceive nothing sinister in the active interest appellant took in his brother after 1942. Here was a family, closely associated in the development and maintenance of a large industrial concern. Appellant married and thereafter did not reside with the other members of the family. When death removed all the members thereof save and except decedent and his brother, appellant herein, it seems only natural to us that as sole survivors of a once large family the relations between these two brothers should become closer. The right of courts and juries to draw inferences is not arbitrary and unrestrained. An inference must not only be founded on a fact legally proven, but on such a deduction from that fact as is warranted by a consideration, among other things, of the propensities of people and the course of nature (Code Civ.Proc. Sec. 1960). The foregoing proven facts do not warrant a natural inference of perfidy but on the contrary, under the circumstances here present, reflect the natural propensities of one brother toward another. Furthermore, in the absence of evidence, it cannot be assumed that a person is guilty of wrong doing. On the other hand, it must be presumed in the absence of evidence to the contrary, that one is innocent of crime or wrong doing (Sec. 1963, Subdiv. 1, Code Civ.Proc.)

[18-20] Considering the foregoing factors, none of which standing alone has the effect of creating a presumption against the validity of the testamentary document, but the probative force of which in combination will make the question as to undue influence one for determination by the triers of fact, we find as to the first consideration, that it is well settled that mere opportunity, even if coupled with a motive to influence a testamentary act, is not sufficient to invalidate such an act. Estate of Kilborn, 162 Cal. 4, 11, 120 P. 762. And

the evidence must indicate more than general influence. The influence necessary to invalidate a testamentary document must be a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made. Estate of Carithers, 156 Cal. 422, 428, 105 P. 127; Estate of Gleason, 164 Cal. 756, 765, 130 P. 872. From the evidence hereinbefore set forth we find no such showing. The testimony herein amounted to no more than a showing that appellant was so situated as to have an opportunity to unduly influence the mind of the testator and at the most, that the actions of appellant might be described as suspicious. Obviously, under the rulings of appellate tribunals in prior cases, such evidence is entirely insufficient to support the finding of the jury. The declarations of the testator that he intended to "take care" of respondents were admissible only to show the relations between them, and the state of the testator's mind with reference to his nephew and niece.

As to the second of the aforesaid considerations, we deem the evidence wholly insufficient to establish the fact that on the day he executed the challenged will, or prior thereto, the condition of the testator was such as to permit of a subversion of his freedom of will. In our consideration of the issue of undue influence, we have herein recited the testimony which conclusively shows that instead of being passive in the face of suggestions concerning his affairs the testator vigorously resisted any interference, and time and again he declared and avowed his intention to dispose of his property as he himself saw fit. What was said by this court in the Estate of Hull, 63 Cal.App.2d 135, 143, 146 P.2d 242, 246, is here pertinent: "The burden was on the contestants to show undue influence, and in meeting that obligation it is not sufficient for them merely to show circumstances consistent with the exercise of undue influence, but before a duly and solemnly executed will can be invalidated, circumstances must be shown that are inconsistent with freedom of action on the part of the testatrix. Estate of Burns, supra [26 Cal.App.2d 741, 80 P.2d 77]."

On the very afternoon the will of March 12, 1945 was executed, the testator was sitting in a chair looking out the widow and smoking a cigarette. And the hospital chart introduced as one of the respondents' exhibits shows the following entry at 4:00 o'clock on that afternoon: "Mentally very clear", and at 4:30 p. m., "Mr. Mueller (attorney who prepared the will) and Mr. Brown (one of the witnesses to the will) with patient". Though drugs were administered to the testator intermittently to produce sleep and rest, the record is without contradiction that no drugs of any kind were administered during the entire afternoon of March 12, 1945, the date the will was executed.

[21] Coming now to the third factor, viz., activity on the part of the person charged with exercising undue influence, the evidence is clear and uncontradicted that appellant was not in the room when the contents of the will were discussed, nor when the testamentary document was executed. Appellant did contact the attorney who prepared the will, but that was at the request of the testator. The attorney was not counsel for appellant but was well-known to the testator, and some years before had prepared a will for him. It was at the request of the attorney that appellant procured the attendance of the witness Brown who was at the hospital at the time visiting his sick wife. Mr. Brown had long been a friend of the testator. Securing of an attorney to draw a will for another has been held not to constitute participation. Estate of Hull, 63 Cal.App.2d 135, 139, 142, 146 P.2d 242. In the instant case the evidence conclusively shows that the will was prepared from directions given by the testator to his attorney and there is very strong evidence that it was the testator's voluntary act. Estate of Fraser, 75 Cal. App.2d 99, 104, 170 P.2d 704. The evidence in the case at bar of activity on the part of appellant is far more lacking in substantiality than that present in Estate of Hamburger, 126 Cal.App. 455, 463, 464, 14 P.2d 802, wherein it was held that a motion for nonsuit was properly granted. In the case now engaging our attention, nothing more was shown than the presence of an oppor-

tunity for appellant to influence the testator's mind with a possible interest or motive so to do. This is totally insufficient. Before a testamentary document will be overthrown because of the exercise of undue influence, the proven circumstances must be inconsistent with voluntary action on the part of the testator.

[22-24] The final circumstance hereinbefore referred to is that the person charged with exercising undue influence unduly profited as beneficiary under the will, or in other words, that the will as executed was an unnatural one. Because of the provisions of Section 20 of the Probate Code, no person who is competent to execute a will is called upon "to consult or satisfy the wishes or views of juries or courts." Estate of Nolan, 25 Cal.App.2d 738, 740, 78 P.2d 456, 457. However, the claimed "unnatural" provisions of a will may be considered as an element supporting an inference of undue influence when the testament is attacked on that ground and the claim is made that by reason of undue influence the testator was induced to make an unreasonable or unjust discrimination against some of his heirs at law. We shall therefore, now dispose of the claimed unnaturalness of the will of March 12, 1945. The provisions of Section 20 of the Probate Code entitle every person "of sound mind" to dispose of his property by will as he sees fit—not in equal proportions to his relatives or to those who would inherit under the laws of succession in case of intestacy. To us it does not necessarily appear from the evidence that the will herein was either unnatural or unjust. Nephews and nieces are not necessarily the natural objects of the bounty of an uncle. The reason given by the testator to the draftsman of the will appears to us to be neither illogical or unnatural. It is as follows: "the young people (referring to respondents) have received over a million dollars from the Llewellyn's and I think that is enough for young people, don't you think so?" No evidence was offered by respondents to disprove this assertion. It was also stipulated at the trial that respondents were the beneficiaries of decedent's life insurance policies totalling the not-insignificant sum of $22,865.54. Since the aggregate of decedent's estate was not more than $150,000 we cannot perceive how it can reasonably be said that his failure to make provision for respondents in his will was unnatural. It is true, as urged by respondents, that the will here under attack, was at variance with the provisions of previous testamentary documents, in one of which appellant was not remembered, and in the other of which the bulk of decedent's estate was bequeathed to the respondents. Where, however, there are facts explanatory of such conflict, and if the circumstances disclose an adequate reason for a departure from the provisions of an earlier will, the fact of conflicting intention must be deemed to be without probative force or effect (26 Cal. Jur. 659). Explanatory matters are to be found ordinarily in the events transpiring in the life of the decedent, changes in his affections, and even the peculiarities of his temperament.

[25] Following the death in 1942 of decedent's only sister, the mother of respondents, his relations with his brother, appellant herein, became closer, and the testimony shows that commencing in 1943 they would see each other often. As to decedent's feelings toward his nephew and contestant Reese L. Milner, the record indicates that he elected to leave the Berkeley Square home where he resided with Reese Milner, and spend intervals at the Jonathan Club during the year 1944. According to the record he was at the club that year from March 17 to 31, from July 6 to 19, and from September 26 to November 11. During much of this time respondent Mrs. Cheesewright was absent from Los Angeles, although she corresponded with her uncle, the decedent, once a week. There also remains the testimony that decedent executed a will on March 9, 1945, the terms of which were in entire accord with the challenged will of March 12, 1945. When the attorney who drew the wills of March 9 and March 12, 1945, returned on the latter date he was told by the decedent that he wanted appellant to have everything. Confirmation of this is found in the testimony of the witness to the will, Arthur G. Brown, conceded by respondents to be a disinterested

and truthful witness, who testified that decedent stated, "that is right; I want Dave (appellant) to have everything, my guns and everything." It would, therefore, appear that the will of March 12, 1945, was a complete confirmation of the wishes of the testator as expressed three days previously. Estate of Stump, 202 Cal. 308, 310, 260 P. 543. Bearing on the question of the claimed unnaturalness of the will, it must be remembered that a will cannot be characterized as unnatural, even though those not remembered therein are natural objects of the testator's bounty, when the evidence shows that such persons were in no need of funds, aid or assistance (26 Cal.Jur. 699).

[26] In the case at bar the facts are such as to put it beyond the reach of the rule that under certain circumstances importance should attach to the consideration that a will was unnatural.

From a review of the entire record, we are forced to the conclusion that there is not sufficient evidence to support the verdicts and the judgment predicated thereon. As was said in the case of In re Wilson, 117 Cal. 262, 279, 49 P. 172, 177, 711: "* * * the case presents another instance of a jury being, insensibly perhaps, carried away from the real issues legitimately before them by the notion that the will was not such as in their opinion it ought to have been, and therefore should be set aside."

Persuaded as we are, from a consideration of the entire record, that the same fails to disclose any substantial evidence that at the time of the execution of the will of March 12, 1945, the testator was mentally incompetent to execute the same, or that said testamentary document was procured by or through undue influence exercised upon the testator by appellant, and that, therefore, a verdict should have been directed in favor of proponent and appellant, and that a motion therefore was made before the entry of judgment, the judgment rendered herein is reversed and the cause remanded with directions to the court below to enter judgment admitting to probate the will executed by decedent, William Llewellyn, dated March 12, 1945.

YORK, P. J., and DORAN, J., concur.

Hearing denied; CARTER, J., dissenting.

84 Cal.App.2d 95

## COLWELL v. JONES.

Civ. 3487.

District Court of Appeal, Fourth District, California.

March 1, 1948.

1. Malicious prosecution ⇐56

In malicious prosecution action, burden is on plaintiff to prove absence of both probable cause and malice.

2. Malicious prosecution ⇐27

In malicious prosecution action, malice required to justify recovery must be actual malice involving the attitude of mind of the person who initiated the prosecution.

3. Malicious prosecution ⇐18(1)

Probable cause in instituting prosecution alleged to be malicious depends upon the existence of such facts as then known to the party bringing the charge which would naturally create in the mind of a reasonable person the honest belief that a crime has been committed.

4. Malicious prosecution ⇐64(2)

In malicious prosecution action, evidence sustained finding that defendant, who procured arrest of neighbor, subsequently acquitted of discharging firearms in violation of city ordinance, after defendant heard shots coming from neighbor's premises, saw her injured dog come from that direction and was thereafter told by the neighbor that he had intentionally shot the dog, had probable cause for believing that the ordinance had been violated.

5. Malicious prosecution ⇐64(2)

In malicious prosecution action, evidence sustained finding that defendant, who had probable cause to believe city ordinance penalizing discharge of firearms had been violated and procured arrest of neighbor, subsequently acquitted, after he allegedly shot and killed her dog, was not guilty of malice.

Appeal from Superior Court, Riverside County; Wm. D. Dehy, Judge

Action by Truman A. Colwell against Joy Jones for malicious prosecution. From the judgment, plaintiff appeals.

Affirmed.

Louis J. Euler, of Los Angeles, for appellant.

Best, Best, Gabbert & Krieger, of Riverside for respondent.

BARNARD, Presiding Justice.

This is an action for damages for malicious prosecution. The parties occupied adjoining "farming" premises within the city limits of Corona. Mrs. Jones lived alone with her daughter and for some fifteen months had kept a dog. About five o'clock in the morning of the day in question Mrs. Jones and her daughter left the house to do some "chores" and released the dog which had been tied up during the night. A few minutes later they heard a shot from the direction of the plaintiff's house and then saw the dog come limping home. Shortly thereafter, the plaintiff told the respondent that he had intentionally shot the dog because it had been under his rabbit hutches.

Later that morning the city poundmaster came to dispose of the dog's remains. When he was told what had occurred he informed Mrs. Jones that there was an ordinance against shooting within the city, and advised her to see the city judge. She did so, and the judge read to her a city ordinance making it unlawful for any person to shoot a firearm within the city limits except "in necessary self defense, or in the performance of official duty." The judge then asked her "That is what you want to do isn't it" and when she replied in the affirmative he directed her to the police department for the issuance of the complaint. At the police department she met the city attorney who drew the complaint and a warrant was issued. The plaintiff was arrested and held at the police department for about an hour, when he was released on bail. Thereafter, he was tried before the city judge and was acquitted of the charge.

The plaintiff then filed this action, seeking damages in the sum of $15,315. The trial court found in all respects in favor of the defendant, and the plaintiff has appealed from the judgment.

[1-3] It is conceded that a criminal proceeding was instituted by the respondent which terminated in favor of the appellant. The material questions raised on this appeal involve the remaining elements of such an action as this, absence of probable cause and malice. It is well settled that in such an action the burden is upon the plaintiff to prove both of these elements; that the malice required must be actual malice, involving the attitude of mind of the person who initiated the prosecution; and that probable cause depends upon the existence of such facts, as then known to the party bringing the charge, which would naturally create in the mind of a reasonable person the honest belief that a crime has been committed. Richter v. Neilson, 11 Cal.App.2d 503, 54 P.2d 54.

The appellant here contends that the evidence is not sufficient to support the court's findings to the effect that there was probable cause for this arrest and that the respondent was not actuated by malice. Relying on conflicting portions of the evidence, he contends that there was a lack of probable cause and malice because the respondent knew that this dog was vicious and destructive, that it had attacked newsboys and children, including the plaintiff's grandchild, and that it had killed rabbits; that by reason of this knowledge she knew that he had shot the dog in lawful defense of his property and the protection of his family; and that it follows that she acted maliciously and without probable cause in having him arrested. While long portions of the testimony are set forth in appellant's briefs most of the matters relied on happened months before, have doubtful materiality to the question at issue, and are not sufficiently shown to have been known to the respondent. On the other hand, there is plenty of evidence which would justify a finding that the respondent did not know that the dog was vicious, if it was, and that she did not know that it had ever killed rabbits. It does appear that on one occasion, some months before, the respondent learned that the dog had knocked down the appellant's three-

year-old granddaughter, that she inquired about it and was told by a member of the appellant's family that no serious damage had been done.

[4] On the issue of probable cause there is evidence that on this morning the respondent heard the sound of a shot coming from the appellant's premises; that the injured dog immediately came from that direction; that shortly thereafter the appellant told her that he had intentionally shot the dog because it was under his rabbit hutch; that the respondent's daughter told her that she saw the gun at appellant's house shortly after the shooting; that the poundmaster informed the respondent of the ordinance and advised her to see the city judge; that the city judge read the ordinance to her and, in effect, advised her to proceed; that she then went to the police department and talked to the city attorney; and that he prepared the complaint. There can be no question that this evidence was sufficient to disclose probable cause for believing that this ordinance had been violated.

The issue of malice finds no support from any absence of evidence of probable cause. There is no evidence which would clearly indicate the existence of malice on the part of the respondent. It appears that she acted only after being informed of the existence of this ordinance by the poundmaster and it is a fair inference from the evidence that she then acted very largely on the advice of several city officials, including the city attorney. The appellant himself testified that there had never been any ill feeling between him and the respondent prior to the day of the shooting, and that nothing was said in his conversation with her that day which indicated that she had any ill feeling toward him. The respondent testified, as to why she brought the charge, that she lived alone with her daughter and that they needed a dog for their protection; that they would have to get another dog; that the dog and other animals might get loose and go upon the appellant's property; that she wanted some assurance that the appellant was not going to be shooting; and that she felt that perhaps the appellant did not know of the ordinance and should be reminded of it by someone who had authority. The daughter testified that she and her mother talked the matter over and decided that their place would be safer for themselves and their livestock, in case any of the animals ever got out, if the appellant were reminded of the city ordinance and "so my mother went to see the Judge." Assuming that any conflicting inferences might have been drawn from the evidence the record sufficiently supports the finding made.

[5] It is further contended that malice clearly appears because the respondent did not relate the full facts to the city judge but told him the dog had been shot for the reason that it "had been over on the man's premises underneath the rabbit hutch." It is argued that she did not tell the truth and concealed the fact that the dog had been previously vicious and destructive. Not only is the evidence conflicting as to her knowledge of any such fact, but she told the judge exactly what the appellant told her, a few minutes after the shooting, was his reason for shooting the dog. Even the appellant, in his testimony, did not claim that he had ever given the respondent any other reason, his version being that he had told her that "he had been after my rabbits and chickens."

Not only were the issues raised entirely questions of fact, but the record confirms the court's view of the evidence and indicates that the remedy most beneficial to the appellant would be a change in his own mental attitude.

The judgment is affirmed.

GRIFFIN, J., concurs.

83 Cal.App.2d 812

## PEOPLE v. COLEMAN.

Cr. 2496.

District Court of Appeals, First District, Division 2, California.

Feb. 24, 1948.

**1. Rape ⇐51(4)**

Evidence sustained forcible rape conviction.

**2. Criminal law ⇐739(2)**

In prosecution for forcible rape, defendant's evidence as to alibi and reputation created, at most, a conflict that was solely within the province of the jury to resolve.

**3. Rape ⇐57(2)**

In rape prosecution, whether defendant was sufficiently identified as the one who raped prosecutrix was for jury.

**4. Rape ⇐57(2)**

In a rape prosecution, the strength or weakness of identification of the defendant is a matter solely within the province of the jury, and its acceptance is conclusive unless inherently improbable.

**5. Witnesses ⇐277(2)**

In rape prosecution, wherein defendant testified on direct examination concerning a previous arrest and discovery in his room by police on that occasion of revolvers and jewelry, and offered explanations as to his possession of such articles, cross-examination of defendant as to circumstances of prior arrest and possession of such articles, and to impeach defendant's version of the previous arrest, was proper.

**6. Criminal law ⇐938(1)**

Denial of defendant's motion for new trial of rape prosecution on ground of newly discovered evidence was not an abuse of discretion, where newly discovered evidence was cumulative and there was no satisfactory showing of diligence.

**7. Indictment and information ⇐33(4)**

Indictment charging rape was not insufficient because it was not signed by the district attorney. Pen.Code, §§ 917, 940; Government Code, §§ 26501, 26502.

**8. Indictment and information ⇐9**

Provision of Government Code that a district attorney has the duty to draw all indictments and informations means that the district attorney must draw all indictments only when requested by the grand jury for its advice and assistance. Pen. Code, §§ 917, 940; Government Code, §§ 26501, 26502.

**9. Indictment and information ⇐10**

An indictment is the independent act of the grand jury. Pen.Code, § 917.

---

Appeal from Superior Court, City and County of San Francisco; Daniel R. Shoemaker, Judge.

John H. Coleman was convicted of forcible rape, and he appeals.

Affirmed.

Ernest Spagnoli, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

OGDEN, Justice pro tem.

Appellant was convicted by the verdict of a jury of the crime of forcible rape. He appeals from the judgment of conviction and from an order denying his motion for a new trial.

The prosecutrix, an unmarried woman of the age of thirty-five years, testified that she was accosted while walking alone through the Alta Plaza Park in San Francisco on her return from church services shortly before nine o'clock on a Sunday evening. A man approached her along an otherwise deserted path, thrust his face close to hers, saying: "Oh, I thought you were someone I know, but you'll do." Her outcries were stifled by her assailant who placed his hands around her neck and choked her, which he continued to do throughout the attack. When she tried to remove his hands from her throat he said, "Take your hands away or I will kill you." Despite her continued efforts to resist, she was forcibly dragged to a near-by clump of bushes and an act of sexual intercourse

accomplished upon her. Her attacker fled and she ran to her home which was but a short distance away. The police were immediately notified by telephone and responded within a few minutes. The park was sufficiently lighted to enable her to clearly see the man's face which, she testified, had certain characteristic features which were unmistakable. She described him as a man of dark complexion, with a peculiarly long oval face having "bags under his eyes" and as wearing a long peaked cap.

One of the police officers who responded to her call, a Sgt. Murphy, had arrested appellant about a month previously in the vicinity of the same park in the early morning hours hiding in an alleyway. As a result of the description furnished by the prosecutrix Sgt. Murphy went to the rooming house where appellant lived. Not finding him home he again returned thereto and apprehended appellant at 1:45 o'clock a. m. as the latter was about to enter his house. At that time appellant was wearing a brown hat, but in his room was found a cap which Sgt. Murphy identified as the one he was wearing at the time of his previous arrest and which the prosecutrix identified as being similar to the one worn by her assailant. Appellant was immediately taken to the home of the prosecutrix and was positively identified by her. He was first charged with assault to commit rape and when it later developed that the prosecutrix was in a pregnant condition he was indicted by the grand jury for the completed offense.

At the time of his arrest appellant, in reply to questioning as to his conduct during that night and evening, was quite vague merely saying that he had been "here and there," had had a couple of drinks but did not remember where, that he had been alone and met no one he knew. He stated that he did not know where he got the mud stains of the front of his trousers to which the officers directed his attention.

The clothing worn by the prosecutrix at the time of the attack and that worn by appellant when arrested were submitted to a biochemist for laboratory examination. The latter testified that white fibres from the coat of the prosecutrix were found on the clothing of appellant and brown fibres from appellant's suit were found on the coat of the prosecutrix. Hairs from live squirrels were found on both sets of clothing. (It was shown that squirrels inhabited the park.) A chemical analysis was made of dirt taken from appellant's shoes, of dirt taken from the clothing of the prosecutrix and of that taken from the scene of the attack. They were found to be virtually identical. The biochemist testified that in his opinion the two sets of clothing had been in contact with each other and that the dirt found on both came from the soil at the scene of the attack. Adequate showing was made that the two sets of clothing had been kept separated before their examination.

Appellant testified in his own behalf, denying his guilt, that he had been in the vicinity of the park that evening and that he had ever worn the cap previously referred to since his discharge from the army. In contrast to his inability to remember when questioned by the arresting officer, he gave a detailed account of his movements on the night of the attack and offered the testimony of alibi witnesses consisting of two fellow roomers and a bartender. These witnesses and a former employer also testified as to his good reputation for morality and integrity.

[1, 2] The verdict of the jury is amply supported by the evidence. It requires no citation of authority and appellant concedes that his evidence as to alibi and good reputation at the most created a conflict which was solely within the province of the jury to resolve.

The contention that the testimony of the prosecutrix is inherently improbable and the suggestion that it was fabricated to explain her pregnancy have no semblance of merit or support in the record. There can be no room for doubt that she was in fact criminally attacked. At the scene of the attack the police found the books that she had been carrying, one of her earrings and one of the garters which had been torn from her girdle. A medical examination, made the same evening at the emergency hospital, revealed marks on her throat from being choked and a marked redness

about the vagina. A laboratory examination of vaginal smears and of her underclothing disclosed the presence of male semen. That the act was completed is conclusive from the subsequent development of pregnancy.

[3, 4] There is no merit in the contention that the identification was "cultured or suggested." That it was made of one whom the prosecutrix knew was suspected by the police was merely one of the circumstances for the jury to consider in determining its weight. Upon being confronted by appellant, the prosecutrix without hesitation responded, "That is the man, I can not forget that face." It was in no way suggested by the police officers. The strength or weakness of identification is a matter solely within the province of the jury (People v. Farrington, 213 Cal. 459, 2 P.2d 814; People v. Harsch, 44 Cal.App. 2d 572, 112 P.2d 654) and its acceptance is conclusive unless inherently improbable. People v. Castro, 68 Cal.App.2d 491, 157 P.2d 25.

[5] Appellant claims prejudicial error in the rulings of the trial court permitting the district attorney, both in the cross-examination of appellant and by rebuttal testimony, to disclose to the jury the full details of the prior arrest of appellant and of his then possession of fire arms and articles of jewelry. In the presentation of his case the district attorney was permitted only to bring out that the police officers had on a previous occasion seen appellant wearing the cap found in his room and which the prosecutrix testified was similar to the one worn by her assailant. On direct examination, in reply to questions propounded by his own counsel, appellant testified as to the fact of his previous arrest, of the discovery in his room by the police on that occasion of three revolvers, several wallets, watches and items of jewelry and offered explanations as to his possession of them. The cross-examination as to all of the circumstances of that arrest and of his possession of those articles was well within the scope of the direct examination conducted by his counsel. The rebuttal testimony tending to impeach appellant's version thereof was likewise permissible. If appellant were prejudiced by the full disclosure of all the circumstances of his prior arrest, he can blame no one for it but himself and cannot be heard to complain on this appeal.

Certain other rulings of the trial court in the admission of evidence and certain instructions given to the jury are criticized as constituting error. Appellant cites no authorities in support of his contentions and they are so wholly without merit as not to justify discussion here. We have carefully reviewed the entire record and find no prejudicial error. The jury was fairly and correctly instructed as to the law.

[6] The trial court committed no abuse of its discretion in denying appellant's motion for a new trial. It was based primarily upon the ground of the newly discovered evidence of a witness who would testify that she heard and recognized the voice of appellant in his rooming house at 9:45 o'clock p. m. on the night of the attack. The proposed testimony was but cumulative of that offered at the trial. Moreover, no satisfactory showing was made as to why in the exercise of due diligence it could not have been discovered sooner and presented at the trial.

[7, 8] The sufficiency of the indictment is attacked on the ground that it is not signed by the district attorney. It is not necessary to consider whether such objection can be raised for the first time on appeal nor to consider the adequacy of the signature of the assistant district attorney in the light of such cases as People v. Etting, 99 Cal. 577, 34 P. 237; People v. Griner, 124 Cal. 19, 56 P. 625; People v. Turner, 85 Cal. 432, 24 P. 857, which deal with informations. This is so for the reason that there is no requirement that an indictment be signed by the district attorney. See People v. Ashnauer, 47 Cal. 98. The statutory provisions relating to the form and sufficiency of an indictment contain no reference to that officer or his signature. Penal Code, section 940, prescribes the manner in which an indictment must be found and indorsed. People v. Henninger, 20 Cal.App. 79, 128 P. 352. It requires no other signature than that of the foreman

of the grand jury to its indorsement as a "true bill." One of the statutory duties of the district attorney is to draw all indictments and informations. Government Code, section 26502. This duty must be construed in connection with the duty prescribed in Government Code, sec. 26501, to "* * * attend before and give advice to the grand jury whenever cases are presented to it for its consideration." There is no requirement, however, that it is the duty of the grand jury to request or accept that advice. The obvious intendment is that the district attorney must draw all indictments only when requested by the grand jury for its advice and assistance.

[9] To hold that any action or signature of the district attorney is essential to a valid indictment would be inconsistent with the definition found in Penal Code, section 917, which reads, "An indictment is an accusation in writing, presented by the grand jury to a competent court, charging a person with a public offense." An indictment is the independent act of the grand jury. To require the signature of the district attorney thereto would destroy the independency of action of that body and defeat the primary purpose of its existence.

The judgment and the order denying appellant's motion for a new trial are affirmed.

NOURSE, P. J., and DOOLING, J., concur.




83 Cal.App.2d 758

**ETZEL v. ROSENBLOOM et al.**

**Civ. 16204.**

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1948.

Hearing Denied April 19, 1948.

**1. Appeal and error ⇐1046(5)**

Any misconduct of trial judge from which it may rightfully be deduced that jury was influenced in rendering its verdict is prejudicial error.

**2. Appeal and error ⇐201(2)**

Generally, unless harmful result of misconduct of trial judge cannot be obviated by an appropriate instruction, error cannot be predicated thereon in absence of an assignment of such misconduct as error and request for instruction that jury disregard it.

**3. Appeal and error ⇐201(2)**

Where admonition of trial judge to jury to disregard misconduct of trial judge would not remove its prejudicial effect, objection thereto and request that jury be instructed to disregard it is not prerequisite to urging such error on appeal.

**4. Trial ⇐29(1), 106**

Trial judge or counsel are never justified in being discourteous one to the other, to witnesses, parties litigant or jurors.

**5. Trial ⇐29(1)**

Presiding judge should conduct trial in fair and impartial manner, and refrain from making unnecessary comments during course of trial which may tend toward prejudicial result to litigant.

**6. Appeal and error ⇐1046(5)**

Trial judge's statement that objection would be sustained since counsel did not want jury to know the truth and judge's question to plaintiff indicating that defendant's automobile had struck plaintiff, was misconduct constituting prejudicial error.

**7. Appeal and error ⇐201(2)**

Where misconduct of trial judge was of such nature that an objection to such misconduct and an admonition by the court to the jury to disregard it would have been ineffectual, objection and request for admonition were unnecessary as prerequisite to urging such error on appeal.

**8. Judges ⇐24**

The canons of judicial ethics require a judge to be courteous to counsel, temperate, attentive, patient, and not to indulge in individual idiosyncrasies in administering justice.

---

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Katherine Etzel against Abe Rosenbloom and another, to recover damages for injuries. Judgment for plaintiff and defendants appeal.

Reversed.

Crider, Runkle & Tilson and Charles H. Lynch, all of Los Angeles, for appellants.

Jones & Wiener, by Edward Clayton Jones, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before a jury in an action to recover damages for personal injuries resulting from plaintiff's being struck by defendants' automobile, defendants appeal.

The record discloses evidence which supports these facts:

Defendant Abe Rosenbloom's automobile was pushed from a standing position one block east of the intersection of Beverly boulevard and Genesee street, Los Angeles, toward a service station located at the crossing. It had been raining and the motor of the car would not start; hence the reason for its being pushed. The windshield wiper on the car was not operating. As the automobile crossed the sidewalk entrance to the service station it struck and injured plaintiff.

This is the sole question necessary for us to determine:

*Did the trial judge's conduct constitute prejudicial error which resulted in depriving defendants of a fair and impartial trial by jury?*

This question must be answered in the affirmative.

## *MISCONDUCT OF JUDGE BURNELL WHO PRESIDED AT THE TRIAL*

### *First*

During the examination of defendant Mr. Rosenbloom the following colloquy occurred:

"The Court: Well, it was pretty hard for you to see without that windshield wiper working, wasn't it?

"Mr. Rosenbloom: Well, it would work.

"The Court: That wasn't my question. It was pretty hard for you to see without it working, wasn't it?

"Mr. Rosenbloom: The motor wasn't working.

"The Court: I didn't ask you that. Will you please answer a simple question, if you can? I asked you if it was not difficult for you to see because of the fact that your windshield wiper was not working?"

* * * * * *

"The Court: How far was that from your place of business where you started?

"Mr. Rosenbloom: Where I started?

"The Court: Yes, where you started from your place of business.

"Mr. Rosenbloom: Well, when I was to the driveway he gave me a shove.

"The Court: I wish you would answer a plain question. You know where your place of business was, do you not?

"Mr. Rosenbloom: Yes, sir.

"The Court: That is where he started to shove you?

"Mr. Rosenbloom: Yes, sir.

"The Court: How far is that from this driveway?

"Mr. Rosenbloom: The exact figure, Your Honor?

"The Court: As near as you can tell us.

"Mr. Rosenbloom: I cannot say the exact figure.

"The Court: Well, was it 10 miles or a block, or—

"Mr. Rosenbloom: Just about a block.

"The Court: And you mean that he gave you just one shove for you to go a block?

"Mr. Rosenbloom: Yes, for me to get close to the driveway.

* * * * * *

"Mr. Jones: Now, Mr. Rosenbloom, what, if anything, has caused you to change your mind with respect to the position of the automobile as you made it yesterday?

"Mr. Lynch: That is objected to as argumentative.

"The Court: Do you not think that counsel is entitled to know why a man has testified one way one time and a different way another?

"Mr. Lynch: I merely make the objection.

"The Court: All right, I will sustain the objection since you do not want the jury to know the truth about that."

*Second*

While plaintiff was testifying upon direct examination the following occurred:

"The Court: When this car hit you, where were you at that time, when the collision actually took place, in the street or on the sidewalk or where?

"Miss Etzel: I do not recall, but the next thing I knew, I was in the gutter.

"Mr. Lynch: I am going to object to the Court's question on the ground that it invades the province of the jury.

"The Court: I thought you admitted the collision.

"Mr. Lynch: Yes, your Honor, but—

"The Court: The objection is sustained. Anything that counsel do not want you to know I do not want you to know. If that is the way they want to try the case that is all right. If you don't want the jury to know the truth, I will sustain your objection.

* * * * * *

"Mr. Jones: Do you know what the cost of that fountain pen that you lost was?

"Miss Etzel: About $7.50, or so.

"The Court: I didn't get that.

"Mr. Lynch: $7.50, or so.

"The Court: Does it write under water?

"Miss Etzel: I haven't tried it yet.

"The Court: You had a good chance to try it that night, didn't you?

"Miss Etzel: Yes, I did."

*Third*

At the time of the taking of one of the recesses the court made the following remark to the jury:

"The Court: We will take a recess until 10:00 o'clock tomorrow morning, and remember the admonition of the Court, ladies and gentlemen, and remain reasonably sober."

[1–5] The following rules are applicable to the present situation:

(1) Any misconduct on the part of the trial judge from which it may be rightfully deduced that the jury was influenced in rendering its verdict constitutes prejudicial error. (People v. Frank, 71 Cal.App. 575, 581, 236 P. 189; Abbott v. Coronada Beach Co., 55 Cal.App. 179, 181, 203 P. 145; McMinn v. Whelan, 27 Cal. 300, 319.)

(2) General rule: Unless the harmful result of the misconduct of the trial judge cannot be obviated by an appropriate instruction, error cannot be predicated thereon in the absence of (a) and assignment of such misconduct as error and (b) a request to the trial court to instruct the jury to disregard it. (Church v. Payne, 36 Cal. App.2d 382, 400, 97 P.2d 819.)

Exception: In cases where an admonition of the judge to the jury to disregard his misconduct would not remove the prejudicial effect of such misconduct, it is not a prerequisite to urging such error on appeal for the appellant to have objected thereto and made a request that the jury be instructed to disregard it. (Estate of Golden, 4 Cal.2d 300, 311, 48 P.2d 962.)

(3) There is *never* an instance which justifies a trial judge or counsel in being discourteous one to the other, to witnesses, parties litigant or jurors. A judge presiding at a trial should conduct it in a fair and impartial manner, and refrain from making unnecessary comments during the course of the trial which may tend toward a prejudicial result to a litigant. (People v. Williams, 55 Cal.App.2d 696, 703, 131 P.2d 851.)

[6] Applying the foregoing rules to the facts of the instant case it is evident that the trial judge's remarks were of such a character as to indicate to the jury, first, that defendant Abe Rosenbloom was not telling the truth; second, that defendants' car had struck the plaintiff; and third, that defendants' counsel was trying to keep the facts from being presented to the jury. Therefore, under rule 1, supra, such misconduct constituted prejudicial error.

[7] It is likewise evident that an objection to such misconduct and an admonition by the court to the jury to disregard it would have been ineffectual and would have accentuated the error rather than have removed it. Therefore this case falls under the exception rather than under the general rule set forth above

(number 2), and hence it was unnecessary for defendants to have objected to the misconduct of the trial judge and to have requested him to admonish the jury to disregard it.

In the ordinary case we would be constrained to reprimand Judge Burnell for his flagrant disregard of the canons of judicial ethics and for his nonjudicial and outrageous conduct. However, we refrain from doing so for the reason that the reported cases show that from time to time during twenty years the appellate courts of this state have directed Judge Burnell's attention to the impropriety of conduct similar to that which occurred in the present case—all to no avail.

In 1927 our Supreme Court in referring to misconduct of Judge Burnell in People v. Mahoney, 201 Cal. 618, 627, 258 P. 607, 610, said:

"When, as in this case, the trial court persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses, and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge, and in other ways discredits the cause of the defense, it has transcended so far beyond the pale of judicial fairness as to render a new trial necessary. Neither can a plea for the application of the section of the Constitution save this situation. The fact that a record shows a defendant to be guilty of a crime does not necessarily determine that there has been no miscarriage of justice. In this case the defendant did not have the fair trial guaranteed to him by law and the Constitution."

In 1935, Mr. Justice Wood, in referring to the misconduct of Judge Burnell in People v. Earl, 10 Cal.App.2d 163, 166, 51 P. 2d 147, 148, said:

"Appellants vigorously assert that the trial court was guilty of misconduct in his remarks made while defendant Ryan was on the witness stand and in his questions directed to this defendant. The record shows that the trial judge made this statement: 'I have tried to get this witness to speak like a man, but it doesn't seem to do any good. He doesn't seem to want the jury to hear his testimony.' A little later in the record the following questions by the court and answers by the defendant Ryan appear:

"'Q. You did tell the truth then occasionally, did you? * * *

"'Q. What was your idea in telling all of those lies? A. I did not know what to say.

"'Q. Did it ever occur to you to tell the truth? A. Yes, I tried to make it look—

"'Q. How did you happen to be telling all those lies on this particular case? A. I did not know what to say. Everyone was firing questions at me.

"'Q. When people ask you questions, is it your custom to lie? A. No, it hasn't been.

"'Q. This was just a special time, at that particular time you concluded to lie part of the time? A. I did not know what to say.

"'Q. Didn't it ever occur to you to tell the truth? A. I told the truth as much as I knew about it.

"'Q. That is all I wanted to ask you.' The statements made by the court and the questions asked were not proper."

In 1935, in referring to the misconduct of Judge Burnell, Mr. Justice Gould, in People v. Johnson, 11 Cal.App.2d 22, 23, 52 P.2d 964, 965, said:

"No citation of authority or recitation of principles of judicial decorum is necessary to brand this conduct of the trial court as improper and tending to prejudice defendant's rights. When the court belatedly attempted to remedy his judicial *faux pas* by telling the jury that he did not 'want to be deemed as having made any statement as to the truth or falsity' of the testimony of the witness in question, it is obvious that the wrong done could not be cured."

In 1935, Mr. Justice Edmonds, in commenting upon the misconduct of Judge Burnell in People v. McNeer, 8 Cal.App. 2d 676, 681, 47 P.2d 813, 815, said:

"Under all of the circumstances shown by the record in this case, the actions of the trial judge prejudiced the rights of

the defendant, requiring a reversal of the judgment." The court then quotes with approval from People v. Mahoney, supra. The quotation is set forth in full above.

In 1942, this court in People v. Williams, 55 Cal.App.2d 696, 701, 131 P.2d 851, 853, referring to the misconduct of Judge Burnell, made the following remarks:

"The foregoing reference to the defendant by the trial judge was unquestionably erroneous. Defendants were presumed to be innocent, and they were entitled to a fair trial and to receive from the jury a verdict uninfluenced by disparaging or abusive remarks from the judge. The statement of the judge, made in the presence of the jury and before the rendition of a verdict, that defendants were not gentlemen and that he could think of a better name for them, could hardly fail to indicate to the jury that the judge was firmly convinced of their guilt. A number of cases have been brought to our attention, in which the same trial judge who presided in the instant case also presided, and in which the defendants bitterly complained of the judge's misconduct."

Fully appreciating Judge Burnell's ability as a lawyer and at the same time recognizing his determination to indulge in conduct unbecoming a judicial officer, and realizing that anything we may say will have no effect on his future course of action, we make the following comments for the purpose of calling to the attention of the profession the fact that the appellate courts of this state neither condone nor approve such conduct.

[8] The canons of judicial ethics require a judge to be courteous to counsel, temperate, attentive, patient, and not to indulge in individual idiosyncracies in administering justice. (Canons 5, 10 and 21 of the Canons of Judicial Ethics of The American Bar Association, Vol. 62, Reports of The American Bar Association, 1937, pp. 1125, 1126 and 1130.)

Trial judges should bear in mind Socrates' admonition:

"Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially."

Also Lord Bacon's comment:

"Judges should be more learned than witty."

By striving to attain the foregoing ideals they will serve more efficiently and at the same time attain greater eminence even though they fail to justify the immortal bard's comical description of a judge:

"In fair round belly, with good capon lin'd,
With eyes severe, and beard of formal cut,
Full of wise saws and modern instances * * *." *

[9] Finally, it should constantly be borne in mind that courtesy is not only a privilege which a judge *may* extend to counsel, witnesses, jurors and litigants, but it is a *duty* which he owes to the humblest member of the public.

The trial of a lawsuit is a serious matter, and the courtroom is not the forum in which the buffoon should ascend the bench to display his wares.

Misconduct resulting in the reversal of cases costs the taxpayers large sums of money, is an utter economic waste, and often results in guilty persons escaping justice. (See criminal cases cited, supra.)

Judge Burnell's conduct in this case is to be condemned without reservation.

The judgment is reversed.

MOORE, P. J., and WILSON, J., concur.

* Shakespeare's "As You Like It", Act 2, Scene 7.

## LIBERTY MUT. INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.*

No. 13625.

District Court of Appeal, First District, Division 1, California.

Feb. 26, 1948.

Rehearing Denied March 27, 1948.

Hearing Granted April 22, 1948.

1. Workmen's compensation ⇐1724

Question of amount of permanent disability is one of fact to be determined by the Industrial Accident Commission.

2. Workmen's compensation ⇐1939

District Court of Appeal will not annul an award of the Industrial Accident Commission where there is substantial evidence to support the commission's finding and order.

3. Workmen's compensation ⇐1731

Compensation referee has the right to determine the credibility of any witness.

4. Workmen's compensation ⇐1418

Industrial Accident Commission has power to choose between expert medical opinions.

5. Workmen's compensation ⇐1418

Industrial Accident Commission can base an award for pain on testimony of injured man alone even though opposed by testimony of medical experts.

6. Workmen's compensation ⇐1417

Extent of loss of grasping power of an injured hand is within the knowledge of experts only and is not within the common knowledge of laymen.

7. Workmen's compensation ⇐1663

Compensation referee's finding of permanent disability through partial loss of grasping power of hand based on referee's estimate of amount of alleged malingering by injured employee while taking a dynamometer test of the grasping power out of the referee's presence, testified to by Industrial Accident Commission doctor who stated that he didn't believe the employee was trying, was improper as mere guess not based on substantial evidence.

8. Workmen's compensation ⇐1409

An insurance carrier is entitled to have a compensation award against it made on substantial evidence rather than on mere surmise and conjecture, even though such award is more favorable to it than other evidence in the case.

9. Workmen's compensation ⇐1663

Evidence failed to sustain finding by Industrial Accident Commission of 32¼ per cent. permanent disability suffered by a carpenter through injury to grasping power of right hand.

PETERS, P. J., dissenting.

---

Proceeding by Liberty Mutual Insurance Company, insurer, against the Industrial Accident Commission of the State of California and Joe Serafin, employee, to review and annul an award of the Industrial Accident Commission granting compensation for permanent disability.

Award annulled, and proceeding remanded.

Leonard, Hanna & Brophy, of San Francisco, for petitioners.

T. Groezinger and John A. Rowe, both of San Francisco, for respondent.

BRAY, Justice.

The sole question presented here is whether there is any evidence to support the percentage of disability of one Joe Serafin (hereinafter referred to as applicant) which the commission found.

Applicant, on July 5, 1945, sustained an injury to his right hand while working in the course of his employment as a laborer. The injury consisted of a blister which subsequently became infected. Certain temporary disability indemnity was paid him by petitioner up to March 17, 1946. Thereafter he worked for approximately nine months, and then applied to the commission for an informal permanent disability rating. The acting assistant medical director of the commission examined him on January 6, 1947, and on his report an informal rating of permanent disability of 8½% was

* Subsequent opinion 199 P.2d 302.

made. On March 6, 1947, applicant applied for an adjustment of claim. A hearing was had and a permanent disability rating of 32¼% made. The carrier petitioned for a rehearing on the ground that there was no evidence to support the rating.

[1, 2] The question of the amount of permanent disability is one of fact to be determined by the commission. "It is, of course, well settled that this court will not annul an award of the commission where there is substantial evidence to support the commission's finding and order. [Citing cases.]" Hartford Accident & Indemnity Co. v. Industrial Acc. Com., 202 Cal. 688, at page 692, 262 P. 309, 310, 58 A.L.R. 1392.

We have searched the record and are unable to find any substantial evidence to support the finding of the degree of permanent disability. The referee's findings as to the permanent disability were: "* * * limitation of flexion of distal joint of major thumb to 35/58; limited flexion of fingers, tips of index and middle fingers failing to touch palm on active motion by 2⅞" and 1¾", ring and little fingers touching palm approximately 1" proximal to normal position; some slight loss of extension of middle and distal joints of ring finger; grip of hand being 30/165; occasional constant sharp pain from proximal joints of middle and ring fingers up to elbow, especially when hand is tired and warm causing dropping of objects; some thickening over proximal joint of index finger; some pain on pressure over proximal joint of ring finger." No complaint is made of this finding except as to the grip figure. The main complaint is the degree of disability based on the finding. This degree is based primarily upon loss of grasping power in the hand.

Between January 7, 1946, and January 7, 1947, to determine the amount of loss of grasping power, applicant submitted to certain dynamometer tests. A dynamometer is an instrument used by doctors to measure a loss of grasping ability or weakness in one hand. The opposite hand is measured as a comparative. As will be seen later, there is a variance in the intensity of the instruments used by the various doctors. Inasmuch, however, as the units as calibrated on them do not represent fixed units of force (i. e., foot pounds, kilograms, etc.), the degree of intensity is not important. The figures are important only in comparison of the injured hand with the other hand.

Ten tests were made by Drs. Sales and McCarthy, apparently doctors for the carrier. These averaged 77/114. (Grasping power of right hand 77, compared to 114 of the left hand.) The figure showing the greatest weakness in the injured hand was 50/100 and the least 85/100. The test made by the assistant medical director upon which the original 8½% rating was based showed 110/165. After the formal application for rating, tests were made by three other doctors. The test made by Dr. Silberman showing greatest loss of power read 25/80. Dr. Cline, one of the carrier's doctors, testified that applicant purposely was not applying pressure, and hence he could make no determination. Dr. Harrison, assistant medical director of the commission (not the same director who made the previous tests) gave as the figure showing lowest strength in the hand 15/165. It will be noted that this figure is by far the lowest of all the figures given by the various doctors. As to the amount of strength left in applicant's injured hand, Dr. Harrison reported, however, "It is the examiner's impression that this applicant definitely does not put forth his best efforts in grasping either the instrument or the examiner's hand. I also feel he voluntarily inhibits motions of the fingers." None of the doctors, other than Dr. Cline and Dr. Harrison, reported any holding back in the tests by applicant.

In the findings and award by the referee the permanent disability is 32¼%. This figure was arrived at by the commission's rating expert based upon a grip figure of 30/165, which in percentage gives a rating of 31¼% to which he added 1% for the occasional sharp pain testified to by applicant. No complaint is made of the 1% allowance for pain, but it is contended that there is no basis for the figure of 30/165 (or in percentage 31¼%). The rating expert received this figure from the referee, who reported that he arrived at it

by taking the highest figure of Dr. Harrison, 15/165, and then "He [Dr. Harrison] thought the applicant was exaggerating the loss of grasping power, but naturally he could not say how much, *so I simply decided that the applicant was probably doing half as well as he could,* and therefore fixed the loss of grasp at 30/165." (Emphasis added.) In other words, the referee just doubled the finding of Dr. Harrison. In none of the test figures given by any of the doctors does the figure 30/165 appear, nor is there any figure other than Dr. Harrison's 15/165 (which the referee declined to accept as given) which gives anywhere near as great a loss of grasping power. Even Dr. Silberman, applicant's own doctor, found him to have a grasping power over twice that found by the referee.

It is obvious that there is no evidence to support the amount of disability found by the referee, unless it can be held that the referee had the right to estimate the amount of holding back the applicant was doing when the tests were being made by Dr. Harrison. The referee was not present, and it is plain that his estimate is mere guess-work.

[3] The referee reported: "I had just as much right, perhaps more authority, to determine the doctor's feelings that the man was not honestly doing the best he could to grasp the dynamometer or hand were not as persuasive to me as the man's sworn testimony based on a general estimation of his capacity for veracity that he had done the best he could, and that there was some difficulty in the hand, not immediately perceivable by these examining doctors, responsible for the loss of grasping power; that I would hesitate to believe that a carpenter of this man's age and general appearance, whose reputation for veracity was unchallenged, and who could make the money he could now make as a carpenter, would claim the disability he claims unless he either had it or believed he had it, which amounted to the same thing as not having the grasping power." It would appear from the foregoing that the referee did not believe Dr. Harrison's statement that the applicant was holding back in the tests. Of course, a referee has the right to determine the credibility of any witness, and had the referee based his finding on the fact that the applicant was doing his best, and accepted Dr. Harrison's figure of 15/165, there would be evidence to support such finding. But while the referee stated that he thought the applicant was not holding back in the tests, he made his finding based upon the fact that he actually was holding back to the extent of 50%. He might just as well have guessed the percentage at 10% or 500%. There is no basis in the evidence for determining to what extent the applicant was not trying.

[4] There can be no doubt that the commission has the power to choose between expert medical opinions. Liberty Mut. Ins. Co. v. Industrial Acc. Comm., 73 Cal.App.2d 555, 166 P.2d 908. But that was not done here. Had the referee taken any figure of any of the doctors, his action would have been supported.

[5] Respondent commission contends that since Dr. Harrison gave no reason for his impression that the applicant was not fully exerting himself, the referee could give such weight to his opinion as he saw fit. Gazzera v. City and County of San Francisco, 70 Cal.App.2d 833, 838, 161 P.2d 806. But Dr. Harrison did not attempt to determine the amount of grasping power lost due to lack of effort, but merely gave the machine ratings, and his conclusion that the applicant was not trying. Respondent takes the position that "The referee * * *, being the exclusive judge of the credibility of the employee as a witness, comes very near to being an expert" and compares the referee's observation of the applicant to the situation where a referee's inspection of premises where an injury has occurred may justify a finding, as in Ethel D. Co. v. Industrial Acc. Comm., 219 Cal 699, 28 P.2d 919. Respondent also relies upon Employer's etc. Corp. v. Industrial Acc. Comm., 42 Cal.App.2d 669, 109 P.2d 716, which holds that the commission could base an award for pain on the testimony of the injured man alone, even though opposed by the testimony of the medical experts, as "the injured person naturally

was in the best position to tell whether he was suffering pain" (42 Cal.App.2d at page 671, 109 P.2d at page 718). Also, in County of Los Angeles v. Industrial Acc. Comm., 14 Cal.App.2d 134, 57 P.2d 1341, it was held that the commission had the right to determine the question whether an applicant had suffered permanent injuries even though no physician was asked the question whether in his opinion the injuries were serious. These cases, however, are not authority for the proposition that a referee may determine the extent to which a person is not trying in making machine tests taken out of his presence. Conditions disclosed in an inspection of premises are ordinarily matters properly ascertainable by a layman. Pain is a matter alone known to the individual himself. The rule of the County of Los Angeles case, supra, is not that in every instance the commission may determine the permanency of an injury in the absence of expert testimony, but that "Manifestly there are many cases in which laymen can well determine the permanency of an injury, such as the loss of sight or limbs. Innumerable cases might be mentioned as coming within this category." (14 Cal.App.2d at page 137, 57 P.2d at page 1342). In that case there was a lengthening of a leg due to the injury. There is considerable difference between determining the permanency of a condition visible or described to the referee, and trying to determine how much an individual did not try in a test which the referee never saw.

[6] The extent of loss of grasping power is a question which is one of those referred to as "one within the knowledge of experts only, and is not within the common knowledge of laymen." William Simpson Const. Co. v. Industrial Acc. Comm., 74 Cal. App. 239, 243, 240 P. 58, 59. It requires tests by medical men not only by instruments but by examination and observation of the injured hand, aided by scientific knowledge of the effect such injuries would have on the normal use of it. It is similar to the situation in Simmons Co. v. Industrial Acc. Comm., 70 Cal.App.2d 664, 161 P.2d 702, where the court held that while the observations of a referee in viewing a mechanical device may be considered as evidence, the observations of a complicated machine by a referee who was not shown to be a mechanical expert did not support his finding of the necessity for a safety guard for the machine. But not even a medical man, by merely looking at an individual, could tell how much effort he held back at a machine test at which such expert was not present.

[7] Stress is laid upon the fact that since the referee could have declined to believe Dr. Harrison's statement as to lack of effort by applicant, but could have accepted the doctor's figure of 15/165, which would have meant a loss of twice the grasping power, and a doubling of the award, petitioner has not been prejudiced by the rating actually made, and therefore cannot complain. There are two answers to this: First, while the referee, in one portion of his report, stated that he could have disbelieved Dr. Harrison, yet he actually did not disbelieve him, for he made a finding based on the fact that the applicant was only half trying, and to justify the referee in accepting the lower figure, he would definitely and completely have to disbelieve Dr. Harrison's statement. Secondly, the conclusion of the commission must be based on evidence. Hartford Accident & Indemnity Co. v. Industrial Acc. Comm., 140 Cal.App. 482, 35 P.2d 366; Market St. Ry. Co. v. Industrial Acc. Comm., 193 Cal. 178, 182, 224 P. 95. The record shows that no matter upon what evidence the referee might have based his finding, he actually did base it on his estimate, actually, not of the applicant's loss of grasping power, but of the amount of holding back applicant did while undergoing Dr. Harrison's tests.

[8] In any event, the petitioner is entitled to have an award against it made on substantial evidence rather than on what the court in Simmons Co. v. Industrial Acc. Comm., supra [70 Cal.App.2d 664, 161 P. 2d 702] in considering a situation somewhat similar to the one here, characterized as "merely a surmise and conjecture" (70 Cal.App.2d at page 670, 161 P.2d at page 705), even though such award is more favorable to it than other evidence in the case. Particularly is this so where to consider that there is other evidence more

favorable to petitioner, the court must assume that the referee would have believed Dr. Harrison as to the figures of the tests, but disbelieved him in other particulars.

[9] It is true that the decision in this case is that of the commission, for on the same day the referee's findings and award were filed, a panel of the commission approved and confirmed it, and also denied a petition for a rehearing. Whether the commission exercised an independent judgment on the facts does not appear. (It passed upon some 35 other matters the same day.) The real question here is not whether we assume that the commission adopted the reasoning of the referee as disclosed in his report, but whether the finding of the commission finds any support in the evidence. Inasmuch as there is no evidence to support the degree of disability fixed by the commission, but the referee's explanation does fit it, we assume the commission (if it considered the matter at all) adopted the referee's reasoning. However, this opinion is not based on that assumption, but on the absence of any evidence to support the commission's finding. As said in Market St. Ry. Co. v. Industrial Acc. Comm., supra [193 Cal. 178, 182, 224 P. 95, 96]: "There is in this case that entire lack of evidence to support the finding on which the award was made, which subjects the proceeding to a review by this court. [Citing cases.]"

The award is annulled, and the proceeding is remanded to the Industrial Accident Commission for such further proceedings and order as are not inconsistent with the views herein expressed.

WARD, J., concurs.

PETERS, Presiding Justice (dissenting).

I dissent.

In this case there was evidence, substantial in nature, to support a disability rating of 62½%, and other substantial testimony to support a disability rating of 100%. Yet the majority opinion, on the petition not of the employee but of the insurance carrier, holds that a disability rating of 31¼% plus 1% for pain is not supported. Thus, according to the majority, the larger does not include the smaller, the whole does not include the parts of which it is made! This somewhat amazing conclusion is based upon the premises that no doctor testified to the exact figure that would have justified a 31¼% rating, and that the referee in his report, but not in his proposed findings, mentioned the reasoning by which he had arrived at a recommendation of 31¼%. It is then conclusively assumed that the panel of the Commission adopted this reasoning, and this in spite of the fact that the record shows that the panel decided this case and not the referee. The record also shows that on petition for rehearing addressed to the Commission the petitioner made every point now made before this court, and the Commission denied the rehearing, thus demonstrating that the Commission exercised an independent judgment on the facts.

The rule of law applicable to this case is clear. Where the evidence is susceptible of conflicting inferences the finding of the Commission is final and the courts have no power to interfere. California Shipbuilding Corp. v. Ind. Acc. Comm., 27 Cal.2d 536, 165 P.2d 669. The majority, while giving lip service to this rule, have simply disregarded it. The record shows that this employee was injured in an industrial accident on July 5, 1945. Admittedly he is disabled as a result of his industrial injury. Because of such disability he has been forced to give up his employment as a carpenter. He testified, and he is certainly competent to testify as to the degree of his disability, that he was unable to do carpenter work; that not only could he not close the fist of his right hand, but, when the hand became warm or moist, a sharp spasm occurred which caused him to drop any thing he was then holding. Many doctors made tests of the grasping power of that hand compared with the other. Those tests all showed some disability ranging from a small percentage in loss of grasping power to a 100% of loss of grasping power. Dr. Harrison fixed the loss in grasping power at a figure that would have warranted a 62½% rating. But loss of grasping power was only one of seven or eight other factors that the record shows was considered

by the Commission in fixing the rating. Even at the last hearing of this case, held nearly two years after the injury, this man's hand was still swollen. It is true that the referee prepared a report for the benefit of the Commission, but in that report he summarized all of the evidence that had been introduced. The majority have seen fit to quote that portion of this report that indicates that the referee reached a rating of 31¼% disability by dividing Dr. Harrison's estimate of 62½% by two, assuming the employee was only half trying. The majority assume that this report of the referee necessarily is binding on the Commission, necessarily reflects the reasoning of the Commission, and demonstrates that the Commission's finding is based on surmise or conjecture. These are all unjustified assumptions. It needs no citation of authority to support the statement that under the Constitution and statutes of this state the Commission, or a panel of the Commission, is the body that renders decisions. The referee prepares a report to the Commission and recommends findings. The Commission is empowered, and, under the law required, to exercise an independent judgment on the facts. It can disregard the proposed findings and makes its own findings. Where there are conflicts it can find contrary to the recommendation of its referee, and frequently does so. It is not bound by the reasoning contained in the report of the referee. Therefore, the real question in this case is not the main question discussed by the majority, namely, whether the recommendation and reasoning of the referee as disclosed in his report are supported, but whether the finding of the Commission that this man was disabled to the extent fixed by its finds support. If this point be considered, there is no doubt at all. The employee testified as to facts which, if believed, showed a total loss of use of his right hand in the carpenter trade. The doctors, by mechanical tests, found a loss of grasping power ranging from 100% down to a few per cent. The Commission has seen fit to fix the disability at 31¼% plus 1% for pain. It was permitted to fix the disability anywhere within the range of the testimony, considering not only loss of grasping power as disclosed by mechanical tests, but all the other testimony in the record. The majority have assumed, without any justification whatever, that the findings of the Commission are based solely on mechanical tests of Dr. Harrison, reduced one-half. The findings of the Commission, as distinguished from the report of the referee, do not disclose that this was the theory of the Commission. That body had before it a summary of all the evidence. That evidence showed seven or eight factors going to make up the disability. The employee had testified that while he had some grasping power (the only factor measured by the mechanical tests) in his right hand, the hand was useless to him as a mechanic because of the periodic spasms that caused him to drop whatever he was then holding. We must assume that the Commission did its duty and weighed all the evidence. We know a much larger award could have been made. It follows that the smaller award made is amply supported. It is not and should not be the law that there must be expert evidence in exact accord with the finding. There was expert testimony that indicated a disability to some degree existed. That testimony showed a disability ranging from a few per cent to 100%. The Commission, as the fact finding body, was entitled to weigh all the evidence and to fix the rating within the lower and upper limits of the testimony. This it did and its finding should be approved.

In my opinion the award should be affirmed.

Rehearing denied; PETERS, P. J., dissenting.

## DEVENS v. GOLDBERG.

Civ. 13508.

District Court of Appeal, First District, Division 1, California.

Feb. 18, 1948.

Hearing Granted April 15, 1948.

1. Pleading ⇐237(1)

Pleadings should be amended to conform to proofs, and defendant should be given an opportunity to plead and prove such defenses as he might have to the cause of action which is tried.

2. Judgment ⇐199(2)
New trial ⇐18

A court which permits case to be tried and submits case to jury under proper instructions based on one theory cannot grant judgment notwithstanding verdict because complaint was originally drawn on a different theory, particularly when submitted theory is included in complaint as drawn, but court can grant a new trial to get the pleadings in proper shape.

3. Pleading ⇐52(1)

Two causes of action which the facts alleged in the complaint covered should be separately stated.

4. Trial ⇐169

A litigant who sets up facts in his complaint showing that he has a cause of action will not be denied an opportunity to submit his case to jury merely because of lack of niceties of pleading, or because he has pleaded too much or because he may not have set forth all the facts necessary, when such facts are in evidence.

5. Workmen's compensation ⇐2125

An employee's complaint against employer for damages for employer's failure to provide safe place to work should allege that employer and employee were not subject to Workmen's Compensation Act. Labor Code, § 3700 et seq.

6. Pleading ⇐403(2)

A complaint which lacks averment of fact essential to cause of action may be so aided by averment of fact in answer as to uphold a judgment thereon.

* Subsequent opinion 199 P.2d 943.

7. Workmen's compensation ⇐2122

Where employee's complaint for damages against uninsured employer also stated cause of action based on common-law negligence in that employer failed to provide employee with reasonably safe place to work, and employer's answer set up fact that District Court of Appeal had decided and Industrial Accident Commission had found that employer and employee did not come within Workmen's Compensation Act, and case was tried and presented to jury on negligence theory, trial court could not grant judgment for employer notwithstanding verdict for employee for lack of allegation that employer and employee were not subject to Workmen's Compensation Act. Labor Code, § 3700 et seq.

8. Judgment ⇐199(3)

A judgment notwithstanding verdict for plaintiff should be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, there is no evidence of sufficient substantiality to support verdict for plaintiff.

9. Master and servant ⇐124(7)

An employer's duty, independently of statute, to provide employee with safe place to work requires employer to make reasonable inspection of premises at time employee goes to work, and such duty of inspection must be continuously fulfilled and positively performed at reasonable intervals to learn of dangers not apparent to the eye.

10. Master and servant ⇐265(5)

In domestic servant's action against employer for injuries allegedly resulting from employer's failure to provide safe place to work, evidence that injury was caused by giving way of porch rail, placed upon employer burden to show that employer had made reasonably careful inspection of premises and that he did not know and from such reasonable inspection would not have known, that railing was unsafe.

**11. Master and servant ⇐115(1)**

An employer must provide domestic servant accustomed to shaking rug over porch railing, with a railing sufficiently strong to sustain strain of servant's tripping before reaching the railing or falling against railing in coming out of the door.

**12. Master and servant ⇐265(14)**

A domestic servant suing employer for injuries sustained when porch railing gave way while servant was shaking rug would be presumed to have been exercising due care in absence of evidence to contrary. Code Civ.Proc. § 1963, subd. 4.

**13. Master and servant ⇐235(7)**

A domestic servant must use reasonable care for her safety, but she is not under the same duty of inspection as her employer, and she is entitled to assume that her employer will comply with the law and provide her with a safe place in which to work.

**14. Master and servant ⇐278(16)**

Evidence warranted domestic servant's recovery of damages from employer for injuries sustained when porch railing gave way while servant was shaking rug, on ground that employer was negligent in failing to make reasonable inspections which would have disclosed that railing was unsafe.

WARD, J., dissenting.

---

Appeal from Superior Court, San Mateo County; Edmund Scott, Judge.

Action on complaint entitled "complaint for damages against willfully uninsured employers" by Katherine Devens against Joseph Goldberg. From a judgment for the defendant notwithstanding verdict in favor of plaintiff, the plaintiff appeals.

Reversed.

Melvin M. Belli, Henry G. Sanford and Van H. Pinney, all of San Francisco, for appellant.

Geo. C. Faulkner, R. Edward Burton and Wilkie C. Courter, all of San Francisco, for respondent.

BRAY, Justice.

The jury awarded plaintiff a judgment against defendant in the sum of $10,000. The court thereafter granted judgment notwithstanding the verdict in favor of defendant, on the grounds, first, of insufficiency of the evidence to support the verdict, and secondly, that the only stated cause of action in plaintiff's complaint was "barred by a complete defense thereto established by uncontradicted evidence," namely, a certain final award of the Industrial Accident Commission.

Plaintiff was injured on January 15, 1944, while serving as a part-time domestic employee in the home of the defendant. The Industrial Accident Commission, on plaintiff's application, found that she and her employer, the defendant, were both subject to the provisions of the California Workmen's Compensation Insurance and Safety Act (re-enacted as section 3700 et seq. of the Labor Code, but for clarity referred to herein as the Workmen's Compensation Act); that defendant had wilfully failed to insure with respect to her employment and her injury, and that her injury arose out of and in the course of her employment. The commission denied defendant's petition for a rehearing and he thereupon filed a petition for a writ of review with the District Court of Appeal.

While that petition was pending, plaintiff filed this action. The complaint is entitled "Complaint for Damages against Willfully Uninsured Employers." The complaint sets forth a single cause of action based upon the theory that both parties are subject to the Workmen's Compensation Act, that defendant had violated the terms of the act in failing to insure, that plaintiff was injured in the course of her employment through the negligence of defendant in negligently maintaining a defective porch railing at the defendant's home where plaintiff worked, that due to such negligent maintenance of said railing, it gave way and plaintiff fell from the porch to the ground, receiving injuries for which she was asking damages; also attorney's fees. The complaint also sets up the finding of the commission hereinbefore mentioned.

After the filing of the complaint herein, the District Court of Appeal in Goldberg v. Pacific Employers Ins. Co., 70 Cal.App. 2d 472, 161 P.2d 272, held that because plaintiff did not work 52 hours per week for defendant, neither she nor her employment came within the provisions of the Workmen's Compensation Act, and annulled the finding of the commission. Thereupon the Industrial Accident Commission amended its findings to the same effect. That determination has become final.

Defendant amended his answer in which he denied any negligence whatever and that either plaintiff or he were subject to the provisions of the Workmen's Compensation Act, by adding to it the decision in Goldberg v. Pacific Employers Ins. Co., supra, and the amended findings of the commission.

On this state of the pleadings the case went to trial. An examination of the record discloses clearly that the case was tried by the plaintiff, and submitted to the jury by the court, on a different theory than that on which the complaint was based, namely, that the parties no longer claimed to be included within the terms of the act, but that defendant, as the employer, was liable, not under the act, but because of negligence in failing to provide defendant with a safe place to work. Throughout the trial, defendant objected to such a theory as not being within the pleadings, moved for a nonsuit at the end of plaintiff's case, and at all times insisted that the plaintiff had not made out a case as alleged, and that defendant had made out a complete defense to the cause of action as alleged.

[1] Disregarding the allegations in the complaint concerning the application of the Workmen's Compensation Act and the failure of the defendant to insure, the complaint does state a cause of action based on common-law negligence, which requires an employer to provide his employee (regardless of the Workmen's Compensation Act) with a reasonably safe place to work. 16 Cal.Jur. 995. Moreover, the defendant's answer set up the fact that the District Court of Appeal had determined and the commission found that the parties did not come within the Workmen's Compensation Act. The plaintiff did not dispute this. It was no longer an issue in the case. While the defendant contended that that ended the case, the court held, in effect, that the complaint was broad enough to include a general cause of action in negligence, and the case was tried and presented to the jury on that issue. While the pleadings should have been amended to conform to the proofs, and defendant given (had he asked for it) an opportunity to plead and prove such defenses as he might have to the cause of action as actually tried (for example, comparative contributory negligence of plaintiff, secs. 2700 and 2801, Labor Code,) since the case was submitted to the jury on the negligence theory, the most the court thereafter should have done was to grant a new trial and get the pleadings in proper shape.

[2] The court instructed the jury upon the negligence theory. Defendant did not offer any instructions on comparative contributory negligence, apparently because of his insistence that the jury be instructed that the plaintiff had failed to make out a case of included non-insured employer as alleged; moreover, it is doubtful if the facts here showed any contributory negligence on the part of plaintiff. See Crabbe v. Mammoth Channel Gold Mining Co., 168 Cal. 500, 503, 143 P. 714. A court which permits the case to be tried and submits it to the jury under proper instructions based upon one theory, is not justified in granting a judgment notwithstanding the verdict because the complaint was originally drawn on a different theory, particularly when the submitted theory is included in the complaint as drawn.

[3-7] In Mannon v. Pesula, 59 Cal.App. 2d 597, 139 P.2d 336, this court held that the fact that a complainant pleads an erroneous theory does not bar him from recovery, if his pleading contains facts to support a proper theory of recovery. There can be no question here but that plaintiff pleaded sufficient facts to justify a recovery by an employee from her employer for injuries received in the scope of her employment through the alleged negli-

gence of the employer in failing to provide her a safe place of employment. The allegations to the effect that both parties are subject to the provisions of the Workmen's Compensation Act and the failure of defendant to insure may be, and were, by the court, considered surplusage at the time of submission of the case to the jury. The complaint was in the same situation as the complaint in Cass v. Ocean Park Bath Co., 45 Cal.App. 656, 188 P. 616. There the allegations of the complaint (45 Cal.App. at page 658, 188 P. at page 617) "were such as to present two theories, upon either of which recovery might be had, and while the findings as to one [conversion] are adverse, they are as to the other in favor of plaintiff, and hence judgment should follow thereon in his favor." While, from a strict pleading standpoint, the two causes of action which the facts alleged in the complaint covered should have been separately stated (Sharp v. Miller, 54 Cal. 329, decided in the days when the attitude of the courts towards pleadings was highly technical) we are no longer dealing with the matter as strictly one of pleading. The case was tried and submitted to the jury on one of these theories. To grant a judgment now on the pleadings on the opposite theory would not be fair or equitable. The day has passed in California when a litigant who sets up facts in his complaint showing that he has a cause of action will be denied an opportunity to submit his case to a jury, merely because of lack of niceties of pleading, because he has pleaded too much, or because he may not have set forth all the facts necessary, when such facts are in evidence. Thus, here, to make a perfect pleading, the complaint should have alleged that the parties were not subject to the Workmen's Compensation Act. Butler v. Wyman, 128 Cal.App. 736, 18 P.2d 354. But we are not considering a pleading on demurrer. We are considering a situation where the case has been tried on a theory which the facts alleged in the complaint support in most part, and where the answer provides the fact missing from the complaint. "Even where the complaint lacks the averment of a fact essential to a cause of action, it may, nevertheless, be so aided by the averment of the fact in the answer as to uphold a judgment thereon." 2 Cal. Jur. 244; Flinn v. Ferry, 127 Cal. 648, 60 P. 434, 436. Had the complaint been amended to conform to the proof at the time the case was submitted to the jury, then there could have been no question of its sufficiency. "Under the code, where an answer has been filed, any relief may be granted a plaintiff which is consistent with the facts stated in the complaint. An action does not now, as formerly, fail because of a mistake as to the form of remedy. If a complaint shows that the plaintiff has a cause of action, and that he is entitled to some relief, the question as to the kind or extent of the relief to be granted cannot be raised by demurrer on the general ground that sufficient facts are not stated; the complaint is not to be dismissed because plaintiff has proceeded upon the wrong theory, or has prayed for a judgment to which he is not entitled." 21 Cal.Jur. 111.

Moreover, as pointed out before, we are considering a case which has actually been submitted to the jury. If the other party by reason of confusion in the pleadings has been deprived of an opportunity to meet all the issues under the actual facts of the case, the remedy is not by granting a judgment to that party, but by granting a new trial.

[8] This brings us to the crux of the case: was the court justified in holding that the evidence was insufficient to justify the jury's verdict? In this connection, it is important to bear in mind the rule which binds this court in determining whether a trial court is justified in disregarding the verdict of the jury and granting a judgment notwithstanding the verdict. As said in Docherty v. Key System, 80 Cal.App. 2d 888, 184 P.2d 33, 34, quoting from Card v. Boms, 210 Cal. 200, 202, 291 P. 190: "The court should therefore grant such a motion when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff."

Plaintiff lived at the home of defendant and was employed part time as a domestic servant. She weighed about 105 pounds. On the day in question, about 1 p. m., she started to clean the bathroom, which was located about 15 or 20 feet from the back porch, which was raised about eight feet from the ground, and on which there was a 2x4 railing about three feet above the porch floor. Plaintiff went into the bathroom to get the rug to shake it over the railing on the porch, as she had done on other occasions. She remembers nothing further until she woke up in the hospital. (A physician testified that in his opinion she could be suffering from retrograde amnesia as the result of her injury, which, in view of the fact that the testimony shows that plaintiff was not subject to spells of fainting or dizziness, accounts for her failure to recall the circumstances of her fall.) A next door neighbor, Mrs. Williams, heard some moaning coming from the direction of the defendant's house. On investigation, she found plaintiff lying on a rug on the ground below and about three and a half feet from the porch. Plaintiff was unconscious, lying in a large pool of blood. Lying by her was the railing, splintered, broken. "* * * it appeared to be decayed." The witness did not pick it up. This was the only evidence offered by plaintiff as to the accident or the condition of the railing.

Defendant placed on the stand a man named Robinson, who testified that he was a handy man who did carpenter work and other repair work. On the date of the accident, or shortly thereafter, he picked up the railing. It was not broken or decayed. The railing had pulled out from some of the nails which nailed it to the post on the porch. The points of some of the nails had remained in the post, but the railing had pulled away and had taken other nails with it. No explanation was given as to why the railing pulled away from the nails. The railing which gave way was attached to the same post as was the side railing. The wood itself was solid; it was only broken where the nails pulled out. Both Robinson and defendant testified that when the screen door was opened it would hit the side railing. Robinson said "they were always slamming that door * * * the screen door with a railing behind it gets hard usage."

It is clear from the evidence that the plaintiff fell off the porch because the railing gave way. According to plaintiff's witness, Mrs. Williams, it gave way because it was defective, as in the case of Bock v. Hamilton Square Baptist Church, 219 Cal. 284, 26 P.2d 7. According to defendant's witness Robinson, it gave way because it pulled away from the post holding it. The jury could have drawn the inference that the constant striking of the side railing by the screen door caused the weakening of the connection of the post and the front railing.

[9] Independently of statute, an employer is required to provide his employee with a safe place in which to work. As stated in Cordler v. Keffel, 161 Cal. 475, at page 478, 119 P. 658, at page 660, this duty "requires the employer to 'make reasonable inspection of the premises at the time he sets the servant to work'; that 'the duty of inspection must be continuously fulfilled and positively performed.'" Also "The duty of a master to his servant requires him to make a reasonably careful inspection at reasonable intervals to learn of dangers, not apparent to the eye, to which the servant may be exposed while engaged at the place where he is directed to work." 161 Cal. at page 479, 119 P. at page 660.

[10] It appearing from the evidence that the injury was caused by the giving way of the rail, the burden devolved upon the defendant to show that he had made reasonably careful inspection of the premises, and that he did not know, and from such a reasonable inspection would not have known, that the railing was unsafe, either from decay, or loosening at the nails. The defendant did not testify to making any inspection as such, of the railing at any time. He did testify that he saw it at least twice daily, and a dozen times or more on Sunday. Every morning, in picking up the milk, he rested one hand on the railing, and lots of times in taking boxes out he would push against the railing with his leg. The railing was not loose in any

way, nor did it ever shake or give. Robinson likewise testified that he had previously worked on the screen door, laid against and put pressure on the railing, and had never noticed anything wrong with the railing. Whether by this testimony the defendant met the burden of proving inspection was a matter for the jury. The jury did not necessarily have to believe the testimony of the defendant and his witness. The jury observed the demeanor of the witnesses on the stand, knew of their interest in the outcome of the case, and may have considered the fact that while the lawsuit was pending and the defendant knew that the plaintiff claimed the railing to be defective, defendant did not save the railing, but approximately a year and a half after the accident rebuilt the porch and permitted the railing in question to be destroyed or disposed of at the dumps.

[11, 12] Defendant cites certain cases such as Metz v. Southern Pac. Co., 51 Cal. App.2d 260, 124 P.2d 670, for the proposition that where a person is injured from an unknown or uncertain cause no presumption of negligence arises on the part of the owner of the instrumentality used at the time of the accident. However, that proposition does not apply here. The jury was justified in concluding that the giving way of the railing caused the fall. Even though, as suggested by defendant, plaintiff tripped before reaching the railing, or fell against it in coming out the door, it was the duty of the employer to provide a railing sufficiently strong to hold up in any of those eventualities. It must be contemplated that a porch railing will be submitted to such a strain. However, in view of plaintiff's custom of shaking the rug over the railing and the presumption that in the absence of evidence to the contrary she was using due care (sec. 1963, subd. 4, Code Civ.Proc.) it is a legitimate inference that the railing gave way as she leaned upon it, while shaking the rug.

[13] In view of the testimony of the defendant's own witness and himself to the effect that the screen door on opening hit the adjoining railing and the fact that the railing did give way, neither the trial court nor this court can say as a matter of law that a reasonable inspection by the defendant would not have disclosed at least the fact that the railing was pulling away from the nails. The fact that the defendant knew that the screen door was constantly hitting the adjoining rail, and this over a long period of time, placed a duty upon him of frequently examining the railing to see the effect of such hitting. Nor can we say, as a matter of law, that the jury was not entitled to disregard defendant's testimony as to his observance of the railing, and to find that a reasonable inspection would have disclosed its condition. Even the fact that the plaintiff, who saw the railing daily, did not discover any defect or weakness in it, would not affect this result. While the plaintiff is required to use reasonable care for her safety, she was entitled to assume that the defendant would comply with the law and provide her a safe place in which to work. She is not under the same duty of inspection as the employer. Crabbe v. Mammoth Channel Gold Mining Co., supra, 168 Cal. 500, 143 P. 714.

In Cordler v. Keffel, supra, 161 Cal. 475, 479, 119 P. 658, it was held that the determination of the amount of inspection depended largely upon the peculiar circumstances of each case. There it was held that a reasonably careful person would not have been content to allow a wooden covering over a wall to remain eleven years without a careful inspection, rather than an inspection by a passing glance at its upper surface.

Defendant relies upon Baddeley v. Shea, 114 Cal. 1, 45 P. 990, 991, 33 L.R.A. 747, 55 Am.St.Rep. 56, in support of his contention that there was no evidence that would put defendant on notice as to the condition of the railing, and that his daily use of it constituted sufficient inspection under the law. In the Baddeley case a transfer man was called to the defendant's home to get two trunks to deliver to the railroad depot. A platform which was a part of the front steps to defendant's house broke when plaintiff, carrying one of the trunks, stepped on it. The steps had been built about seven or eight years. There was testimony that the materials used should ordinarily wear sixteen to twenty years without repair. An examination after the

accident showed that the breaking was due to dry rot which could not have been discovered without making an opening through or under the vertical side of the platform sufficient to admit a person under the platform. On appeal, after a verdict in favor of plaintiff, the Supreme Court ordered a new trial, primarily for the failure of the court to give an instruction of which the following was a part: "If you believe from the evidence that the platform through which the plaintiff broke was constructed in a good and substantial manner, and gave no indication of being unsafe, up to the accident testified to, then I instruct you the defendant was under no legal obligations to have the said platform inspected from time to time; and if you find from the evidence that the defect in said platform, was secret and unknown to defendant, and was incident to the ordinary wear and tear of said platform, then you will find a verdict for the defendant." But even this instruction would leave it to the jury to determine whether the platform "gave no indication of being unsafe" before the accident. If, in our case, the jury should find that the railing broke because of a latent defect not discoverable by ordinary use or inspection, then the ruling in the Baddeley case would apply. But if the accident was caused by the pulling away of the railing from its nails, the evidence of the striking of the adjoining railing by the door would justify a finding by the jury that a reasonable inspection might have disclosed the weakness at the nails. At least, the constant striking of the rail by the door, over a long period of time, would put the defendant on notice that a weakening of the railing might be resulting. As said in Shearman and Redfield on Negligence, Vol. 2, p. 479, section 204, the master "is chargeable with constructive notice of whatever, by the use of ordinary care and diligence, he might have discovered, or avoided the danger incident thereupon."

In O'Connor v. Mennie, 169 Cal. 217, 146 P. 674, an employee was injured by the falling of an elevator used in the course of his employment. The court in applying the doctrine of res ipsa loquitur stated: "* * * in view of the circumstances shown, no adequate cause for the accident appeared other than the giving or yielding of the supports of the head-piece. * * *

"We are of the opinion that, in order to make a sufficient case for the jury, it was not incumbent on plaintiff, under the circumstances appearing, to do anything further in the way of showing that the defect in the appliance was actually known to the defendant, or would have been discovered upon the exercise of reasonable care to ascertain as to its condition. There was nothing in the evidence showing that the defect was such that it would not have been discovered, had such an examination of the structure been made by defendant as reasonable care for the safety of his employés demanded." 169 Cal. at page 225, 146 P. at page 677.

Having in mind that the defendant did not choose to make any explanation of what caused the railing to pull away from the nails, the following language is significant, 169 Cal. at page 226, 146 P. at page 677: "There are numerous authorities to the effect that under such circumstances it is enough for the employé to show that the accident was due to a defect in the appliance furnished the employé, without showing the precise nature of the defect, in this respect, and that such a showing warrants the inference that, if the defendant does not choose to give an explanation, the real cause was negligence on his part. This conclusion does not violate the well-settled rule that the party who alleged negligence must prove it, but simply means that such proof, under the circumstances stated, fairly warrants an inference of negligence, in the absence of explanation or evidence of reasonable care on the part of a defendant having superior knowledge as to the facts. In the case of Penson v. Island Empire etc. Co., 73 Wash. 338, 132 P. 39, [L.R.A.1915F, 15], this question was discussed. In that case a scaffold on which the plaintiff was standing while painting a roof fell, the fall being due to the breaking of a 2x4 support, and it did not appear whether the defect in the timber was a patent or a latent defect. The same contention was there made as here, and the court, after a full discussion, concluded as follows: 'The prima facie case made

by the character of the accident itself was not met in any way. The unexplained facts speak negligence.' The theory of the decisions in accord with this view is simply that the circumstances appearing are such that the jury may reasonably infer therefrom, in the absence of explanation, that the employer was guilty of negligence in the matter. There is ample authority for the view thus expressed, and it appears to us to be in accord with reason."

[14] We are not holding that the preponderance of evidence supports the finding of the jury, but that there was substantial evidence to support the verdict for plaintiff, and that therefore, under the rule, the court was not justified in granting a judgment notwithstanding the verdict.

The judgment is reversed.

PETERS, P. J., concurs.

WARD, Justice.

I dissent.

I agree in substance with the views expressed in the majority opinion that the Workmen's Compensation Act has no application to the facts of this case. In other words, the theory that an award for compensation may be made without proof of negligence must be eliminated from consideration. The case should be treated as an ordinary tort action.

I agree that the motion herein should be granted when plaintiff's evidence is given reasonable inferences. However, there is no proof of defendant's negligence. There should be some moderation of liberality under such circumstances.

The evidence of plaintiff is epitomized by the following portion of the transcript. "Q. Where were you when you last remember your having the rug in your hands? A. I don't remember anything, except that I knew that I had started to clean the bathroom, and I went in to get the rug to shake it.

"Q. When did you wake up? A. In the hospital about 7 o'clock that night."

Plaintiff had previously been treated for a condition due to menopause. The bathroom door was approximately 18 feet from the back porch; the porch was about four feet square, with a railing around it about three feet high. Plaintiff testified that she was familiar with the railing; that she had never noticed it shake when she leaned against it, and that she was of the opinion it was "firmly fixed and solid." If there was a defect in the railing it was latent and not patent. Another witness testified that in working on the springs of the screen door at different times prior to the accident: "I laid against that wall and put the pressure against that rail. I have done that many times." As stated in the majority opinion, defendant testified that the railing was not loose in any way nor did it ever shake or give. The opinion holds that an employer should build railings sufficiently strong to hold up in any eventuality. If there was a latent defect in the door or in the railing it was incumbent upon plaintiff to show that defendant knew or should have known of such defect.

The majority opinion suggests two possible causes for this accident. The first seems to be that a porch door when opened hit the railing on a number of occasions, thereby weakening it. This explanation appears to be more theoretical than substantial. I can find no evidence that anyone noticed, or upon an examination should have noticed, that the impact of the door had weakened the connection of the railing to its support. The evidence shows to the contrary. The second supposition is that the nails pulled out from the posts when the railing was hit by plaintiff. Of course when a railing is knocked to the ground and the posts remain in position it may be assumed that the nails had pulled out.

To my mind the point in this case is whether there is any evidence that the employer knew or by the exercise of reasonable care should have known of a latent defect, if any, in the railing, the repair of which would, in view of all the circumstances, exclude the probability of this particular accident. The degree of care that an employer should exercise in seeking a latent defect depends upon the circumstances of each case. Here no complaint was made within a reasonable time of the accident or within any period prior thereto from any source that a defect existed in

the railing through the loosening of nails or that the impact with the screen door had damaged any part of the porch. The employee herein was in as good position to observe any defect as the employer. The general rule is that the employee cannot recover on the basis of alleged failure of the employer to make inspection where each was equally well situated to discover any danger of injury. 35 Am.Jur., pp. 571–573, secs. 141, 142.

An employer may not be able to ascertain whether ordinary wear and tear has caused secret defects. Baddeley v. Shea, 114 Cal. 1, 45 P. 990, 33 L.R.A. 747, 55 Am.St.Rep. 56. The cause of the accident in this case may be only surmised, namely, that the rail broke due to the impact of the body of plaintiff who had lost consciousness. No witness saw the accident. Assuming that surmise may be raised to the standard of an inference, it has not been suggested how the employer could have ascertained that plaintiff would become unconscious as she approached the rail, or the degree of force with which her body would hit it.

In this case there should be no reference to Labor Code sec. 2801, which provides that when a master is charged with lack of ordinary or reasonable care the servant's slight negligence may be compared with the master's gross negligence. I do not understand that there is any evidence that the employer in this case was guilty of gross or any negligence, or that the employee was guilty of contributory negligence. The provision of the Roseberry Act (Stats.1911, p. 796) in that regard is the only instance of comparative negligence being recognized by a California statute.

I am not in accord with the holding that the doctrine of res ipsa loquitur applies. I assume my associates are satisfied that defendant did not know that plaintiff would become unconscious, and upon a further examination would not have known that the force of plaintiff's body against the railing would pull out the nails. There is evidence that almost daily defendant placed his hand or his leg against that railing. There is no evidence that it was unsteady or that any examination he could have made would be of avail in explaining the cause of plaintiff's unconsciousness.

There is no proof in this case that defendant did not supply plaintiff with a safe and suitable place to work. The doctrine of res ipsa loquitur does not apply where there is evidence of the cause of the accident. 38 Am.Jur., p. 992, sec. 296. Here the cause of the break in the rail was the accidental impact of plaintiff's body, attributable to her unconsciousness. The majority opinion relies upon O'Connor v. Mennie, 169 Cal. 217, 146 P. 674, and a case from the State of Washington cited therein. In the O'Connor case, 169 Cal. at pages 223–224, 146 P. at page 676, the court said: "Of course, to justify its application in any case, the circumstances of the accident must be such as, unexplained, afford reasonable evidence of want of care in a respect for which the defendant is liable in the particular action. For this reason the rule that the accident speaks for itself and prima facie shows negligence has been held inapplicable in many actions by an employé against his employer to recover damages for injuries sustained by the employé in the course of his employment. * * * It may safely be said that the authorities generally support the conclusion that, where the evidence as to the accident was such as to leave it purely a matter of mere surmise or conjecture whether the injury was due to a cause for which the employer was liable, the doctrine is not applicable. The burden of proof is on the employé to show actionable negligence, and under such circumstances the mere happening of the accident is not prima facie evidence of such negligence." "We have no doubt, however, but that the specification of improper and negligent construction must be construed as meaning an improper and negligent condition of the elevator as it was at the time of the accident—its unfitness at that time for the purposes for which it was intended and was being used." [169 Cal. at page 222, 146 P. at page 676].

"Therefore, if, instead of relying upon a general allegation of negligence, a plaintiff sets out specifically the negligent acts or omissions complained of, the doctrine

does not apply." 19 Cal.Jur., p. 127, sec. 127. The complaint in this case alleges: "That on or about the 15th day of January, 1944, the defendant negligently and carelessly maintained a defective railing on the back porch of the premises known as 729 Occidental Avenue in the City of San Mateo, County of San Mateo, State of California; that on said date, by reason of the negligence and carelessness of said defendants in so maintaining said defective railing on said porch, said railing gave way and plaintiff fell from said porch to the ground below, a distance of eight feet, and sustained the following injuries. * * *" The rights of parties should not be decided upon a sympathetic conjecture.

The judgment appealed from should be affirmed, otherwise the majority opinion becomes the law of this case. If the trial court has the power to grant a new trial the defendant will be called upon to explain not only why the nails pulled out but perhaps the cause of plaintiff's unconsciousness. I cannot agree with the majority opinion that an employer must provide against any eventuality. The negligence in this case should be determined under the old rule—did the defendant exercise the care which an ordinarily prudent person would use under the same circumstances in the discharge of any duty then resting upon him? 38 Am.Jur., p. 643, sec. 2.




84 Cal.App.2d 18

**PEOPLE v. BURNS et al.**

Cr. 2452.

District Court of Appeal, First District, Division 2, California.

Feb. 25, 1948.

Hearing Denied March 25, 1948.

**1. Criminal law ⇐172**

The formula that "jeopardy" attaches to a defendant when he is placed on trial before a court of competent jurisdiction upon a valid indictment or information before a jury impaneled and charged with his deliverance applies to cases where there are alternates as well as to cases where there are not. Pen.Code, § 1089.

See Words and Phrases, Permanent Edition, for all other definitions of "Jeopardy".

**2. Jury ⇐32(1)**

Trial court properly ordered an alternate juror in criminal prosecution where there had been two trials resulting in disagreements and there was no way of telling how long the third trial might take. Pen. Code, § 1089.

**3. Criminal law ⇐172**

Where, after original 12 jurors were sworn, trial court ordered an alternate and excused one of original 12 jurors, "jeopardy" did not attach upon swearing of original 12 jurors so as to render trial before jury after substitution of alternate for excused juror double jeopardy, but jeopardy attached only upon swearing of the alternate juror. Pen.Code, § 1089.

**4. Jury ⇐32(1)**

No invasion of right of jury trial occurred where same proceedings were had in selection of alternate juror as in case of first 12 jurors and no complaint was made that the alternate juror selected was not in fact a fair and impartial person to act as juror. Pen.Code, § 1089; Business and Professions Code, § 2141; Const. art. 1, § 7.

**5. Criminal law ⇐1166½(6)**

Procedure by which alternate juror was substituted in place of regular juror, although not within purview of statute providing for alternate jurors, was but a harmless irregularity not requiring reversal where verdict would not have been different had alternate juror not participated in deliberations of jury and alternate was subject to the same challenge and took same oath as other jurors. Pen.Code, § 1089; Const. art. 1, § 7; art. 6, § 4½.

**6. Jury ⇐79(3)**

In prosecution for conspiracy to commit abortions and for practicing medicine without a certificate, defendants had right to impartial jury but not to a jury composed of particular individuals. Pen.Code,

§§ 182, 274, 1089; Business and Professions Code, § 2141; Const. art. 1, § 7.

---

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Inez L. Burns, Mabel Spaulding, Myrtle Ramsay, Joseph Hoff and Musette Briggs were convicted of conspiracy to commit abortions and of practicing medicine without a certificate, and they appeal.

Judgment affirmed.

See also 78 Cal.App.2d 294, 177 P.2d 649.

Walter McGovern and John R. Golden, both of San Francisco, for appellants.

Fred N. Howser, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty. and Thomas C. Lynch, Asst. Dist. Atty., both of San Francisco, for respondent.

GOODELL, Justice.

The appellants were accused by information of conspiracy to commit abortions, Penal Code, secs. 182, 274, and of practicing medicine without a certificate, Business & Professions Code, sec. 2141. There were two trials, each resulting in a disagreement of the jury. The third trial resulted in a verdict of guilty as to all five defendants on both charges, and from the judgment entered thereon this appeal was taken.

At the opening of their brief appellants "elect to rely solely, in this appeal, on their contention that the trial court deprived them of their constitutional rights not to be placed in jeopardy twice for the same offense." That being so, a statement of the evidence is not necessary. It will suffice to relate the circumstances out of which double jeopardy is claimed to have arisen, as follows:

The trial opened on September 17th, 1946, and that day and the 18th and part of the morning of the 19th, were taken up in the section of a jury. At approximately eleven o'clock on the 19th a jury of twelve persons, including Thomas J. Furner, had been selected and sworn to try the case. The court then gave the usual admonition on separation and told the jurors that they were to be in the custody of the sheriff during the trial. The record then shows the following:

"Mr. Lynch: Does your Honor intend to select any alternate jurors?

"The Court: Yes, I believe we should select two alternates.

"The Clerk. There is only one juror left in the box.

"The Court: You will send for other jurors and we will take that up after the recess."

A recess was then taken.

At the opening of the afternoon session, the judge ordered: "Mr. Clerk, in accordance with the provisions of section 1089 of the Penal Code, you will make an entry in the minutes that the court in its discretion will require the selection of two alternate jurors, and in accordance with customary procedure you will draw the names." To this the defense objected on the ground that "there has been no showing of necessity for that." Several prospective alternates were examined on their voir dire and after one had been seated the court remarked that one alternate would be sufficient, to which counsel for the defense respondent "All right, that is our stipulation."

The judge then called counsel into chambers and stated that after the jury had been impaneled and sworn his attention had been called to the fact that juror Furner stood accused by an information then pending in the same department of the court, of a violation of section 480 of the Vehicle Code (hit and run) which fact neither he nor any of the counsel in the pending case had known at the time of Furner's voir dire examination. The judge stated that in his judgment this juror should not serve; that he purposed calling him in, and if he did not ask to be excused the court would, in the exercise of its discretion, excuse him for cause and put the alternate in his place.

The defense objected, stating that a jury had been duly and regularly sworn to try the case; that the contemplated action could not be carried out legally; that the fact that Furner had been accused was not a ground for challenge for cause, and that if carried out the proposed action would

result in a denial of the defendants' constitutional rights respecting double jeopardy. The defense stated, further, that if Furner were brought into chambers and questioned it would be intimidating the juror and would "possibly scare him into asking to be excused"; that the substitution of another juror would be denying the defendants their right to be tried by a jury of their own selection. The district attorney, when invited to comment, said nothing.

The juror was then called in and stated, in reply to the judge's question, that he was the same Thomas J. Furner against whom such information had been filed. The following transpired:

"The Court: * * * Do you feel, Mr. Furner, under the circumstances, that you would care to be excused?

"Juror Furner: It is entirely up to yourself, your Honor. I want to be fair about it. In fact, I discussed this with my attorney and he said as long as I wasn't objected to and as long as I answered the questions truthfully, I could.

"The Court: Well, of course, there is no reflection upon you whatever. I want you to understand that. It was not called to the attention of the court, nor was it called to the attention of the attorneys. None of us knew anything about it. And, of course, you are presumed to be innocent on that charge. But in view of the fact that you have been informed against by the district attorney and that that charge is now pending in this very department, the thought has occurred to me that you might possibly wish to be excused. I will ask you again then if you wish to be discharged under those circumstances?

"Juror Furner: Well, if you think it is liable to cast reflection on anyone, it is perfectly all right with me if you wish to excuse me.

"Mr. McGovern: I am going to object, your Honor, on all of the grounds heretofore interposed.

"The Court: The record will show that, and the record will show that the court in its discretion will excuse you, Mr. Furner. And you are to understand that there is no reflection upon you in that decision of mine. It is merely that I do not feel, in view of the fact that you have been informed against by the district attorney, who is also prosecuting this case, that it would be fair to you or fair to anyone concerned to have you serve upon this case, and therefore you are discharged.

"Juror Furner: All right, sir.

"The Court: And the record will show for the cause heretofore stated by the court.

"Mr. McGovern: To which we take an exception."

On returning to the courtroom the juror was formally excused and the alternate juror, named Lawrence A. Bailey, was sworn and seated in Furner's place.

Counsel then returned with the judge to chambers and the defense moved that all five defendants be forthwith dismissed from all pending charges on the ground that the court had indicated it intended to try them by a jury other than that which was theretofore selected, constituting double jeopardy. The motion was denied. They indicated also that a formal plea of former jeopardy would be entered later. In denying the motion to dismiss, the judge stated that in his opinion "no constitutional guarantee, either state or federal has been violated as far as each defendant is concerned; no witness has been sworn, and the court in the exercise of its discretion, does not believe it proper to proceed with a jury of twelve people, one of whom is presently charged with the commission of a felony by the prosecutor and by the same attorneys who are conducting the prosecution in the instant case. An alternate juror has been chosen in accordance with the provisions of the code and upon the excusal of the juror Furner, the alternate juror was substituted in his place in accordance with the court's understanding of what the proper procedure to be followed is. And for those reasons the motion is denied."

The next day the following transpired:

"Mr. Golden: Now, if our understanding of what took place yesterday is correct, at that time Mr. McGovern requested permission to enter a plea of once in jeopardy which would have the effect as though it was made at the time, and the court granted that permission.

"The Court: Yes.

"Mr. Golden: Now, then, for the record, your Honor, I make the plea on behalf of the defendants that, in addition to the plea of not guilty on the part of each defendant, the defendants and each of them plead that they and each of them have been once in jeopardy for the offense charged, namely conspiracy to commit abortions and conspiracy to practice medicine without a certificate, and that on yesterday, September the 19, 1946, * * * in this very courtroom, a jury of twelve persons, consisting of eleven of the persons presently in the jury box, plus a juror by the name of Thomas J. Furner, were duly and regularly impaneled and sworn and charged with the defendants' deliverance in this case— * * *

"* * * Well, in any case, duly and regularly impaneled and sworn to try the case. And I ask that that plea be entered with the effect as though it were made immediately upon the happening of the proceedings of yesterday, when the juror was substituted for Mr. Furner.

"The Court: I suppose the procedure is for me to deny the plea.

"Mr. McGovern: Yes, but will the record show it was made?

"The Court: The plea will be denied and the record will show that the plea made by Mr. Golden was made on behalf of all the defendants and the record will further show that it was timely made."

The trial then went forward in the ordinary way, and the introduction of evidence, the arguments and the instructions consumed six trial days.

The appellants contend that in the proceeding which opened on September 17, 1946 and terminated with the verdict of guilty, they faced two juries and that jeopardy attached as soon as the original twelve jurors were sworn. This position is indicated by their plea, entered after Bailey's substitution, which was as follows: "* * * the defendants * * * plead that they * * * have been once in jeopardy * * * and that on yesterday * * * in this very courtroom, a jury of twelve persons, consisting of eleven of the persons presently in the jury box, plus a juror by the name of Thomas J. Furner, were duly and regularly impaneled and sworn and charged with the defendants' deliverance in this case * * *." It is indicated also by these statements in their brief: (1st) "When the first jury in this third trial was impaneled and sworn these appellants 'entered into a period of jeopardy'. They then and there were in danger of conviction, by a jury of which Furner was a member." (2nd) "When the alternate Bailey was substituted for the juror Furner, the second trial began and appellants were then and there put twice in jeopardy for the same offense." (3rd) "When Furner was removed the jury was destroyed and the Court then and there lost jurisdiction to try the appellants." (4th) "When Furner was removed from the box that jury was destroyed as completely as if all twelve jurors were so removed."

[1] They rely on the rule stated in Jackson v. Superior Court, 10 Cal.2d 350, 352, 74 P.2d 243, 244, 113 A.L.R. 1422, as follows: "The authorities are in unison that jeopardy attaches to a defendant when he is placed on trial before a court of competent jurisdiction upon a valid indictment or information before a jury duly impaneled and charged with his deliverance. * * * These authorities hold that a jury stands charged with the deliverance of a defendant when its members have been impaneled and sworn. * * *"

The appellants' position leaves out of consideration the factor, present in this case, that the court, in the exercise of discretion vested in it by section 1089 of the Penal Code, decided that alternate jurors were required, and ordered their selection. Jackson v. Superior Court, supra, which restates the formula that jeopardy attaches when the jury is impaneled and sworn, was a case where alternates were not at all involved. That formula, although invented long before alternate jurors were thought of, applies of course to cases where there are alternates as well as to cases where there are not. The question now presented is whether in this case, where alternates were ordered, jeopardy attached when the original twelve (including Furner) were sworn, or whether it attached only after the

full complement of jurors of both classes were impaneled and sworn.

Section 1089 provides that "Whenever, in the opinion of a judge of a superior court * * * the trial is likely to be a protracted one, the court may cause an entry to that effect to be made in the minutes of the court, and thereupon, *immediately after the jury is impaneled and sworn,* the court may direct the calling of one or more *additional jurors,* in its discretion, to be known as 'alternate jurors.' * * *" (Emphasis added.)

[2, 3] The record shows that immediately after the twelve jurors were sworn the court on the district attorney's suggestion decided that there should be two alternates, to be selected after the recess. Immediately after the recess it was stipulated that one alternate would suffice and Bailey was selected. It certainly was a proper exercise of discretion to order an alternate in this case. There had been two trials resulting in disagreements. There was no way of telling how long the third trial might take. As it turned out it took six days. On this appeal it is not claimed that the court did not properly exercise its discretion in *ordering* the alternate; it is claimed that the court erred in substituting the alternate.

We are satisfied that the question whether there were two juries in this case is answered in the negative by the language of section 1089 itself.

That section requires that the "alternate jurors shall be seated near, with equal power and facilities for seeing and hearing the proceedings in the case, and shall take the same oath as the jurors already selected, and must attend at all times upon the trial of the cause in company with the other jurors; * * *."

Appellants characterize alternate jurors as mere "observers"; the statute, however, calls them "additional jurors". The oath which they must take is the same as that which the regular jurors take, viz., to try the particular case and render a verdict therein. The oath is administered to them at the very outset, and is not postponed until some emergency might call them into the box. But most compelling of all in its bearing on this inquiry, is the statutory requirement that the additional jurors "must attend at all times upon the trial of the cause in company with the other jurors * * *." This means that not a syllable of testimony can be introduced until the "additional jurors" have been sworn to try the case. If, therefore, the jury cannot function until the alternates have qualified, the jury cannot be said to be complete or impaneled until that time. For these reasons we are unable to follow appellants' argument that jeopardy attached in this case when the original twelve jurors were sworn, but must hold that it attached only after the alternate juror was sworn, hence that the appellants faced but one jury.

In the case of People v. Peete, 54 Cal. App. 333, 202 P. 51, the court discusses at great length section 1089 of the Penal Code and its operation and effect. In that case the question of double jeopardy was not presented but the constitutionality of the section was challenged as violative of section 7, article I, of the state constitution, which provides that "The right of trial by jury shall be secured to all, and remain inviolate; * * *." Louise Peete, who had been convicted of first degree murder, claimed on appeal that she had not been given a trial by jury as known to the common law. If there appeared after twelve jurors had been impaneled and sworn that the trial was likely to be a protracted one calling for alternate jurors, and the name of one O'Dell was drawn from the term trial jury-box. He was examined on his voir dire, passed for cause, accepted as the alternate, given the same oath as the jurors already selected, and attended at all times in company with the other jurors. After about two weeks of trial and after much evidence had been introduced, one of the regular jurors named Rudd became so ill that he was unable to continue, and the court excused him and put O'Dell in his place in the jury box. O'Dell sat on the jury with the other eleven for the rest of the trial and with them voted for conviction. The court held (54 Cal.App. at page 366, 202 P. at page 66) that the trial was "by a jury of twelve in every essential particular". To have reached that conclusion the court must have reasoned that there was but one jury from the very beginning.

In the case of People v. Howard, 211 Cal. 322, 295 P. 333, 334, 71 A.L.R. 1385, the defendant was convicted of murder in the first degree, without recommendation. On appeal the defendant made the same point as that made in the Peete case, namely, that his rights under section 7 of article I of the state constitution had been violated. The Howard case parallels the instant case in that the juror there was not excused for a cause within the purview of section 1089. After the evidence was concluded, and during oral argument, a juror communicated to the judge the fact that she was prejudiced against two of the defense witnesses and their testimony. A conference in chambers resulted in the request by one of defense counsel that this juror be discharged and an alternate put in her place, and it was so stipulated. The alternate voted with the original eleven for conviction. The majority opinion, without mentioning the Peete case, arrives at a similar conclusion, namely, that the defendant had a fair trial by jury as known to the common law. The defense there argued that "a mistrial should have been ordered, and that to substitute the alternate for the regular juror under such circumstances amounted to a reversible error" in that the defendant was deprived of a trial by jury as guaranteed by section 7 of article I of the constitution.

The Howard case differs from this in that defense counsel there requested the juror's dismissal while here they strenuously objected to it. There they not only stipulated to the juror's dismissal, but as appears from the opinion "The regularity of this proceeding by which the alternate was selected was also stipulated to." In spite of this stipulation as to its regularity, the court held that the procedure was *irregular*. Such holding would seem to dispose of any claim that that decision turned on the fact that defense counsel had requested the juror's dismissal and thereby waived the irregularity. The opinion does not so much as mention the request, or the stipulation, or the waiver, in giving its reasons. There might as well have been no stipulation at all, for it is entirely ignored as a factor influencing the decision.

The judgment of conviction in the Howard case was originally reversed (289 P. 830) in an opinion by Justice Richards, the Chief Justice and Justice Curtis dissenting. A rehearing was granted and the court on the rehearing made a reduction from first to second degree murder and affirmed the judgment as modified.

The first ground for the original reversal (see 289 P. at page 832; see also dissent at 211 Cal. at pages 333, 334, 295 P. at page 338, 71 A.L.R. 1385) was that although the legislature has the power to provide for alternate jurors in a proper case (citing the Peete case) in so doing it "has expressly limited the right of the trial court in any criminal case to substitute alternate jurors" to the instances set forth in section 1089. From this the conclusion was drawn "that the substituted alternate juror in the instant case, having been called to replace a regular juror who had neither died nor become ill * * * had no more right to sit or act in the case than any other person who might have been selected under like circumstances by any method not authorized by the express provisions of the foregoing sections of the Penal Code." *This is substantially the appellants' position in the case at bar.*

The second ground for the original reversal was that because of the dismissal of the regular juror the defendant had been deprived of a trial by a jury of twelve persons, and that although defense counsel had requested such dismissal, and formally stipulated to it, the defendant had not personally consented to it. In its second and final opinion (211 Cal. at page 325, 295 P. at page 334, 71 A.L.R. 1385) the court summarily disposed of that by saying, "The situation here presented is not one in which a waiver of the right to a jury trial in a felony case enters into the consideration."

[4] The Howard case is authority herein on still another ground. When counsel in the instant case objected in the trial court to the substitution they stated: "We submit that * * * putting another juror in his [Furner's] place will be denying to us our right to be tried by a jury of our own selection." The court in the Howard case in dealing with the same question said: "The first essential of a common-law jury in criminal causes is a jury of twelve citi-

zens, no more nor less, drawn from the locality, duly examined and sworn to try the cause. No objection was offered to the panel in this case. The second requirement is that the jurors must be impartial. No claim is made that juror Shields, the alternate selected, was not in fact a fair and impartial person to act as a juror. While the record brought here does not contain the examination of the jurors on voir dire, it does indicate that the same proceedings were had in the selection of the alternate jurors as in the case of the first twelve who took their places in the box. We may assume that the defendant was satisfied that the alternate jurors thus selected would give him the fair and impartial trial to which he was entitled, should either be called in lieu of one of the other jurors." Let Bailey's name be substituted for Shields' and everything just quoted fits the case at bar precisely.

The Peete case, 54 Cal.App. 333, 366, 202 P. 51, 66, supra, in dealing with the same subject points out that the alternate has been chosen "only after an examination as to his qualifications, subject to the same challenges as the other jurors, and upon his being selected as an alternate—i.e., before the introduction of any evidence whatever—he has taken the same oath that was taken by the other jurors—an oath well and truly to try the matter in issue and a true verdict render according to the evidence. Section 1089, Pen.Code, and section 604, Code Civ.Proc. * * * we must assume that he will obey his oath, and that he will well and truly try the matter in issue, as he has sworn to do, just as he would if he were one of the original twelve jurors. Every safeguard that the law has thrown around the regular jurors to insure an impartial verdict, even to the extent of being kept in the custody of the sheriff during the trial, the alternate juror is surrounded with from the commencement to the end of the trial."

[5, 6] It must be admitted that the circumstances of the substitution of Bailey for Furner were not within the purview of section 1089. In that respect the Howard case, 211 Cal. at page 325, 295 P. at page 334, 71 A.L.R. 1385, is again in point, where the court says: "While the circumstances of this case are not such as to bring it within the purview of section 1089 of the Penal Code providing for alternate jurors, we think *the procedure by which the alternate juror was substituted* in the place and stead of the regular juror *was, at most, but an irregularity which in no way substantially affected the defendant's rights. * * * It is not claimed that the verdict would have been any different had the alternate juror not participated in the deliberations of the jury.* He was subject to the same challenge and took the same oath as the other jurors. We should assume that in all respects he obeyed his oath and that he well and truly tried all the matters in issue and rendered a true and impartial verdict in the cause. *Defendant's right was to a fair and impartial jury, not to a jury composed of any particular individuals.* People v. Durrant, 116 Cal. 179, 199, 48 P. 75." (Emphasis added.)

A very unusual and rather extreme case is that of People v. Duncan, 8 Cal.App. 186, 96 P. 414, which is relied on in the Howard case. In the Duncan case one of the persons who sat on the jury throughout the trial and voted for the verdict of guilty, was not even on the jury list and had not been summoned to serve as a juror. He was a mere interloper. The court held, nevertheless, that the verdict was not invalidated by this irregularity. With respect to that case the following appears in the Howard opinion, 211 Cal. at page 325, 295 P. at page 334, 71 A.L.R. 1385: "No case has arisen in this state, or perhaps elsewhere, precisely like the case at bar in its facts. Earlier cases, in which disqualification of a juror has been raised after verdict in criminal causes, are reviewed in People v. Duncan, 8 Cal.App. 186, 96 P. 414. In that case, one Bernard Sherry appeared at the trial and substituted himself as a juror in place of John H. Sherry, whose name was upon the jury list, and who had been regularly subpoenaed to attend court as a trial juror. Upon the impanelment of the jury, the name of the rightful juror was drawn, and in answer thereto the other Sherry took his place in the box, and, after due examination as to his qualifications, was accepted and sworn

as a juror and acted throughout the trial of the cause. The jury returned a verdict of guilty of murder in the second degree. On appeal, it was contended that Bernard Sherry never became a juror because he was not selected and returned as required, and that therefore the verdict was the verdict of but eleven jurors. The court swept aside the contention, saying that it begged the question. The judgment of conviction was affirmed, and the petition to have the cause heard in the Supreme Court was denied."

Appellants rely on Jackson v. Superior Court, 10 Cal.2d 350, 74 P.2d 243, 113 A. L.R. 1422, supra, but that case is distinguishable. In the case at bar the Furner episode arose before the jury in its entirety had been impaneled and sworn. True the twelve regular jurors had been sworn, but the alternate had not. In the Jackson case there was no alternate involved, simply the conventional jury of twelve. In the process of impaneling that jury a dispute arose over the use of peremptory challenges; the defense questioned the regularity of the process but a jury of twelve was nevertheless obtained and sworn to try the case. Later on the assistant district attorney had misgivings and stated to the court "that there probably was error committed which was prejudicial in the rulings made by the court relative to the exercising of the peremptory challenges". He moved for a mistrial; the defense resisted the motion but the court granted it, declared a mistrial, discharged the jury and continued the case to the following morning for retrial. The defense moved for permission to enter pleas of former jeopardy and former acquittal and when their motion was denied they obtained in the District Court of Appeal, a writ of prohibition to prevent the second trial. The Supreme Court granted a hearing and adopted the opinion of the District Court of Appeal. The holding was that the error in the exercise of the peremptory challenges, on which the court had declared the mistrial, was not prejudicial, and that it had been waived. Accordingly it was held that there had been no legal basis for declaring a mistrial and that, because a jury had been sworn, and thereafter discharged without legal cause, the defendants had been in jeopardy.

The case of People v. Young, 100 Cal. App. 18, 279 P. 824, on which the appellants strongly rely, is distinguishable on three grounds. The first is that a peremptory challenge was allowed in that case after the entire jury—regulars and alternates—had been impaneled and sworn. Section 1068 Penal Code provides that challenges "must be taken when the juror appears, and before he is sworn to try the cause; but the court may for cause permit it to be taken after the juror is sworn, and before the jury is completed." The challenge cannot be exercised *after* the jury is completed and sworn even with leave of court. People v. Scoggins, 37 Cal. 676, 680; People v. Galloway, 202 Cal. 81, 90, 259 P. 332. This was the error which upset the judgment. The second ground of distinction is that in the Young case the place of the challenged juror was filled, not by one of the alternates already examined and sworn to try the case, but by a juror called from the venire. Thus the unity of the jury composed of 12 regulars and 2 alternates already accepted by both sides (upon whose impanelment jeopardy had attached) was destroyed by the calling in of a new juror. Had this not been done the situation would have been similar to that in the Howard case, where an alternate was used, and might well have led to a similar conclusion as that reached in the Howard case. The third ground of distinction has to do with the dismissal of the defendant from custody. The court having held it reversible error to permit the challenge after the jury had been completed and sworn, then had to decide whether there should be merely a reversal or whether the defendant should be dismissed from custody. The holding was that he should be dismissed, for he could not be again put on trial. Twelve regular jurors *and two alternates* had been examined, accepted and sworn to try the case before the unity of the jury was destroyed by the exercise of the peremptory challenge. Thus the jury *in its entirety* had been impaneled and sworn, and the defend-

ant had been once in jeopardy. Therein lies the principal distinction between that case and this.

It is implicit in the Howard and Peete cases that a verdict by twelve jurors, one of whom was originally an alternate juror, is the verdict of the jury originally sworn to try the case. If the substitution of the alternate for one of the regular jurors is in accordance with the provisions of Penal Code section 1089 no question of double jeopardy would arise. This can only be true if the substitution of the alternate for the regular juror does not destroy the unity of the jury. It does not destroy the unity of the jury because the jury is not complete until the alternate is accepted and sworn and the alternate is at all times a potential member of the regular jury. The requirement of trial by one jury is satisfied, where a jury composed of twelve regular jurors and one or more alternates has been impaneled, if the verdict is returned by twelve jurors sworn to try the case although one or more alternates may be included in the jury which renders the verdict. If this is true where the substitution has been made in the manner provided by Penal Code section 1089 it must be true where it has been made in an irregular manner. The same number of jurors sworn to try the case in the same way are involved in either instance. Either the substitution of an alternate for a regular juror destroys the unity of the jury or it does not. If it does not destroy the unity of the jury as is settled by the Peete and Howard cases, then the substitution of an alternate for a regular juror in an unauthorized manner does not place the defendant twice in jeopardy but is merely an error of law which should not lead to a reversal in the absence of a showing that it has resulted in a miscarriage of justice under Art. VI, sec. 4½ of the constitution.

We have already seen that the juror Bailey was a juror of the defendants' own selection, for he had been subjected to the same examination as to qualifications and impartiality as had Furner and the other eleven. We have seen, also, that a defendant has a right "to a fair and impartial jury, not to a jury composed of any particular individuals." Further, on the question of a fair trial this is to be said: in the Peete case the substitution was made after two weeks of trial and "after much evidence had been introduced"; in the Howard case the substitution was made after all the evidence had been introduced, and during the argument. In the case at bar, unlike these other cases, Bailey was substituted at the very outset and as a regular juror heard every word of testimony, hence the same twelve minds worked on this case throughout.

Twenty-five witnesses testified for the prosecution and over fifty exhibits, documentary and physical, were introduced. None of the defendants took the stand nor did they call any witnesses whatever. There is no claim of insufficiency of the evidence; there is no claim of error in the admission or rejection of evidence or in the giving or refusing of instructions. The sole point relied on is the jeopardy question. We are satisfied that no miscarriage of justice resulted from the irregularity complained of.

The judgment appealed from is affirmed.

NOURSE, P. J., and DOOLING, J., concur.




83 Cal.App.2d 693

**BOWMAN v. VICTOR.**

**Civ. 15918.**

District Court of Appeal, Second District, Division 1, California.

Feb. 18, 1948.

**1. Appeal and error ⇐931(1)**

Where plaintiff contended on appeal that evidence did not support trial court's finding, all conflicts were required to be resolved in favor of defendant, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible.

**2. Appeal and error ⇐989**

Where verdict is attacked as being unsupported by the evidence, an appellate

court's power begins and ends with a determination whether there is any substantial evidence, contradicted or uncontradicted, that will support the jury's conclusion.

**3. Appeal and error ⇐996**

Where two or more inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.

**4. Contracts ⇐15**

An essential element of a contract is a meeting of the minds of the parties.

**5. Injunction ⇐128**

In suit by beauty shop operator to restrain former employee from soliciting operator's customers, evidence sustained finding that at time of rescission there was no secret intent in employee's mind to violate alleged implied covenants that employee should not reveal information gained during his employment and that neither party would do anything to injure the other party.

**6. Sales ⇐92**

In suit by beauty shop operator to restrain former employee from soliciting operator's customers, wherein employee filed a counterclaim for amount paid to operator under contract to buy an interest in the business, on ground that contract had been rescinded by the parties, evidence sustained finding that parties entered into an oral contract of rescission.

**7. Contracts ⇐265**

"Rescission" of a contract means not only annulment or abrogation of the contract, but the placing of the parties in status quo as well.

See Words and Phrases, Permanent Edition, for all other definitions of "Rescission".

**8. Sales ⇐396**

Allegations of cross-complaint that beauty shop operator and employee entered into a contract that employee should buy an interest in the business, that employee paid operator $1,100 under contract, that contract was rescinded by mutual agreement, and that operator failed to repay the $1,100, stated a cause of action for recovery of the $1,100. Civ.Code, §§ 1688, 1691, subd. 2.

**9. Contracts ⇐274**

Where contract was rescinded, the contract was extinguished and there was nothing left for the parties to perform thereunder. Civ.Code, § 1688.

**10. Sales ⇐396**

In suit by beauty shop operator to restrain former employee from soliciting operator's customers, wherein employee filed a counterclaim for amount paid to operator under contract to buy an interest in the business, on ground that contract had been rescinded by the parties, employee was not required to plead nor to prove that he had restored everything received under contract from operator, since employee had received nothing of value under the contract. Civ.Code, §§ 1688, 1691, subd. 2.

**11. Equity ⇐39(1)**

Where plaintiff by his complaint sought an injunction, and defendant by his cross-complaint for rescission asked equitable relief from the court, it was court's duty to dispose of the entire controversy and to require both parties to do equity.

---

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Suit by Hayden Bowman, doing business under the fictitious firm name and style of Lindbrook Beauty Salon, against James Victor to restrain the defendant from soliciting plaintiff's customers, the names of whom defendant had learned in the course of his employment by plaintiff, wherein the defendant filed a cross-complaint alleging a partnership and seeking recovery of amount allegedly paid to plaintiff under the partnership agreement. Judgment was rendered restraining the defendant from soliciting the business of any former customers of plaintiff and requiring plaintiff to return the sum of $1,100 to defendant, and the plaintiff appeals.

Judgment affirmed.

Lee Combs, Wallace B. Scales and Robert W. McIntyre, all of Los Angeles, for appellant.

Vincent A. Marco and Jerry K. Harter, both of Beverly Hills, for respondent.

BARTLETT, Justice pro tem.

Appellant, a beauty shop operator, commenced an action on April 5, 1946, to restrain respondent from soliciting appellant's customers, the names of whom respondent had learned in the course of his employment by appellant. Respondent answered denying that he had solicited appellant's customers and cross-complained alleging a partnership under a written option agreement and a mutual agreement made on March 17, 1946 to terminate the same by the terms of which agreement appellant was to return $1,100 paid by respondent to him under this option agreement.

The cross-complaint prayed, among other things, that the contract of January 17, 1946 be cancelled and that appellant refund to respondent the $1,100 which had been paid by respondent under the agreement. Appellant answered this cross-complaint by denying any partnership relation; admitted an option agreement was entered into on January 17, 1946; admitted a down-payment of the $1,100 advance under the option agreement, and denied any liability to repay it.

The court rendered judgment against the respondent that he be restrained from solicitation of the business of any of the former customers of appellant, and that appellant return to respondent the sum of $1,100. The appeal is from that portion of the judgment awarding the $1,100 to respondent.

Appellant is the owner of a beauty shop located in Westwood Village, Los Angeles, California. On January 17, 1946, while respondent was in the employ of appellant, they entered into an option agreement for a purchase by respondent of a 49 percent interest in the business. Under the terms of this agreement, respondent made a partial payment of $1,100 on the purchase price by January 28, 1946. Thereafter a dispute arose in regard to the management of the shop and following this dispute the parties met on March 15, 1946 and entered into an agreement whereby the contract of January 17, 1946 was rescinded, the right of respondent to purchase an interest in the business was cancelled, and, therefore, appellant was to return to respondent the $1,100 he had received from him.

At the trial of the action no controversy developed regarding the injunction phase of the matter, the appellant stating at the outset that the respondent had moved so far away from Westwood Village that there was no longer any competition between the two as any attempt to solicit business would now be a vain act. However, on account of the possibility that respondent might return to Westwood Village, the request for an injunction was not abandoned.

The real trial was upon the issues raised by the cross-complaint and the answer thereto. Appellant states that there are two grounds upon which the judgment should be reversed: (1) The evidence does not support the finding that an oral contract of rescission was entered into; (2) Assuming, for purposes of argument, that there was a contract of rescission made March 15, 1946, respondent neither pleaded nor proved performance thereof on his part.

The findings of the court which are pertinent to a consideration of these questions are as follows:

I. "That defendant and cross-complainant upon leaving the employment of the plaintiff, did not take with him a list of patrons of the place of employment.

* * * * * *

V. "That the parties entered into a valid verbal agreement on March 15, 1946, whereby plaintiff agreed that the sum of $1100.00 was to be returned to defendant and cross-complainant and defendant and cross-complainant surrendered all rights under the option to purchase of January 17, 1946.

VI. "That the requirement made by plaintiff that the defendant and cross-complainant refrain for a period of one year from working as a beauty operator in Westwood Village, County of Los Angeles, State of California, was not a part of the agreement entered into on March 15, 1946.

VII. "That the plaintiff has not paid the sum of $1100.00 or any portion thereof to defendant and cross-complainant."

The finding under attack is finding V, set forth above.

[1-3] The rule governing appellate courts in the premises is set forth in Crawford v. Southern Pacific Co., 3 Cal.2d 427, at page 429, 45 P.2d 183, at page 184: "In reviewing the evidence on such an appeal, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157; Wing v. Kishi, 92 Cal.App. 495, 268 P. 483."

[4, 5] The court's finding was made on sharply conflicting testimony. The respondent unequivocally testified to the making of this contract and to its terms as set forth in the finding attacked. In this testimony he was corroborated by two other witnesses. From this standpoint there was ample and direct testimony to support the finding. To avoid the effect of this, appellant contends that there exists a confidential relationship between employer and employee to the extent that the employee is prohibited from revealing trade secrets and information gained during the employment to others; that neither party will do anything to injure the other party; that all contracts contain an implied provision incorporating the law governing the parties to and the subject matter of the contract and that, in the words of appellant, there was "therefore no meeting of the minds on March 15, 1946". That there be a meeting of the minds of the parties to a contract is an essential element of a contract and the court in making its finding that such a contract was entered into necessarily found as a fact that there was such a meeting of the minds. When two or more inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court and conclude that there was some secret intent in the mind of respondent on March 15, 1946, to violate the implied covenants referred to if, in fact, such implied covenants existed.

There are two other findings of the trial court which are not attacked but bear materially upon this question. These are the findings specifically made that respondent did not take with him a list of patrons of the place of his employment, and that there was no provision in the contract that he should refrain from working as a beauty operator in Westwood Village. If respondent had the mental reservations on March 15, 1946, suggested by appellant it would be reasonable to presume that he would have compiled just such a list and taken it with him when he left that employment. There is no testimony in the record that on the date of the rescission respondent had any connection with any other beauty parlor and it is reasonable to presume that he would not make any such connection until he saw how the conversation with appellant would turn out.

At the conversation on March 15, 1946, appellant asked repondent to remain another week to finish appointments that he had booked for the following week. It is a reasonable deduction that during the following week, while still at appellant's shop, he made some connection with another beauty shop in Westwood for future employment. The only testimony as to just what happened during that week is that of respondent and his testimony is somewhat ambiguous. He was asked if during this week he told any people he was going to work at the Charm Cottage. He said he did those who requested it. The following question was then asked and the following answer given:

"Q. What do you mean, 'Those who requested it'? A. I had given them an appointment. I had gone to the appoint-

ment book they wanted for the following time. I told them I wouldn't be there. They said, 'Where do you expect to be?' I said, 'The only thing I can do is get in touch with you'."

After March 25, 1946, he did go to work for the Charm Cottage. While he was there the proprietor of the Charm Cottage sent out over a thousand cards announcing the association of respondent with the proprietor of that business. Respondent gave him no list but did pick out about 25 names from a list presented to him, which seemed familiar, and addressed announcement cards to them.

All of this leads to no irresistible deduction that on March 15, 1946, respondent had such mental reservations or secret intentions that a meeting of the minds did not take place on that date, especially when taken into consideration with the other unattacked findings of the court, and also with certain other testimony. On March 23, 1946, respondent went to appellant and demanded his $1,100, at which time appellant presented to him a written agreement that he would not engage in any type of work as a beauty operator within a radius of four miles of appellant's establishment, and stated that he would not return the $1,100 unless respondent signed it. Respondent stated, and the court found, that was not part of the agreement. He also stated that that was the first time the subject had been mentioned and did not sign.

On March 25, 1946, respondent returned to appellant and offered to sign the proposed agreement as to the work in Westwood Village and again demanded his $1,100. Notwithstanding that, payment of the $1,100 was again refused.

[6] We have here reviewed all of the testimony, including that most favorable to the appellant, which could possibly bear on this subject, and are led to the conclusion that there was a meeting of the minds of the parties on March 15, 1946, and that the court's finding that a contract of rescission was made on that date is correct.

Appellant's second ground that the judgment should be reversed complains that respondent neither pleaded nor proved performance on his part. He states in his brief, "the law has been thoroughly established that a party suing upon a contract must plead and prove compliance himself with the terms and conditions of the contract sued upon before recovery may be had." His whole argument is based on a misapprehension as to just what the action set forth in the cross-complaint was. The cause of action pleaded in the cross-complaint was purely one to have it established by the court that on March 15, 1946, the prior contract between the parties of January 17, 1946, had been rescinded by mutual consent and that as an incident thereof the parties to the contract of January 17, 1946, should be placed in status quo by the return to the respondent of the $1,100 he had paid under it and for which he had no tangible return. It will readily be seen, therefore, that this was in no sense an action on a contract.

[7] What is the rescission of a contract? It means not only its annulment or abrogation, but the placing of the parties in status quo as well. Sessions v. Meadows, 13 Cal.App.2d 748, 57 P.2d 548.

[8, 9] The cross-complaint alleged, among other things, the entering into the contract of January 17, 1946, the terms of that contract, the payment under it of $1,100 by respondent to appellant, the rescission on March 15, 1946, by mutual agreement of that contract of January 17, 1946, and the failure of appellant to repay the $1,100. These allegations were sufficient to state a cause of action such as this. The court found that the contract of January 17, 1946, was an option agreement whereby respondent was purchasing an interest in a business. When it was rescinded on March 17, the contract of January 17 was extinguished. (Civil Code, sec. 1688). There was nothing left for respondent to perform. What is there to perform when a rescission has been made? All that is required of either party is that set forth in section 1691, subdivision 2, of the Civil Code, as follows: "He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise,

unless the latter is unable or positively refuses to do so."

[10] Here nothing of value had been received by respondent. In such a contingency the usual requirement of actions of rescission that a restoration be alleged and proved is not required. Crane v. Ferrier Brock Development Co., 164 Cal. 676, 130 P. 429; Browne v. T. J. Lawrence Co., 204 Cal. 424, 268 P. 631. No such issue as the one we are discussing was raised at the trial. The answer to the cross-complaint consisted of a categorical denial that the contract of rescission of March 15, 1946, had ever been made and an admission of the nonpayment of the $1,100. No estoppel on the part of the respondent nor any waiver on his part or any affirmative defense was set up by appellant. The court tried the case strictly upon the issues raised by the pleadings and therefore so far as the cross-complaint was concerned, in view of the appellant's answer, the sole issue was, did the parties mutually rescind the agreement of January 17, 1946, on March 15, 1946?

[11] There is another aspect of this case. The appellant by his complaint for an injunction, and the respondent by his cross-complaint for rescission, asked equitable relief from the court. It was the duty of the court to dispose of the entire controversy and to require both parties to do equity. The only part of the judgment appealed from is that portion requiring the appellant to return the $1,100 referred to. The evidence disclosed that in all equity and in good conscience he should have done so. Surely he should not receive the equitable relief which he requested unless he himself was to do equity. All that the portion of the judgment appealed from requires is that he do just that and thereby place the parties in the position they were in prior to January 17, 1946.

Judgment is affirmed.

WHITE, J., concurs.

DORAN, Acting P. J., concurs in the judgment.

1988

# CALIFORNIA REPORTER

## 190 PACIFIC REPORTER

### SECOND SERIES

31 Cal.2d 489

**LUTHRINGER v. MOORE et al.**

Sac. 5877.

Supreme Court of California, In Bank.

Feb. 24, 1948.

**1. Torts ⇐28**

The question of whether case was proper one for imposing absolute or strict liability for tort in carrying on an ultra hazardous activity was one of law for court.

**2. Torts ⇐1**

One who carries on ultra-hazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultra-hazardous, although utmost care is exercised to prevent harm.

**3. Torts ⇐1**

An activity is "ultra-hazardous", within rule imposing liability for tort without fault, if it necessarily involves risk of serious harm to person, land or chattel of others which cannot be eliminated by exercise of utmost care, and is not a matter of common usage.

See Words and Phrases, Permanent Edition, for all other definitions of "Ultrahazardous".

**4. Torts ⇐1**

An activity is the matter of "common usage", so as not to constitute an ultra-hazardous activity within rule imposing liability for tort without fault, if it is customarily carried on by great mass of mankind or by many people in the community.

See Words and Phrases, Permanent Edition, for all other definitions of "Common Usage".



**5. Carriers ⇐280(1)**
**Officers ⇐114**
**Torts ⇐1**

The rule imposing liability for tort without fault in case of injuries arising from ultra-hazardous activity does not apply if activity is carried on in pursuance of a public duty imposed upon actor as a public officer or employee or as a common carrier.

**6. Torts ⇐18**

The rule imposing liability for tort without fault in case of injuries arising from ultra-hazardous activity does not apply where person harmed by unpreventable miscarriage of ultra-hazardous activity has reason to know of risk which makes activity ultra-hazardous and takes part in it or brings himself within area which will be endangered by its miscarriage without a privilege, or in exercise of privilege derived from consent of person carrying on activity, or as a member of public entitled to service of public utility carrying on the activity.

**7. Torts ⇐18**

A plaintiff is not barred from recovery for harm done by miscarriage of ultra-hazardous activity caused by his failure to exercise reasonable care to observe fact that activity is being carried on or by intentionally coming into area which would be endangered by its miscarriage.

**8. Torts ⇐18**

A plaintiff is barred from recovery for harm caused by miscarriage of ultra-hazardous activity only if he intentionally or negligently cause activity to miscarry, or after knowledge that it has miscarried or is about to miscarry, he fails to exercise reasonable care to avoid harm threatened thereby.

**9. Poisons ⇐6**

Use of hydrocyanic acid with which to fumigate basement of commercial building

in which there were a great many tenants was an "ultra-hazardous activity" imposing liability without fault upon fumigating contractor for injuries sustained by employee of a tenant of the building caused by breathing gas which had escaped from the basement. Business and Professions Code, § 8513.

See Words and Phrases, Permanent Edition, for all other definitions of "Ultra-Hazardous Activity".

**10. Torts ⇐1**

An activity may be "ultra-hazardous" within rule imposing liability for tort without fault because of instrumentality which is used in carrying it on, nature of subject matter with which it deals or condition which it creates.

**11. Poisons ⇐6**

In action for injuries resulting from breathing hydrocyanic acid gas which was used in fumigating adjoining premises, where case was submitted on cause of action based on theory of absolute liability for miscarriage of an ultra-hazardous activity, instruction advising jury that usage of gas in pest control business was not common was proper. Business and Professions Code, § 8513.

**12. Trial ⇐251(8)**

Where case was submitted on theory of strict liability for tort, defendant's requested instructions dealing with inevitable accident and negligence on his part were properly refused as outside issues.

**13. Trial ⇐267(3)**

Even if defendant's requested instruction that it was plaintiff's duty to exercise his faculties of sight and smell to apprise himself of danger and to use ordinary care at all times in exercising such senses, and "to look in a careless manner or to exercise his sense of smell in a careless manner, is not to look or smell at all," was applicable, modification of instruction by striking quoted portion was not error, since part given was sufficient.

**14. Poisons ⇐6**

In action for injuries caused by breathing hydrocyanic acid gas which was being used in fumigating adjoining premises, where case was submitted on cause of action based on theory of absolute liability for miscarriage of ultra-hazardous activity, defendant's requested instruction that no man was responsible for that which no man could control was properly refused as confusing.

**15. Trial ⇐251(8)**

In action for injuries caused by breathing hydrocyanic acid gas which was being used in fumigating adjoining premises, where case was submitted on cause of action based upon theory of absolute liability for miscarriage of ultra-hazardous activity, requested instructions on contributory negligence phrased in language used in ordinary negligence cases was properly refused.

**16. Evidence ⇐370(4)**

In personal injury action where sole foundation for admission of hospital records for time plaintiff was confined in hospital was testimony of custodian of hospital's records that they were the day to day records of patients in the hospital, including plaintiff, and no evidence was offered as to mode of preparation, records were properly excluded on ground that no proper foundation was laid. Code Civ. Proc. § 1953f.

**17. Appeal and error ⇐1004(1)**

Reviewing court will not interfere with jury's award of damages where it cannot say that there is a showing that amount awarded shocks court's sense of justice and raises a presumption that it was result of passion and prejudice.

**18. Damages ⇐130(3)**

$10,000 for injuries from breathing hydrocyanic acid gas was not excessive.

---

Appeal from Superior Court, Sacramento County; Lowell L. Sparks, Judge.

Action by Albert L. Luthringer against R. L. Moore, individually and doing business under the name of Orchard Supply Company and others, on two causes of action to recover damages for injuries sustained as result of breathing hydrocyanic acid gas. From judgment in favor of plaintiff against named defendant on the first cause, the named defendant appeals, and from judgments of non-suit on the second

cause and from judgment in favor of other defendants on the first cause, the plaintiff appeals.

Judgment against named defendant affirmed, and plaintiff's appeal dismissed.

Prior opinion, 181 P.2d 89.

Butler & Reckers and Stanley W. Reckers, all of Sacramento, for plaintiff-appellant.

Busick & Busick and Charles O. Busick, all of Sacramento, for defendant-appellant.

Van Dyke & Harris, Gerald M. Desmond, Henry & Bedeau, Grover W. Bedeau and J. A. Montgomery, all of Sacramento, for respondents.

CARTER, Justice.

Plaintiff recovered a judgment on a verdict for damages for personal injuries against defendant, R. L. Moore. Plaintiff stated his action in two counts, the first predicated upon an absolute liability or liability without fault, and the second, alleged negligence of defendants. The defendants are Bedell, the tenant of the restaurant building hereafter mentioned and the operator of the restaurant therein, Sacramento Medico-Dental Building Company, a corporation, the owner of the office and restaurant buildings, and Moore, an individual engaged in the pest eradication business. A nonsuit was granted as to all defendants as to the second count in the complaint. Bedell and Medico-Dental Building Company were exonerated. Plaintiff appeals from the unfavorable result as to those defendants but advises this court that he urges that appeal only in the event the judgment is reversed as to Moore who is the only appealing defendant. In view of the result (affirmance of the judgment) reached herein we will treat plaintiff's position as an abandonment of his appeal, and accordingly, it is dismissed.

From the foregoing it is apparent that we have presented, the question of whether Moore was absolutely liable for the injury —was liable without fault—whether the doctrine of strict liability is applicable.

The locale of the accident giving rise to the action is commercial buildings in the business district of the City of Sacramento. Defendant, Sacramento Medico-Dental Building Company, is the owner of two contiguous buildings, one a ten story concrete office building and the other a restaurant building. Tenants of that defendant occupy the buildings. Beneath the first floor of both buildings are basement rooms. They are connected by passageways. A room on the street level floor of the office building was occupied by a tenant Flynn in which he conducted a pharmacy. There was also a dress shop on that floor. A restaurant occupied the restaurant building. Flynn's store was adjacent to the main entrance lobby of the office building.

Defendant Moore was engaged to exterminate cockroaches and other vermin in the basement under the restaurant and that part under the dress shop. He made his preparations and released hydrocyanic acid gas in those rooms about midnight on November 16, 1943. Plaintiff, an employee of Flynn in the latter's pharmacy, in the course of his employment, arrived at the pharmacy about 8:45 a.m. on November 17, 1943, with the purpose of opening the store. Although there is a conflict in the evidence, there is testimony that none of the three entrances to the drug store bore any signs or notices warning of the presence or danger of the above mentioned gas. The evidence is clear that there was none on the door used by plaintiff. He entered by a door from the office building lobby. He was suffering from a cold. After entering the store he proceeded to a small mezzanine floor to put on his working clothes. Feeling ill he returned to the main floor and lost consciousness. He was discovered in that condition by Flynn's bookkeeper who arrived at the pharmacy between 9:15 and 9:30 a.m. Plaintiff was removed from the store, treated by the firemen of the city with a resuscitator and taken to the hospital where he received medical attention. He was found suffering from hydrocyanic acid gas poisoning and his injuries are from that source.

Counsel for defendant Moore contends that the evidence is insufficient to justify the verdict in favor of plaintiff. He asserts that there is no evidence of the escape of hydrocyanic acid gas from the basement to the pharmacy or the presence of such gas when plaintiff was there; that there is

no evidence that plaintiff suffered from such gas poisoning on the morning in question or that his condition since was due to such poisoning.

It is beyond dispute that Moore released the gas in the basement of the building the night preceding the morning of plaintiff's injury. It is unlikely that such lethal gas was present and released at any other place in the vicinity. The evidence shows the gas is lighter than air, readily diffuses in air, is very penetrating and in the language of witness Bell: "It will penetrate behind baseboards, cracks and crevises that we couldn't get at with any type of liquid insecticide. It will go through mattresses, chesterfields, furniture, some types of porous walls.

"Q. It does a good job of fumigating? A. That's right.

"Q. Because it can get into small cracks and apertures? A. That's right." It has a bitter almond odor. The bookkeeper who found plaintiff testified that her throat burned and she had to cough after entering the store; that although she did not detect the characteristic odor of the gas on the day of the injury she did detect it on the mezzanine floor of the pharmacy on the following day. Witness Edwards who was in the lobby of the office building about 8:00 a.m. on the morning plaintiff was injured, testified that he smelled the bitter almond odor. Witness Willis, an employee in the pharmacy, stated he detected the odor in the pharmacy later in the day—the same odor he had noticed when he arrived in the morning but did not enter the pharmacy. One of the firemen who endeavored to revive plaintiff after he was removed from the pharmacy testified that he smelled the odor of the gas and that, "his clothes were saturated with it." When plaintiff arrived at the hospital he was examined and treated by a doctor who testified that plaintiff had "a sweetish odor on his breath," the same odor he noticed later in the morning about the elevator in the office building after he left the hospital and went to his office in that building. Dr. Schofield was called by defendant Moore and informed by him that plaintiff had been overcome by gas fumes and should be treated. The doctor was at the hospital where plaintiff was taken but could not examine him immediately. He examined him at 11:35 a.m. He found the gas odor on plaintiff's breath. He unequivocally diagnosed plaintiff's condition to be caused by cyanide gas poisoning.

The foregoing evidence points unerringly to the conclusion that there was cyanide gas in the pharmacy; that it came from the fumigation operation in the basement; and that plaintiff was poisoned by such gas. Moore's arguments with reference to the care used to confine the gas, the failure of some persons to detect any gas odor, the possibility that the presence of gas in the lobby of the office building and elsewhere was due to the gas being blown from the restaurant by Moore and the like, pose nothing more than conflicts in the evidence.

Moore alleges error in the giving of the instruction reading: "I instruct you that any person engaging in an ultra-hazardous activity, who knew, or in the exercise of reasonable care, should have known its ultra-hazardous character, and thereby proximately causes injury to another by a miscarriage of such activity, is liable to the person harmed, unless the latter knew or in the exercise of reasonable care should have known its ultra-hazardous nature and failed to exercise reasonable care for his own safety, or unless he knowingly and voluntarily invited the injury, and brought it upon himself.

"Likewise, any person, firm or corporation who brings, or permits to be brought upon its premises that which is of an ultra-hazardous nature, and who knew, or in the exercise of reasonable care should have known its ultra-hazardous nature, is liable for any injury proximately caused another, by its miscarriage, unless the person so harmed knew, or in the exercise of reasonable care should have known of its ultra-hazardous nature and failed to exercise reasonable care for his own safety or unless he knowingly and voluntarily invited the injury, and brought it upon himself.

"This principal of law does not require a finding of negligence upon those so engaging in such activity, or upon those bringing or permitting it to be brought upon the premises.

"I instruct you as a matter of law that under all the facts and circumstances of this case, the use and release of hydrocyanic acid gas by the defendant Moore, in the premises of defendants Bedell and Sacramento Medico-Dental Building, a corporation, all as appears in the evidence, constituted an ultra-hazardous activity." He asserts that it advised the jury on questions of fact, such as that gas did escape from the basement to the pharmacy which was present when plaintiff entered the pharmacy, and such condition was unknown to plaintiff; that plaintiff came in contact with the gas and became ill therefrom, and that plaintiff was acting in the course of his employment when he entered the pharmacy. Suffice it to say, a mere reading of the instruction refutes Moore's argument. In any event, the jury were fully instructed on proximate cause and fully informed with relation to ultra-hazardous activities (later discussed) as follows: "You are instructed that defendant R. L. Moore, doing business as 'Orchard Supply Company,' was engaged under all the facts and circumstances of this case in what the law considers to be an ultra-hazardous activity when he used hydrocyanic acid gas to fumigate the connected basement rooms which have been referred to as Bedell's storeroom and the Superintendent's office, ~~the latter being located in the basement of the Medico-Dental Office Building.~~ A person who carries on an ultra-hazardous activity is liable to another whom the actor should recognize as likely to be harmed by the ~~unpreventable~~ miscarriage of the activity for harm resulting to said person from that which makes the activity ultra-hazardous, although the utmost care is exercised to prevent the harm, unless the person injured knew or in the exercise of reasonable care should have known its ultra-hazardous nature and fails to exercise reasonable care to avoid the harm threatened thereby ~~after acquiring knowledge that the ultra-hazardous activity is being carried on~~ and after it has miscarried or is about to miscarry. In the present case, if you find from a preponderance of the evidence that defendant R. L. Moore, doing business as 'Orchard Supply Company,' should have recognized that persons in nearby parts of the Medico-Dental Office Building were likely to be harmed if hydrocyanic acid gas escaped from the rooms being fumigated and that hydrocyanic acid gas did in fact escape and find its way to the Medico-Dental Pharmacy premises thereby coming in contact with and causing harm to the plaintiff Albert L. Luthringer, unless you also find from a preponderance of the evidence that plaintiff Albert L. Luthringer knew or in the exercise of reasonable care should have known that fumigation with hydrocyanic acid gas was being carried on and that the gas had escaped or was about to escape to the pharmacy premises and then failed to exercise reasonable care to avoid the harm threatened, or unless he knowingly and voluntarily invited the injury and brought it upon himself, your verdict must be for the plaintiff Albert L. Luthringer and against defendant R. L. Moore, doing business as 'Orchard Supply Company.' "

[1] In connection with the foregoing it is urged that the instructions declare as a matter of law that the release of such gas on the premises constitutes an ultra-hazardous activity. It appears to be settled that the question of whether the case is a proper one for imposing absolute or strict liability is one of law for the court. See, Green v. General Petroleum Corp., 205 Cal. 328, 270 P. 952, 60 A.L.R. 475; Munro v. Pacific Coast Dredging, etc., Co., 84 Cal. 515, 24 P. 303, 18 Am.St.Rep. 248; Rest.,Torts, sec. 520, Com.h.

Turning to the question of whether absolute or strict liability is appropriate in the instant case, we find that according to witness Bell (a man engaged in the pest control business), there are only three operators licensed to use lethal gas in pest control in Sacramento. And in regard to the nature of hydrocyanic acid gas he testified:

"Q. Do you know whether hydrocyanic acid gas is a poisonous gas or a lethal gas? A. It definitely is.

"Q. By lethal, you mean it is deadly, or causes death? A. That's right. * * *

"Q. How about the quantities of it that are required to cause death to animals or

human beings? A. Minimum amount would be about 300 parts per million, would be a lethal dosage.

"Q. The amount to 300 parts by volume. A. Yes, sir.

"Q. Per volume of air? A. Yes, sir.

"Q. That amount would be lethal to human beings? A. That is correct.

"Q. Do you know how long a time would be required? A. It would take very little time with that amount.

"Q. Can you tell us what the physical characteristics of hydrocyanic acid gas are? A. It is a little lighter-than-air gas; a very highly penetrative gas; susceptible to moisture quite a bit, it will follow moisture; it is noninflammable; the flash point is very low so that it can be used without very much hazard of fire.

"Q. It is lighter than air? A. Yes, sir.

"Q. What about the diffusion quality of it? If you put it in a room with air, does it diffuse? A. If the air is warm, it will very rapidly. If the temperature is low, it will not diffuse so rapidly.

"Q. I think you said the gas was very penetrative? A. Definitely.

"Q. What do you mean by that? A. That is one of the advantages of the gas; why they use it in fumigation. It will penetrate behind baseboards, cracks and crevises that we couldn't get at with any type of liquid insecticide. It will go through mattresses, chesterfields, furniture, some types of porous walls.

"Q. It does a good job of fumigating? A. That's right.

"Q. Because it can get into small cracks and apertures? A. That's right.

"Q. Is it difficult to keep that gas confined? A. Yes, because of the fact it will penetrate, you have to be careful to keep it in a definite area.

"Q. In fumigation, what is your practice? You prepare a room so as to keep the gas confined as far as possible? A. You have to seal all the cracks around doors and windows; any holes around plumbing outlets; pack up the trim on the sinks, tape them off; on a regular fumigation they make a paste for that that is used. Sometimes we will use patching plaster; mostly through the use of a tape, because you tear it off in strips; depending on the width of the crack; pack the ventilator openings; wires; anything with any kind of a crack at all should be sealed.

"Q. In the ordinary operation, if you go in and seal up so that you consider it is adequately sealed, you still have some leakage of gas, or not? A. You will have some, yes, sir, unless it is a very well built building.

"Q. I see. What is your practice with reference to adjoining premises or adjoining parts of the same building? A. In fumigating the building, the tenants from an individual building, when you are fumigating any part of it, should be vacated.

"Q. All parts of the building? A. Yes, sir.

"Q. What is the reason for vacating other parts of the building that you do not fumigate? A. The operator going into a building isn't too familiar with the construction of the building. There might be a hidden flue and cracks some place you might miss. If you did miss that, the people above the area would be fumigated. That gas might leak up there. They would be subject to being gassed that way. The safest way is to vacate the building, no matter how careful you are to always be careful of every piece of construction of the building." Hydrocyanic acid gas is defined as a "dangerous or lethal chemical" in the statutes dealing with licensing of those engaged in the pest control business (Business & Professions Code, sec. 8513.) Bell testified on cross examination that the gas was generally used in the community, and that it is used for fumigating railroad cars, homes, apartments, and fruit trees, but as seen there are only three licensed operators in Sacramento.

[2–4] Defendant Moore introduced a written notice which he claims was attached to the door of the pharmacy directing that he be contacted before entering the building because of possible gas leakage, indicating that he believed a leakage possible although he testified that he took every precaution to seal the basement before he released the gas. This evidence, as above discussed, clearly points to the conclusion

that the gas escaped from the basement into the pharmacy although great care to prevent it was exercised by Moore. As before seen, the activity in releasing the gas was carried on in the basement of commercial buildings where there are a great many tenants. Under these circumstances we have a case which calls for liability without fault—a case falling within the category of what has been defined as the miscarriage of an ultra-hazardous activity. It has been said: "One who carries on an ultra-hazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultra-hazardous, although the utmost care is exercised to prevent the harm. * * * An activity is ultra-hazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage. * * * An activity is a matter of common usage if it is customarily carried on by the great mass of mankind or by many people in the community. It does not cease to be so because it is carried on for a purpose peculiar to the individual who carries it on. Certain activities may be so generally carried on as to be regarded as customary. Thus, automobiles have come into such general use that their operation is a matter of common usage. This, together with the fact that the risk involved in the careful operation of a carefully maintained automobile is slight, is sufficient to prevent their operation from being an ultrahazardous activity. However, the use of an automotive vehicle of such size and weight as to be incapable of safe control and to be likely to crush water and gas mains under the surface of the highway is not as yet a usual means of transportation and, therefore, the use of such an automobile is ultrahazardous.

[5-8] "While blasting is recognized as a proper means of clearing woodland for cultivation and of excavating for building purposes, the conditions which require its use are usually of brief duration. It is generally required because of the peculiar character of the land and it is not a part of the customary processes of farming or of building operations. Likewise, the manufacture, storage, transportation and use of high explosives, although necessary to the construction of many public and private works, are carried on by a comparatively small number of persons and, therefore, are not matters of common usage. So, too, the very nature of oil lands and the essential interest of the public in the production of oil require that oil wells be drilled, but the dangers incident thereto are characteristic of oil lands and not of lands in general * * * The rule stated * * * does not apply if the activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee or as a common carrier. * * * The rule stated * * * does not apply where the person harmed by the unpreventable miscarriage of an ultra-hazardous activity has reason to know of the risk which makes the activity ultrahazardous and (a) takes part in it, or (b) brings himself within the area which will be endangered by its miscarriage, (i) without a privilege, or (ii) in the exercise of a privilege derived from the consent of the person carrying on the activity, or (iii) as a member of the public entitled to the services of a public utility carrying on the activity. * * * (1) A plaintiff is not barred from recovery for harm done by the miscarriage of an ultrahazardous activity caused by his failure to exercise reasonable care to observe the fact that the activity is being carried on or by intentionally coming into the area which would be endangered by its miscarriage. (2) A plaintiff is barred from recovery for harm caused by the miscarriage of an ultrahazardous activity if, but only if, (a) he intentionally or negligently causes the activity to miscarry, or (b) after knowledge that it has miscarried or is about to miscarry, he fails to exercise reasonable care to avoid harm threatened thereby." Rest., Torts, secs. 519, 520, 521, 523. In the case of Green v. General Petroleum Corporation, supra, an oil well had "blown out" due to natural gas pressure while in the process of being drilled, and plaintiff's property was damaged by debris being cast thereon. The court declared the driller of the well to be

liable although he had used all care possible to avoid the accident, and announced the rule that: "Where one, in the conduct and maintenance of an enterprise lawful and proper in itself, deliberately does an act under known conditions, and, with knowledge that injury may result to another, proceeds, and injury is done to the other as the direct and proximate consequence of the act, however carefully done, the one who does the act and causes the injury should, in all fairness, be required to compensate the other for the damage done." Page 333 of 205 Cal., page 955 of 270. P.

There is considerable discussion in the briefs about the doctrine of the English case of Fletcher v. Rylands, L.R. 3 H.L. 330, and the latest expression there apparently limiting the doctrine (Read v. Lyons & Co., [1945] 1 All Eng. 106, see 35 Cal.L. Rev. 316.) and whether it is in effect in California. Whatever the situation may be in that regard, there can be no doubt that the case of Green v. General Petroleum Corporation, supra, enunciated a principle of absolute liability which is applicable to the instant case. It is not significant that a property damage, as distinguished from a personal injury, was there involved. The important factor is that certain activities under certain conditions may be so hazardous to the public generally, and of such relative infrequent occurrence, that it may well call for strict liability as the best public policy.

[9-11] The above quoted evidence shows that the use of gas under the circumstances presented is a hazardous activity; that it is perilous and likely to cause injury even though the utmost care is used; that defendant Moore knew or should have known that injury might result; and that the use of it under these circumstances is not a matter of "common usage" within the meaning of the term. In regard to the last feature it may be used commonly by fumigators, but they are relatively few in number and are engaged in a specialized activity. It is not carried on generally by the public, especially under circumstances where many people are present, thus enchancing the hazard, nor is its use a common everyday practice. It is not a common usage within the definition: "An activity may be ultrahazardous because of the instrumentality which is used in carrying it on, the nature of the subject matter with which it deals or the condition which it creates." Rest., Torts, sec. 520(b), com. Cl. (b). And in this connection the instruction advising the jury that the usage was not common, was proper.

[12] Moore claims error in respect to the refusing of instructions offered by him dealing with inevitable accident, negligence on his part and refuting the rule of strict liability. Manifestly such instructions are not appropriate in a case of strict liability.

[13] Moore complains that the modification of an instruction offered by him was error. The instruction was: "The court instructs the jury that it was plaintiff's duty to exercise his faculties of sight and smell to apprise himself of danger and to use ordinary care at all times in exercising such senses. ~~(To look in a careless manner, or to exercise his sense of smell in a careless manner, is not to look or smell at all.)~~" The court did not give the portion in parenthesis. Assuming the instruction was applicable, it is clear the part given was sufficient.

[14] Complaint is made of the refusal to give an instruction reading: "The court instructs you that no man is responsible for that which no man can control." Such an instruction would only lead to confusion in the type of case under consideration and is based on cases where there was common usage in the sense used in the Restatement.

[15] Error is urged in the refusal to give Moore's instructions on contributory negligence of plaintiff phrased in the language used in an ordinary negligence case. Such an instruction was improper as seen from the foregoing discussion of what conduct on part of plaintiff bars his recovery, and was correctly covered by plaintiff's instruction No. 10 heretofore quoted.

[16] Error is claimed in the refusal to admit in evidence the hospital records covering the time plaintiff was confined in the hospital. Not all of those records were excluded and in any event no proper foundation was laid. The law provides: "A record of an act, condition or event,

shall, in so far as relevant, be competent evidence *if the custodian* or other qualified witness *testifies* to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." [Emphasis added.] (Code Civ.Proc., sec. 1953f.) The sole foundation was the testimony of the custodian of the hospital's records, that they were the day to day records of the patients in the hospital, including plaintiff. No evidence was offered as to the mode of preparation.

[17, 18] Finally Moore argues that the damages are excessive. The jury gave a verdict for $20,000. On motion for a new trial, that was reduced to $10,000 with plaintiff's consent. The contention is plainly without merit. Plaintiff was rendered unconscious by the gas. He testified that he was sick and his mind was hazy as to what was transpiring for several days thereafter. He was in the hospital 20 days and in bed at home for approximately two weeks. He had continued to suffer from headaches and weakness up to the time of the trial of this action in July, 1945. He did not return to work until the latter part of December, 1943. His heart misses beats and causes him anxiety. He has continual dripping down his throat and coughs considerably. He has lost 20 pounds in weight. He is not able to perform his work as he did before the injury. These things did not exist before the poisoning. Dr. Schofield testified that plaintiff had sinusitis as a result of the poisoning. Dr. Haworth testified to the sinus difficulty and that it was due to the poisoning; that it would cause headaches. Dr. Martin testified the conditions of nasal inflammation and upper respiratory tract inflammation existed in 1945. Dr. Buck, who examined plaintiff a year after the poisoning, stated the condition would continue for some time in the future. There is a conflict in the evidence but that was resolved by the jury and we cannot say that there is a showing that the amount awarded "shocks the court's sense of justice and raises a presumption that it was the result of passion and prejudice." Johnston v. Long, 30 Cal.2d 54, 181 P.2d 645, 658.

The judgment against defendant Moore is affirmed. Plaintiff's appeal is dismissed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.






31 Cal.2d 469

## PEOPLE v. WESTEK.

Cr. 4817.

Supreme Court of California.
Feb. 20, 1948.
Rehearing Denied March 18, 1948.

1. Criminal law ⇐742(1), 747

Where there is conflict in evidence, weight of evidence and credibility of witnesses is for jury.

2. Criminal law ⇐1159(3)

Where verdict is based on conflicting evidence, it will not be set aside if there is substantial evidence supporting it.

3. Criminal law ⇐742(1)

In prosecution for sodomy and for lewd and lascivious conduct, failure of prosecuting witnesses to report commission of acts to their parents for some time were matters for jury's consideration and did not render the prosecuting witnesses' testimony unworthy of belief. Pen.Code, §§ 286, 288.

4. Sodomy ⇐6

Evidence sustained conviction for sodomy. Pen.Code, § 286.

5. Infants ⇐20

Evidence sustained conviction for lewd and lascivious conduct. Pen.Code, § 288.

6. Criminal law ⇐1160

Verdict of jury may not be disturbed on appeal if jury could reasonably have found conclusion from evidence that defendant committed acts charged, especially

where trial court refused new trial and thereby approved verdict.

**7. Infants ⇐20**

In prosecution for lewd and lascivious conduct in relation to boys under age of 14 years, corroboration of testimony of such boys was not required. Pen.Code, §§ 288, 1111.

**8. Criminal law ⇐507(7)**

In prosecution for sodomy in relation to young boys, where jury accorded full credit to the boys' testimony that they did not willingly join in the criminal acts, the boys were not "accomplices" and corroboration of their testimony was not necessary. Pen.Code, §§ 26, subd. 1, 286, 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

**9. Criminal law ⇐371(9)**

In prosecution for lewd and lascivious conduct involving young boys, where defendant on direct examination stated that he might have touched prosecuting witnesses, but that such touching was done without any lustful intent and that he had never at any time or place committed upon any boy such sexual crime as was charged, permitting cross-examination of defendant as to whether he had not committed such acts upon three specifically named boys, persons other than the prosecuting witnesses, and permitting introduction of rebuttal testimony of such other boys that defendant had committed acts upon them within same general period pertinent to plan of alleged crime, was not error. Pen. Code, §§ 288, 1323.

**10. Criminal law ⇐369(1)**

Generally, evidence of other crimes, where it is offered solely to prove criminal disposition or propensity on part of accused to commit crime charged, should be excluded because its probative value is outweighed by its prejudicial effect.

**11. Witnesses ⇐277(3, 4, 5)**

In criminal prosecution, it is proper to cross-examine a defendant upon any relevant and material matter elicited on his direct examination, for purpose of showing conduct or statements inconsistent with his direct testimony. Pen.Code, § 1323.

**12. Criminal law ⇐371(9)**

In prosecution for lewd and lascivious conduct in relation to young boys, where defendant on direct examination volunteered testimony that he had never committed upon any boy any such sexual crime as was charged, rebuttal testimony of boys other than prosecuting witnesses that defendant had committed acts on them within same general period pertinent to time of alleged criminal conduct for which defendant was being prosecuted was admissible on issue of intent. Pen.Code, § 288.

**13. Criminal law ⇐370, 371(1, 12), 372(1)**

Evidence of other crimes is ordinarily admissible, regardless of its prejudicial effect, where it tends to show guilty knowledge, motive, intent, or presence of a common design or plan.

**14. Criminal law ⇐371(9)**

Where defendant, testifying in his own defense, acknowledges physical touching of child but asserts his innocent intent, thereby definitely placing in issue necessary element of intent, prosecution may introduce evidence that defendant has committed similar offenses on person other than prosecuting witness, in order to rebut testimony of defendant. Pen.Code, § 288.

**15. Criminal law ⇐371(9)**

In prosecution for lewd and lascivious conduct, where defendant denied that acts of touching prosecuting witnesses was done with intent to arouse passions, it was proper to rebut such declared lack of lustful intent by offering proof that defendant committed like lewd and lascivious acts on other young boys. Pen. Code, § 288.

**16. Criminal law ⇐768(1)**

In prosecution for sodomy and lewd and lascivious conduct, instruction that, by reason of fact that the charges involved could easily be made and were often difficult to disprove, it was duty of jury to examine with caution the testimony of prosecuting witnesses, but fact that charge was difficult to disprove should not deter jury from rendering a verdict of guilty

in event that jury were convinced by evidence beyond reasonable doubt that defendant was guilty as charged, was not objectionable. Pen.Code, §§ 286, 288.

**17. Criminal law ⇐1186(4)**

In prosecution for lewd and lascivious conduct, refusing to charge that, if jury believed that there was a touching but that there was not an intent to arouse, appeal to, or gratify lust, passions or sexual desires of defendant or alleged victim, jury must find defendant not guilty, was not error in view of instruction given. Pen.Code, § 288; Const. art. 6, § 4½.

CARTER and SCHAUER, JJ., dissenting.

---

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

George Westek was convicted of sodomy and of lewd and lascivious conduct, and he appeals.

Affirmed.

Prior opinions 181 P.2d 108.

Gladys Towles Root, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and John F. Hassler, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Defendant was found guilty of six counts of violation of section 286 and three counts of violation of section 288 of the Penal Code, in relation to several young boys. His motion for a new trial was denied, as was his application for probation, and he was sentenced on each count to the state prison for the term prescribed by law—the sentences on the six counts of sodomy to run concurrently with each other, and the sentences on the three counts of lewd and lascivious conduct to run concurrently with each other and consecutively with the sentences on the first six counts. He has appealed from the judgment of conviction and from the order denying his motion for a new trial.

As grounds for reversal, appellant urges: (1) The insufficiency of the evidence to sustain the verdicts especially by reason of the claim that the prosecuting witnesses were accomplices and that corroboration, as required by section 1111 of the Penal Code, was lacking; (2) errors of law occurring at the trial in relation to the admission of certain rebuttal testimony; and (3) errors in the instructions to the jury. Careful consideration of the record in the light of these objections and the applicable principles of law negatives the force of appellant's respective contentions and establishes his conviction to be the result of a fair trial with proper regard for his substantial rights.

[1-6] Appellant was accustomed to taking young boys—sometimes singly and sometimes in groups—on camping trips. The several boys here involved testified that the acts in question occurred at various times when they accompanied appellant on such trips. Appellant took the witness stand in his own behalf and denied the accusations. Thus as is usual in these cases, there was a sharp conflict in the testimony, and it becomes unnecessary to recite the sordid details in evidence. No rule is better established in this state than that prescribing the function of an appellate court in reviewing this type of record. "When there is a conflict in the evidence it devolves upon the jury to determine its weight and which witnesses should be believed. When the verdict is based on conflicting evidence it will not be set aside if there is substantial evidence supporting it." People v. Ahsbahs, 77 Cal.App.2d 244, 248, 175 P.2d 33, 35. While there were some contradictions and slight inconsistencies in the boys' testimony, it cannot be said as a matter of law that their respective stories were inherently improbable in their vital particulars. Nor did the failure of the boys to report the commission of the acts to their parents for some period of time render the boys' stories unworthy of belief. These all were matters for the jury's consideration (People v. Fremont, 47 Cal.App. 2d 341, 349, 117 P.2d 891; People v. Grant, 53 Cal.App.2d 286, 287, 127 P.2d 567), and this court may not disturb the verdicts if the jury could reasonably have drawn the conclusion from the evidence that appellant committed the acts in question. To this point it was aptly said in People v. Becker,

140 Cal.App. 162, at page 166, 35 P.2d 196, at page 198: "It is the peculiar and exclusive province of the jury to decide upon the credibility of witnesses; and although impeaching evidence, in the nature of contradictions or otherwise, has been received, it is still not only the right but the duty of the jury to determine to what extent they will believe or disbelieve the testimony of the witness thus assailed." The application of these principles is strengthened where, as here, the trial court has refused a new trial and thereby approved the findings of the jury. (People v. Tedesco, 1 Cal.2d 211, 219, 34 P.2d 467.)

[7] Nor does the record sustain appellant's further challenge of the sufficiency of the evidence upon the ground that the boys here involved were accomplices and that there was no corroboration of their testimony. All of the boys were under the age of fourteen years at the time of the alleged commission of the acts in question. With respect to the three counts of violation of section 288 of the Penal Code, no corroboration was required of the two boys there concerned and the court properly so instructed the jury. People v. Troutman, 187 Cal. 313, 317, 318, 201 P. 928; People v. Spillard, 15 Cal.App.2d 649, 655, 59 P.2d 887; People v. Von Benson, 38 Cal.App.2d 431, 435, 101 P.2d 527.

[8] With respect to the six counts of violation of section 286 of the Penal Code, the question of whether or not the two boys there involved were accomplices—each in relation to three alleged acts—was submitted to the jury. At the trial each of the boys admitted that at the time of the commission of the acts he knew them to be wrongful (Pen.Code, sec. 26, subd. 1), but each maintained that he "was afraid of" appellant and did not "willingly" participate in the acts. In these circumstances the court covered fully in its instructions the applicable law pertaining to accomplices—the statutory definition and the required corroboration to justify a conviction as provided by section 1111 of the Penal Code, as well as "the distinction between the consent necessary to constitute one an accomplice and mere assent and submission without consent." People v. Kanngiesser, 44 Cal.App. 345, 347, 186 P. 388, 389. The importance of this latter consideration rests on the premise that the boys' mere submission to the violation of their persons would not involve the criminal intent necessary to subject them to prosecution for commission of the acts, and so classify them as accomplices. People v. Conklin, 122 Cal.App. 83, 91, 10 P.2d 98.

In People v. Dong Pok Yip, 164 Cal. 143, at page 147, 127 P. 1031, at page 1032, where the alleged victim was a boy nine years of age, the rule is thus stated:

"It may be admitted that the evidence shows that the boy was ignorantly indifferent and passive in the hands of the defendant, even to the point of submission; but there is a decided difference in law between mere submission and actual consent. Consent, in law, means a voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice, to do something proposed by another. 'Consent' differs very materially from 'assent.' The former implies some positive action and always involves submission. The latter means mere passivity or submission, which does not include consent. (Citing authorities.) In cases of the character under discussion, the age and mentality of the subject of an indecent assault is important, and should always be considered in determining the presence or absence of consent. The mere submission of a child of tender years or retarded mental development to an attempted outrage of its person should not, in and of itself, be construed to be such consent as would, in point of law, justify or excuse the assault. 2 Bishop's New Crim.Law, sec. 35, subd. 2. It is neither unreasonable nor unnatural to assume that such a child, in the hands of a strong man, might be easily overawed into submitting without actually consenting. (Citing authority.)"

That the boys accompanied appellant on successive camping trips and so gave appellant opportunity to repeat his alleged criminal acts upon them would not be conclusive; it would only be evidence which it would be proper for the jury to consider in connection with other facts tending to

solve the question whether they acted voluntarily and with "common intent" united in the commission of the acts. People v. Featherstone, 67 Cal.App.2d 793, 796, 155 P.2d 685. The jury may have concluded that appellant's dominant personality kept the boys interested in going on the camping trips for the hunting, fishing and like activities, despite the possibility that they would thereby run the risk of suffering like mistreatment from appellant. There is no suggestion in the record that the boys were consulted beforehand concerning the commission of the acts, or that they, in any manner, affirmatively participated therein. With these considerations at hand, the jury apparently accorded full credit to the boys' testimony that they did not "willingly" join in the criminal acts, and so concluded that their part therein constituted an "assent" rather than a "consent." Consequently the boys, by virtue of the evidence accepted by the jury as true, were not accomplices and corroboration of their testimony was not necessary. People v. Featherstone, supra, 67 Cal.App. 2d 793, 796, 155 P.2d 685.

[9] Upon reaching this conclusion with regard to the sufficiency of the evidence, the second major point to be noted is appellant's contention as to alleged errors of law occurring during the trial by reason of the admission of certain testimony adduced on behalf of the prosecution. Counsel for appellant concedes that "on some occasions the defendant may have flipped some of the boys in fun or that possibly when he was sleeping alongside of them his private parts may have touched them." On direct examination, appellant was asked by his counsel: "Did you at any time fondle their privates during the time you were wrestling? * * * Did you ever fondle them, touch them?" He answered, "I may have touched them," but he denied that such act was done "with any intent of arousing [his] passions or their passions." Then appellant's counsel, "to settle the question," elicited from appellant the statement that he had never "at any time" committed any act of sodomy, or any lewdness, in the county of trial or in "any other county" upon any boy. Thereupon appellant was asked upon cross-examination, and over objection by his counsel, if he had not committed such acts upon three specifically named boys, persons other than the prosecuting witnesses. Appellant denied that he had. Upon rebuttal, the prosecution called the three boys. Each testified, over objection by appellant's counsel, that appellant had committed upon him acts denounced by section 288 of the Penal Code; each stated that he was then "under fourteen years of age"; and each fixed the date of occurrence as within the same general period pertinent to the time of the alleged criminal conduct for which appellant was standing trial. The boys adhered to their stories throughout cross-examination, and upon surrebuttal appellant flatly denied their accusations. Appellant claims that the "admission of this [adverse] testimony was serious error," for it concerned other offenses identified as having been committed in counties other than Los Angeles County, the place of trial, and for which he was not being tried.

[10] It is the general rule that evidence of other crimes, where it is offered solely to prove criminal disposition or propensity on the part of the accused to commit the crime charged, should be excluded because its probative value is outweighed by its prejudicial effect. 22 C.J.S. (1940), Criminal Law § 682; 8 Cal.Jur. (1922), Criminal Law § 167, p. 58; Wigmore on Evidence, Third Ed., Vol. 1, sec. 193, p. 642; sec. 194, p. 646. Application of this general rule in prosecutions charging the commission of lewd and lascivious acts may be found in the cases of People v. Anthony, 185 Cal. 152, 157, 196 P. 47; People v. Asavis, 22 Cal.App.2d 492, 494, 71 P.2d 307; and People v. Huston, 45 Cal.App.2d 596, 597, 114 P.2d 607, where, so far as the respective opinions disclose, the prosecution was undertaking to prove similar offenses as part of its case in chief. But here a totally different situation is involved where appellant, apparently actuated by a desire to place himself in an especially favorable light before the jury, injected into the case in the course of his direct examination the whole subject matter of his past conduct with any boy, and it was to offset the effect of this gratuitous testimony that the prosecution introduced the challenged evidence.

[11] The propriety of the rebuttal testimony stems from the settled rule that it is proper in a criminal case to cross-examine a defendant upon any relevant and material matter elicited on his direct examination, for the purpose of showing conduct or statements inconsistent with his direct testimony. Pen.Code, sec. 1323; People v. Gallagher, 100 Cal. 466, 475-478, 35 P. 80; People v. Buckley, 143 Cal. 375, 388-390, 77 P. 169; People v. Mammilato, 168 Cal. 207, 213, 214, 142 P. 58; People v. Hoffman, 199 Cal. 155, 161, 162, 248 P. 504; People v. King, 13 Cal.2d 521, 527, 90 P.2d 291; People v. Wilson, 25 Cal.2d 341, 350, 351, 153 P.2d 720; People v. Page, 28 Cal.App.2d 642, 649, 83 P.2d 77; People v. Reese, 65 Cal.App.2d 329, 347, 150 P.2d 571; People v. Zammora, 66 Cal.App.2d 166, 213, 214, 152 P.2d 180. As was said in People v. Gallagher, supra, 100 Cal. at page 476, 35 P. at page 83: "The right of cross-examination affords the most effective mode of testing the accuracy or credibility of a witness, and should not be restricted beyond the requirements of the statute [Pen.Code, sec. 1323]. It was not the intention of the legislature to give to a defendant the opportunity of making any statement upon his direct examination which he might choose, in reference to the issue before the court, and to preclude the prosecution from showing out of his own mouth that such statement is false." The correlating principle sustaining the admission of rebuttal testimony where the defendant opens the door to its reception is forcefully illustrated in the case of People v. Hoffman, supra, a prosecution for murder. The parallel features of the record there appear at pages 161, 162, of 199 Cal., at page 507 of 248 P., where the court noted the line of inquiry as follows:

"While on the witness stand on his own behalf the appellant was interrogated in part by his counsel to the following effect: 'During the 22 years you have been in Imperial County, except for the matter which is the subject of this trial here, have you ever had any trouble or difficulty with anybody whomsoever, other than a matter of such discussion as anyone is apt to be subject to? Have you ever been charged with any offense whatsoever?' Appellant responded: 'Never, never in my life.' On cross-examination, and over the objection of appellant's counsel, the prosecution asked the appellant the following questions: 'Q. This is the first occasion you ever had any trouble with a gun with any person, Mr. Hoffman? * * * Q. Did you ever draw a gun on anybody before?' To which questions the appellant respectively answered: 'A. I never used a gun on anybody before.' And, 'A. No, sir. I never drew a gun on anybody.' We find no merit in appellant's contention that the trial court ruled erroneously in each of these instances. The two enumerated questions asked on cross-examination were, in our opinion, clearly within the scope of the direct examination of appellant and therefore proper cross-examination.

"Subsequent to the above proceedings and during the production of rebuttal evidence by the prosecution, the State produced a witness who was permitted to testify, over appellant's objection, to the effect that three or four years previous to the trial he had been quail hunting on the appellant's premises when the appellant appeared holding a 'long gun' pointed at him; that he proceeded toward the appellant but was commanded by the latter to stop, the appellant saying 'No, don't come any closer, if you do I will kill you.' We are of the view that this rebuttal evidence was properly admitted, for it tended to impeach the testimony given by appellant that he had led an untroubled life and had never drawn a gun on anyone. In so holding we are not unmindful of the rules that a witness may not be impeached as to collateral matters, and, that proof of character by evidence of general reputation can be met only by evidence of general reputation and not by specific acts. Neither of these rules is, in our opinion, applicable so as to preclude the introduction of this rebuttal testimony."

See, also, the case of People v. Turco, 29 Cal.App. 608, 611, 156 P. 1001, where the same considerations relating to the permitted scope of cross-examination of a defendant were deemed "conclusive in favor of the propriety of [testimony] in rebuttal," offered by the prosecution for purposes of impeachment.

Despite these well-defined principles in measure of the right of the prosecution to take appropriate steps to test the credibility of a defendant's statements on direct examination, appellant argues that a different view should prevail where the case concerns the commission of sex offenses. Accordingly, he cites the decision in People v. Rogers, 26 Cal.App.2d 371, 79 P.2d 404. That was a prosecution for the violation of section 288 of the Penal Code. There defendant, following his specific denial on the witness stand that he had committed any of the acts charged against him, stated in the course of his cross-examination by the prosecution: "I have never been rude to children." Then he was asked whether he meant by that statement that he had never mistreated any children at all, and he answered: "That is right." The prosecution thereupon was permitted to "introduce evidence that appellant had previously entered a plea of guilty to contributing to the delinquency of a minor (a misdemeanor) predicated upon the charge that he had committed an act prohibited by section 288 of the Penal Code with a female child other than either of the prosecuting witnesses." Page 372 of 26 Cal.App.2d, page 404 of 79 P.2d. In declaring such procedure to constitute prejudicial error, the court cited as authority the cases of People v. Anthony, supra, 185 Cal. 152, 196 P. 47, and People v. Asavis, supra, 22 Cal. App.2d 492, 71 P.2d 307, holding, as heretofore stated in accord with the general rule, that such evidence of other crimes is inadmissible where offered for the purpose of showing criminal disposition or propensity of the accused. But the Rogers decision cannot stand on that basis, for it—contrary to the situation in the Anthony and Asavis cases, where the challenged evidence was presented as part of the prosecution's case in chief—concerned evidence introduced for impeachment purposes. Thus in the Rogers case the defendant, by his statement that he had "never been rude to children," was, in effect, making the claim that he had never been guilty of similar prior conduct as that upon which he was being tried. He thereby invited inquiry into the truth or falsity of his gratuitous testimony. From such standpoint, the prosecution's responsive evidence in regard to the defendant's plea of guilt of the other offense was manifestly not introduced to prove "the specific crime charged," but was offered for the purpose of contradicting the defendant's statement as to his prior conduct. If the defendant saw fit to place before the jury his own testimony with regard to such prior conduct, it was proper for the prosecution to undertake to disprove the truth of such statement. Accordingly, the case of People v. Rogers is disapproved.

Nor does the case of People v. McDaniel, 59 Cal.App.2d 672, 140 P.2d 88, 90, aid appellant in his claim that his testimony in "[opening] the gates" for the rebuttal evidence in question cannot serve to establish its competency. There the point arose in connection with improper cross-examination of a character witness for the defense, by reason of the prosecution's failure to note the "vast difference between inquiring about reports, rumors and the like, of a character witness and questions as to what the witness *knows* of defendant." Page 677 of 59 Cal.App.2d, page 90 of 140 P.2d. Such cross-examination, in disregard of the established rules of evidence, was deemed "highly prejudicial" to the defense and the "so-called 'open the gates' argument" was declared "unavailing" to permit inquiry on irrelevant and collateral matters as there developed. But here appellant's voluntary declaration of his good character and unimpeachable moral status in relation to his prior conduct with boys was material to the issue involved, and the prosecution had the right to present responsive evidence which would "tend to contradict" appellant's self-serving statement "or weaken or modify its effect." People v. Turco, supra, 29 Cal.App. 608, 610, 156 P. 1001, 1002. As the matter was considered in People v. Buckley, supra, 143 Cal. 375, at pages 389, 390, 77 P. 169, at page 175, in connection with the scope of cross-examination, it "would be a harsh rule that would forbid the usual practice of allowing one on trial for a crime to testify, if he so desires, that he has led a decent * * * life * * *, for such evidence certainly tends to show good character," but when he does so open "volun-

tarily * * * the door to his past," he cannot complain if the prosecution elects to subject him to further examination in regard thereto for the purpose of testing his credibility. The same reasoning applies in relation to rebuttal evidence offered by the prosecution. People v. Hoffman, supra, 199 Cal. 155, 162, 248 P. 504; People v. Turco, supra, 29 Cal.App. 608, 611, 156 P. 1001.

[12–14] Moreover, the rebuttal evidence here in question was material in its bearing on the issue of intent. As such it came within the exception to the above-noted general rule, in that evidence of other crimes is ordinarily admissible, regardless of its prejudicial effect, where it tends to show guilty knowledge, motive, intent or presence of a common design or plan. 22 C.J.S.1940, Criminal Law, §§ 683–689; 8 Cal.Jur.1922, Criminal Law, § 168, p. 60. So pertinent are those cases holding that where the defendant, testifying in his own defense, acknowledges the physical touching of the child but asserts his innocent intent, thereby definitely placing in issue the necessary element of intent, the prosecution may then introduce evidence that the defendant has committed similar offenses upon a person or persons other than the prosecuting witness in order to rebut the testimony of the defendant on a point material to the establishment of his guilt of the crime charged. People v. Knight, 62 Cal.App. 143, 146, 147, 216 P. 96; People v. Harrison, 46 Cal.App.2d 779, 786, 117 P.2d 19.

Here appellant on direct examination was asked whether he had ever committed any lewd or lascivious act upon certain of the prosecuting witnesses, and he replied that he may have so touched them but that such touching was done without any lustful intent. Then to emphasize his innocence, appellant volunteered the sweeping statement that he had never, at any time or at any place, committed upon any boy any such sexual crime as was charged. Such factual situation closely parallels that found in People v. Harrison, supra, 46 Cal.App.2d 779, 117 P.2d 19. There the defendant was charged with committing lewd and lascivious acts upon four of his children. On the witness stand he denied that he had ever committed any such criminal acts and protested that all he had ever done was innocently to rub the backs of his children when they requested him to do so. To meet this special defense that his acts were all innocent and proper, it was deemed appropriate for the prosecution to present another child, "not named in the information," to testify as to her father's criminal behavior toward her. Thus the court stated at page 786 of 46 Cal.App.2d, page 23 of 117 P.2d: "In view of the fact that the intent of the defendant was an important factor in the proof of his guilt, it was competent to show other indecencies of the appellant committed with respect to still another child in order to leave no doubt of the criminal quality of the act charged in the information. (Citing cases.) Such evidence was calculated to rebut the innocent intent claimed by appellant. People v. Knight, 62 Cal.App. 143, 216 P. 96; People v. Turco, 29 Cal.App. 608, 156 P. 1001."

[15] Similarly, in the present case it was not until appellant, after making certain admissions, claimed a completely innocent relationship not only with the prosecuting witnesses but with "any boy" with whom he had been associated, that any attempt was made by the prosecution to prove that his testimony in that respect was untrue, by showing the commission of similar acts on his part with other boys. Such procedure accords with the theory that after appellant had denied that acts of touching the boys were done with "intent to arouse [his] passions or their passions," it was proper to rebut this declared lack of lustful intent by offering proof that he had committed like lewd and lascivious acts upon other young boys. Appellant himself "opened the door for the admission of such evidence, and he is therefore in no position to complain of its reception * * * [as] relevant to show intention." People v. Knight, supra, 62 Cal.App. 143, 147, 216 P. 96, 97; cf. People v. Asavis, 22 Cal. App.2d 492, 497, 71 P.2d 307.

[16] Appellant's final contention that error was committed in the instructions is likewise without merit. The court, recognizing the factor of prejudice which normally accompanies a sex-offense accusation, cautioned the jury in its consideration of

the evidence as follows: "By reason of the fact that charges of the nature involved in this case can easily be made and are often difficult to disprove, I instruct you that it is your duty to examine with caution the testimony of the prosecuting witness. The fact that the charge here made, however, is one difficult to disprove should not deter you from rendering a verdict of guilty in the event that you are convinced by the evidence beyond a reasonable doubt that the defendant is guilty as charged." An analysis of this precise instruction was made in the recent case of People v. Ahsbahs, supra, 77 Cal.App.2d 244, 175 P.2d 33, also a prosecution for violation of section 288 of the Penal Code, upon consideration of the identical argument here raised by appellant. As was there said at pages 250, 251 of 77 Cal.App.2d, at pages 36, 37 of 175 P.2d: "The first sentence of this instruction fulfills the requirement for the giving of a cautionary instruction in sex cases. People v. Putnam, 20 Cal.2d 885, 889, 129 P.2d 367; People v. Lucas, 16 Cal.2d 178, 181, 105 P.2d 102, 130 A.L.R. 1485. Appellant complains of the last sentence in the instruction in which the jury was told that the fact that the charge is difficult to disprove should not deter them from finding appellant guilty if they were convinced from the evidence beyond a reasonable doubt of his guilt. This sentence did not weaken, modify or detract from that portion of the instruction in which they were told to examine with caution the testimony of the prosecuting witness. The two portions of the instruction are not opposed to each other and the last sentence does not neutralize the first. By the language complained of the court did not indicate any opinion of its own as to the guilt or innocence of appellant, but in fact it emphasized the duty of the jury to be convinced beyond a reasonable doubt before returning a verdict of guilty. This instruction is identical with one that was approved in People v. Arechiga, 72 Cal.App.2d 238, 240, 164 P.2d 503, 504, as 'an accurate statement of the law of this state on the subject,' * * *."

[17] Equally unavailing is appellant's objection that the court did not instruct so fully as the evidence might recommend relative to the question of his commission of lewd and lascivious acts as denounced by section 288 of the Penal Code. The jury was instructed that "to constitute the offense" prohibited by said section "it [was] not necessary that the bare skin of the minor be touched [but] the touching, fondling, rubbing or feeling of the body, members or private parts of a minor, under the age of fourteen years, with the intent of arousing, appealing to and gratifying the lusts, passions and sexual desires of either the minor or the accused" constituted "the offense charged in the information, even though such touching, fondling, rubbing or feeling was through the clothing of the minor." While admitting that such instruction was proper (cf. People v. Ahsbahs, supra, 77 Cal.App.2d 244, 250, 175 P.2d 33), appellant argues that it did "not cover a set of facts where there may have been a touching in fun as testified to by" him, "or a touching which may have been accidental while a person was sleeping." With these matters in the record, he claims that the court erred in refusing to charge the jury further that "if you believe from the evidence that there was a touching but that there was not an intent to arouse, appeal to or gratify the lust, passions or sexual desires of the defendant or the alleged victim then you must find the defendant not guilty." But such supplementary language would have added nothing material to the instruction given by the court as above quoted, and it was only repetitious on the point that the touching must be with the specified criminal intent. The instruction given by the court was substantially in the language of the statute in reference to the necessary accompanying element of intent, and it would be unreasonable to assume that the jury could derive therefrom the impression that any touching which was inadvertent or in the course of a game or "in fun" would constitute the offense in question. Admittedly, as appellant maintains, the supplemental charge "would have done no harm"; and even conceding that it might "have clarified the matter," nevertheless the court's refusal to engraft such additional language on an instruction which adequate-

ly covered the situation would not constitute ground for reversal of the judgment. Cal.Const., art. VI, sec. 4½.

The judgment and the order denying appellant's motion for a new trial are affirmed.

GIBSON, C. J., and SHENK, EDMONDS and TRAYNOR, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

While the majority opinion gives lip service to the "general rule that evidence of other crimes, where it is offered solely to prove criminal disposition or propensity on the part of the accused to commit the crime charged, should be excluded," it, in effect, abrogates that rule and opens the door for the prosecution to produce evidence relating to wholly irrelevant matters, highly prejudicial to a defendant, on the pretext that such evidence is for the purpose of impeachment. Under the rule announced in the majority opinion, if a defendant was charged with stealing a horse at a certain time and place, and he should happen to testify that he did not steal the horse in question and had never stolen any horses, and that neither his father nor his grandfather had ever stolen any horses, the door would be open to the prosecution to offer evidence by way of impeachment that some time during the lives of one or more of these parties one or all of them had at different times and places stolen one or more horses. This may seem to be a far fetched illustration, but I would not be surprised to see a majority of this court announce it as a sound rule of law if the precise question is ever presented. While the majority base their holding in this case, that evidence of other crimes was admissible, upon the ground that such evidence was offered by way of impeachment, the effect is just the same as if it had been offered as a part of the prosecution's case in chief. If it would have been immaterial and irrelevant as part of the prosecution's case in chief, it was likewise immaterial and irrelevant as impeaching evidence. That a witness cannot be impeached on a collateral or immaterial matter is well settled. 27 Cal.Jur. 107, 152; People v. Smith, 189 Cal. 31, 207 P. 518; Steen v. Santa Clara Valley, etc., Co., 134 Cal. 355, 66 P. 321; People v. Cole, 127 Cal. 545, 59 P. 984; People v. Worthington, 105 Cal. 166, 38 P. 689; People v. Dye, 75 Cal. 108, 16 P. 537; People v. Chin Mook Sow, 51 Cal. 597; People v. Burness, 53 Cal.App.2d 214, 127 P.2d 623; People v. Westcott, 86 Cal.App. 298, 305, 260 P. 901; Moody v. Peirano, 4 Cal.App. 411, 88 P. 380.

Defendant was not charged with lewd and lascivious conduct with respect to the three boys who testified in rebuttal and any testimony elicited from them relevant to such conduct was therefore irrelevant and immaterial and wholly collateral to the charges on which defendant was being tried. But the majority argues that this evidence was admissible because defendant opened the door for its reception. This argument is conclusively answered in People v. McDaniel, 59 Cal.App.2d 672, at page 677, 140 P. 2d 88, at page 90: "The argument that defendant's counsel 'opened the gates' is unavailing. An error that is prejudicial is no less so because it results from a lack of knowledge on the part of either counsel or both. Legitimate cross-examination does not extend to matters improperly admitted on direct examination. Failure to object to improper questions on direct examination may not be taken advantage of on cross-examination to elicit immaterial or irrelevant testimony. The so-called 'open the gates' argument is a popular fallacy. 'Questions designed to elicit testimony which is irrelevant to any issue in the case on trial should be excluded by the judge, even though opposing counsel has been allowed, without objection, to introduce evidence upon the subject.' 27 Cal.Jur. p. 74. 'It is a settled rule that cross-examination as to matters irrelevant to the issue may and should be excluded—even though, in some cases, testimony relative thereto was elicited upon direct examination—and that a party may not, under the guise of cross-examination, introduce evidence that is not competent within the meaning of the established rules.' 27 Cal.Jur. p. 106."

It is true that in this state the trend of decision has been to allow evidence of other crimes generally, to show guilty knowledge, motive, intent, or a common scheme or plan.

8 Cal.Jur. 61. But in cases involving lewdness, the rule that evidence of other crimes is not admissible has not been relaxed. People v. Huston, 45 Cal.App.2d 596, 114 P.2d 607, and cases therein cited. The reason for this is stated in People v. Huston, supra, 45 Cal.App.2d at page 597, 114 P.2d at page 607: "This court on previous occasions has directed the attention of the profession to the reasons for this rule, which are so aptly stated in the universally acknowledged pronouncement of Lord Chief Justice Hale on the subject of the crime of rape, which also applies to offenses interdicted by section 288 of the Penal Code. It is as follows:

"'It must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused though never so innocent; (and we should) be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation that they are over hastily carried to the conviction of the person accused thereof by the confident testimony sometimes of malicious and false witnesses.'"

And the same rule of exclusion is applicable in sodomy cases. People v. Wyett, 49 Cal.App. 289, 193 P. 153; People v. Singh, 121 Cal.App. 107, 8 P.2d 898.

It is the settled policy of the law of this state to give effect to the universally recognized general rule of exclusion under which a defendant may be tried for no offense other than that with which he is charged. 8 Cal.Jur. sec, 167, p. 58; People v. Albertson, 23 Cal.2d 550, 576, 145 P.2d 7; see, also, Wharton's Crim. Evidence, secs. 343, 344, pp. 483 et seq.; 20 Am.Jur. sec. 309, p. 287; 22 C.J.S., Criminal Law, § 682. This rule and the reasons for it are well stated in the leading case of People v. Molineux, 168 N.Y. 264, 291, 61 N.E. 286, 293, 62 L.R.A. 193: "The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged. 1 Bish. New Cr.Proc. § 1120. This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Charta. It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt. This rule, and the reasons upon which it rests, are so familiar to every student of our law that they need be referred to for no other purpose than to point out the exceptions thereto. The rule itself has been stated and discussed in this court in a number of cases, but we will cite only a few. In People v. Sharp, 107 N.Y. 427, 14 N.E. 319, 1 Am.St.Rep. 851, it was said: 'The general rule is that when a man is put upon trial for one offense he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that, under ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded.' In Coleman v. People, 55 N.Y. 81, it is laid down as follows: 'The general rule is against receiving evidence of another offense. A person cannot be convicted of one offense upon proof that he committed another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime if it was known that he had committed another of a similar character, or, indeed, of any character; but the injustice of such a rule in courts of justice is apparent. It would lead to convictions, upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one.'

"In People v. Shea, 147 N.Y. 78, 41 N.E. 505, the rule is thus stated: 'The impropriety of giving evidence showing that the accused had been guilty of other crimes, merely for the purpose of thereby inferring his guilt of the crime for which he is on

trial, may be said to have been assumed and consistently maintained by the English courts ever since the common law has itself been in existence. Two antagonistic methods for the judicial investigation of crime and the conduct of criminal trials have existed for many years. One of these methods favors this kind of evidence in order that the tribunal which is engaged in the trial of the accused may have the benefit of the light to be derived from a record of his whole past life, his tendencies, his nature, his associates, his practices, and in fine all the facts which go to make up the life of a human being. This is the method which is pursued in France, and it is claimed that entire justice is more apt to be done where such a course is pursued than where it is omitted. The common law of England, however, has adopted another, and, so far as the party accused is concerned, a much more merciful, doctrine. By that law the criminal is to be presumed innocent until his guilt is made to appear beyond a reasonable doubt to a jury of twelve men. In order to prove his guilt it is not permitted to show his former character or to prove his guilt of other crimes, merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question.' * * * The court of last resort in Pennsylvania thus states the rule: 'It is the general rule that a distinct crime unconnected with that laid in the indictment cannot be given in evidence against a prisoner. It is not proper to raise a presumption of guilt on the ground that, having committed one crime, the depravity it exhibits makes it likely he would commit another. Logically, the commission of an independent offense is not proof in itself of the commission of another crime. Yet it cannot be said to be without influence on the mind, for certainly if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief that he might have committed the one with which he is charged. It therefor predisposes the mind of the juror to believe the prisoner guilty.' Shaffner v. Com., 72 Pa. 60, 13 Am.Rep. 649."

After thus reviewing the general rule, the court in the Molineux case discusses the applicability of various exceptions, saying: "The exceptions to the rule cannot be stated with categorical precision. Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial. Whart.Cr.Ev. 9th Ed. § 48; Underh.Ev. § 58; Abb.Tr.Brief, Cr. § 598."

The majority opinion cites and relies upon People v. Hoffman, 199 Cal. 155, 248 P. 504, as authority for the position that proof of the commission of other offenses may be offered as impeachment of defendant's testimony on direct examination that he has not previously been in trouble or committed other crimes. It is true this case supports the position taken in the majority opinion. The Hoffman case, however, cites no authority for its holding on this proposition and it stands alone in opposition to the great weight of authority supporting the general rule "that evidence of a distinct crime unconnected with that charged in the indictment cannot be received for the purpose of showing a greater probability that the defendant committed the offense charged."

The obvious vice of allowing the introduction of evidence of other crimes is that it casts upon the defendant the burden of defending against charges he did not know he would be required to meet on the trial of the specific charge then before the court. One of the fundamental provisions of the federal and state Constitutions is that an accused shall be informed of the nature and cause of the accusation. To admit evidence of such collateral facts would be to oppress the accused by trying him on charges the nature and cause of which he has not been informed and which he has made no preparation to meet, and by prejudicing the jury against him through the assertion of an offense the depravity of which would of necessity create prejudice in the minds of the jurors, and it would prompt a more ready belief that the defendant might have committed the act with which he is charged. The other offenses which the prosecution

seeks to prove may be wholly groundless, but it may be impossible for defendant to locate and produce witnesses to refute them during the instant trial. The injustice of his situation is apparent when he is brought into court to answer to a specific charge, for the defense of which he has had ample time to prepare, and then be forced to meet evidence presented by the prosecution of one or more other offenses wholly unrelated to the specific charge. This was the identical situation in the case at bar and there can be little doubt but that defendant was prejudiced thereby.

Therefore, under the circumstances of this case, I am of the opinion that it was error to admit evidence of other crimes over defendant's objection. And, obviously, such error was not cured by the provisions of section 4½ of Article VI of our Constitution.

For the foregoing reasons I would reverse the judgment and remand the case for a new trial.

SCHAUER, J., concurs.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.




84 Cal.App.2d 131

## WARNER v. HARRIS.

Civ. 16156.

District Court of Appeal, Second District, Division 2, California.

March 2, 1948.

**1. Joint adventures ⇐5(2)**

Complaint which for second cause of action alleged essential facts which, if supported by evidence, would entitle plaintiff to an accounting on theory that parties had entered into a joint venture was sufficient though not alleging exact amount of contribution of each joint venturer or dates upon which they were made.

**2. Judgment ⇐18(4)**

In action on first cause to establish a trust and upon a second cause of action for dissolution of a partnership and an accounting, failure to specifically indicate upon which cause of action judgment in favor of plaintiff was predicated was not error.

**3. Appeal and error ⇐934(2)**
**Judgment ⇐18(4)**

One valid count in a complaint is sufficient to sustain a judgment and upon appeal the judgment will be presumed to be based upon such count.

**4. Judgment ⇐18(4)**

Where complaint contains several causes of action, one of which is sufficient to sustain judgment, judgment will not be reversed though another cause of action may be invalid.

**5. New trial ⇐163(1)**

In ruling on motion for new trial, court may, on such terms as it deems just, change its former findings or make new findings. Code Civ.Proc. § 662.

**6. New trial ⇐164**

Trial judge, in denying motion for new trial, had authority to modify finding with respect to memorandum creating joint adventure and to make an additional finding that two alleged causes of action set forth in complaint did not relate to distinct sets of facts but were merely pleader's ultimate construction of one and the same set of facts, and that the parties were joint adventurers. Code Civ.Proc. § 662.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Rosalind Francis Warner against Forrest W. Harris for an accounting. Judgment for plaintiff and defendant appeals.

Affirmed.

Frank L. Rogers, of Long Beach, for appellant.

Kilpatrick & Robbins, of Monterey Park, and C. M. Kilpatrick, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action for an accounting, defendant appeals.

The essential facts are these:

Plaintiff filed a complaint containing two counts, the first to establish a trust, the second for the dissolution of a partnership and an accounting.

Defendant filed a general and special demurrer to each count of the complaint, which demurrer was overruled. Thereafter following a trial the court entered a judgment in favor of plaintiff, and among others made the following finding: "VII That it is true as alleged in the 'Third, Separate and Distinct Defense' of the Answer that the agreement described in paragraph III of these Findings of Fact was not in writing, and that there was no note or memorandum thereof subscribed by the defendant or any agent of his, and it is true also that the effect of said agreement was to create a partnership and a trust; that except as thus found to be true, each of the other allegations and conclusions of said 'Third, Separate and Distinct Defense' is untrue."

Subsequently in denying defendant's motion for a new trial the court amended paragraph VII to read as follows: "That it is true as alleged in the 'Third, Separate and Distinct Defense' of the Answer that the agreement described in paragraph III of these Findings of Fact was not in writing, and that there was no note or memorandum thereof subscribed by the defendant or any agent of his, and it is true also that said agreement was one purporting to create a partnership or a trust or a joint adventure; that except as thus found to be true, each of the other allegations and conclusions of said 'Third, Separate and Distinct Defense' is untrue."

The court also made an additional finding, number IX, which reads thus: "That the two alleged causes of action set forth in the complaint do not relate to or describe two separate and distinct sets of facts, but are merely the pleader's alternate constructions of one and the same set of facts; and in respect to the allegations of paragraphs II, III, IV, V and VI of the Second, Separate and Distinct Cause of Action set forth in the complaint, the findings of the court as to the agreement and transactions between the parties are as hereinabove set forth, and hence need not be repeated, *the conclusion of this court being that the parties were joint adventurers.*" (Italics ours.)

Three questions are presented for our determination which will be stated and answered hereunder consecutively:

[1] First: *Did the trial court err in overruling defendant's demurrer to the complaint?*

This question must be answered in the negative. The second cause of action in the complaint alleged essential facts which, if supported by evidence, would entitle plaintiff to an accounting predicated upon the theory that the parties had entered into a joint venture. It is not necessary in alleging such a cause of action to set forth the exact amount of the contribution of each joint venturer or the dates upon which they were made.

Defendant has failed to direct our attention to any defect in the cause of action thus alleged.

[2-4] Second: *Did the trial court err in failing to specifically indicate upon which cause of action the judgment was predicated?*

This question must likewise be answered in the negative. One valid count in a complaint is sufficient to sustain a judgment, and upon appeal the judgment will be presumed to be based upon such count. (Coombs v. Minor, 60 Cal.App.2d 645, 655, 141 P.2d 491; Martin v. Los Angeles Turf Club, Inc., 39 Cal.App.2d 338, 349, 103 P.2d 188.) Where a complaint contains several causes of action, one of which is sufficient to sustain the judgment, the judgment will not be reversed even though another cause of action may be invalid. (Coombs v. Minor, supra; Martin v. Los Angeles Turf Club, Inc., supra.)

In the present case the second cause of action alleged, as we have heretofore indicated, was valid. Therefore we need not discuss claimed defects in the first cause of action.

[5, 6] Third: *Did the trial court exceed its authority in (a) amending its previous finding, number VII, and (b) making an additional finding, number IX, at the time*

*it denied defendant's motion for a new trial?*

This question must also be answered in the negative. In ruling on a motion for a new trial the court may on such terms as it deems just change its former findings or make new findings. (Sec. 662, Code of Civil Procedure; Gossman v. Gossman, 52 Cal.App.2d 184, 198, 126 P.2d 178; Bureau of Welfare, etc., v. Drapeau, 21 Cal. App.2d 138, 150, 68 P.2d 998.)

The statement in Del Barrio v. Sherman, 16 Cal.App.2d 407, 412, 60 P.2d 559, that there is no authority for the trial court in denying a motion for a new trial to make new findings increasing the amount of a judgment in favor of a party who has not made the motion for a new trial, is contrary to the provisions of section 662, Code of Civil Procedure and the authorities hereinbefore cited. (See also Hontou v. Orvis, 42 Cal.App.2d 585, 591, 109 P.2d 395.)

Applying the foregoing rule, the trial judge had authority, in denying the motion for a new trial, to modify its finding, number VII, and to make the new finding, number IX.

The judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.




83 Cal.App.2d 665

**MAYER v. BEONDO.**

**Civ. 16171.**

District Court of Appeal, Second District, Division 2, California.

March 2, 1948.

Hearing Denied April 7, 1948.

**Appeal and error** ⇐1178(8)

Where defect in pleadings and necessity of proof was called to plaintiff's attention at trial, and plaintiff failed to amend pleadings or to supply omitted proof and such failure resulted in reversal of judgment, plaintiff would not be granted further opportunity to amend pleadings or to supply such proof.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

On petition for rehearing.

Petition denied.

Prior opinion 189 P.2d 327.

Gerard Remington and John A. Jorgenson, both of Los Angeles, for appellant.

Syril S. Tipton and Fulcher & Wynn, all of Los Angeles, for respondent.

PER CURIAM.

As we construe respondent's petition for rehearing, he does not request that the cause be reheard in this court but that we strike from the judgment the direction to the trial court to enter judgment for defendant, in order that upon a retrial of the case he may correct errors and deficiencies in his pleadings and proof which were expressly called to his attention when the case was on trial, and which, by reason of his failure to amend his pleadings and supply omitted proof, resulted in a reversal of the judgment.

1. He maintains that during the trial his failure to prove tender of consideration to appellant was not raised. On the contrary, the necessity of such proof was twice called to his attention: (a) The allegation in the complaint that respondent had performed the conditions of the agreement and had tendered to defendant the purchase price was expressly denied in appellant's answer. (b) After the evidence had been completed and both sides had rested, the failure of proof was called to respondent's attention by counsel for appellant, who said: "Regarding the escrow instruction, there is no tender of cash. There has been no proper tender shown." Respondent did not, as was his privilege, request leave to reopen the case for the purpose of offering proof of tender if such tender had been made.

2. Respondent's second contention is that the direction to the trial court to enter judgment for defendant should be stricken from our judgment and that the case should be remanded for retrial, in order that he may amend his complaint and correct the fatal defect therein by supplying an allegation that the contract was fair, just and equitable to defendant. Three

times during the trial appellant's counsel specifically pointed out this defect, and once objected to evidence as to the value of the property because of the absence of such allegation, but respondent did not ask leave to amend by supplying the necessary averment.

Respondent had ample opportunity during the trial to correct the errors which caused a reversal of the judgment. Having elected to stand on the defective pleading and having failed to furnish proof of a necessary allegation that had been denied, he is not now entitled to further opportunity to correct his errors.

Petition for rehearing denied.

Hearing denied; CARTER, J., dissenting.




84 Cal.App.2d 167

## TERMINIX CO. v. CONTRACTORS' STATE LICENSE BOARD OF DEPARTMENT OF PROFESSIONAL AND VOCATIONAL STANDARDS.

Civ. 15375.

District Court of Appeal, Second District, Division 3, California.

March 2, 1948.

Hearing Denied April 29, 1948.

**1. Mandamus ⇐187(9)**

Where contractor was found guilty by Contractors' State License Board of violations of Contractors' License Law and, on mandamus to review action of board, superior court found contractor guilty of certain of the charges, on appeal District Court of Appeal would consider only the legal correctness of those violations found by superior court. Business and Professions Code, §§ 7109, 7113, 7116, 7119.

**2. Administrative law and procedure ⇐315 Agriculture ⇐9**

The word "improve" as used in Contractors' License Law provision requiring a contractor's license for work involving the repairing and improving of a building does not apply to the use of Terminix fluid for termite control unconnected with any structural work, and such use falls under the Structural Pest Control Act rather than under Contractors' License Law. Business and Professions Code, §§ 7026, 8505.

See Words and Phrases, Permanent Edition, for all other definitions of "Improve".

**3. Administrative law and procedure ⇐315 Agriculture ⇐9**

The Structural Pest Control Board having jurisdiction over the application of Terminix fluid, for termite control, unconnected with any structural work, disciplinary action taken by Contractors' State License Board against contractor for alleged overcharge in applying such fluid was beyond jurisdiction of the board. Business and Professions Code, §§ 7026, 7116, 8505.

**4. Principal and agent ⇐148(4)**

Where a third person has notice of a limitation upon an agent's authority, he cannot hold principal responsible for a transaction with agent in violation of such limitation.

**5. Licenses ⇐38**

Contractor was not subject to discipline by Contractors' State License Board for failure to give effect to oral promises of its representatives to customers where contracts recited in large clear type that no representative has any power to alter contract or to make any promises or representations other than contained in contract and that contract contained entire agreement of the parties. Business and Professions Code, §§ 7000–7145; Civ. Code, § 2318.

**6. Licenses ⇐38**

Where oral promises, relied upon by Contractors' State License Board to sustain disciplinary action taken against contractor, in each instance constituted variances from terms of written contracts and there was no finding that promises were made without intention to perform them, no fraud was committed by representatives in making such promises. Business and Professions Code, §§ 7000–7145; Civ.Code, §§ 1572, 1710.

**7. Principal and agent ⇐148(1)**

The effect of recital in contract that no representative had any power to make

any alterations of contract or any promises or representations other than those contained therein and that contract contained entire agreement of parties was to notify customers that, as to them, contractor's representatives were powerless to vary by oral promises the terms of written contract and that contractor's responsibility to them did not extend beyond terms of written contract. Civ.Code, § 2318.

**8. Licenses ⇐38**

In disciplinary proceedings against contractor on charges of departure from or disregard of plans or specifications, of failure to complete an operation for contract price, of doing a willful or fraudulent act to substantial injury of another, and for willful and unjustified failure and refusal to prosecute an operation with reasonable diligence to material injury of another, material prejudice or substantial injury is an essential element to each charge, and, in the absence of a showing of such prejudice or injury, charge cannot be sustained. Business and Professions Code, §§ 7109, 7113, 7116, 7119.

**9. Licenses ⇐38**

Where contractor's misconduct consisted of making direct and indirect overcharges and record disclosed that customers involved, with one exception whose claim was disallowed on another ground, had not paid their bills as rendered, and long before complaint was filed contractor had made fair settlements with customers, charges could not be sustained for want of substantial injury to customers. Business and Professions Code, §§ 7109, 7113, 7116, 7119.

**10. Licenses ⇐38**

Where contractor performed unsatisfactory work for customer, and prior to initiation of disciplinary proceedings by Contractors' State License Board, offered to settle with customer on terms more favorable to customer than customer was entitled to under the findings of board's hearing officer but customer refused the offer, and offer was made in good faith, there was a want of substantial injury to customer and no violation of Contractors' License Law sufficient to justify disciplinary action. Business and Professions Code, §§ 7109, 7113.

**11. Licenses ⇐38**

The Contractors' License Law does not penalize a licensee for making overcharges which owner does not pay nor for poor work which is done over to satisfaction of owner, and the contractor cannot be held guilty of violation of the act so long as he stands ready, able, and willing to fulfill his contract. Business and Professions Code, §§ 7000–7145.

**12. Agriculture ⇐9**
**Licenses ⇐38**

Action of representatives of Contractors' State License Board and of Structural Pest Control Board in refusing to give licensee any information concerning complaints made against it and in instructing customers of licensee to refuse to discuss any matters with licensee, and to refuse to pay anything on their bills, constituted an abuse of authority. Business and Professions Code, §§ 7000–7145, 8500–8677.

**13. Licenses ⇐25**

In determining whether injury has resulted to owner as result of dealings with a licensed contractor, positions of owner and contractor must be judged as of time when business is concluded. Business and Professions Code, §§ 7000–7145, 8500–8677.

---

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Proceeding on the complaint of Contractors' State License Board of the Department of Professional and Vocational Standards against Terminix Company, owned by E. L. Bruce Co., Inc., contractor, for the discipline of contractor for alleged violation of certain provisions of the Contractors' License Law. To review an order of board suspending contractor's license and imposing upon it other penalties, the contractor instituted mandamus proceedings, and from a judgment denying a peremptory writ of mandate the contractor appeals.

Reversed in accordance with opinion.

Henry C. Rohr, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondant.

SHINN, Acting Presiding Justice.

This is an appeal by the Terminix Company, hereafter called appellant, from a judgment denying a peremptory writ of mandate. Appellant initiated these mandamus proceedings in order to obtain court review of the validity of an order of the Contractors' State License Board, hereafter called respondent, suspending appellant's contractor's license for six months and imposing upon it other penalties for alleged violations of the Contractors' License Law as codified. (Bus. & Prof. Code, secs. 7000–7145—all section references hereafter made are to this code unless otherwise indicated.) By a writ of supersedeas issued by this court upon stipulation of the parties, the execution of the judgment appealed from has been stayed pending final determination of this appeal.

[1] The complaint before respondent charged appellant with having violated sections 7109, 7113, 7115, 7116 and 7119 of the Contractors' License Law, in forty particulars in the course of certain termite control work done for six customers. After a lengthy hearing respondent found that appellant had violated the aforementioned sections, with the exception of section 7115, substantially as alleged, in twenty-seven particulars. The trial court found, on the basis of the record made before respondent and one lone affidavit of a customer, Mrs. Beardsley, that appellant had violated the aforementioned sections, save for section 7115, in nine particulars in the course of work done for four customers, and that otherwise appellant was not guilty of the violations found by respondent. Upon this appeal we are concerned only with the legal correctness of those violations found by the trial court.

Appellant is licensed under both the Contractors' License Law and the Structural Pest Control Act (secs. 8500–8677). Its work, however, is exclusively pest control work, including structural work incidental thereto. The trial court found appellant guilty of having violated four sections of the Contractors' License Law which is administered by respondent. Summarily stated, these sections are as follows: (1) Wilful, material and prejudicial departure from or disregard of plans or specifications (sec. 7109); (2) material failure to complete an operation for the contract price (sec. 7113); (3) doing a wilful or fraudulent act to the substantial injury of another (sec. 7116); (4) wilful and unjustified failure or refusal to prosecute an operation with reasonable diligence to the material injury of another (sec. 7119). Each of these statutory forms of misconduct is expressly made a cause for disciplinary action by respondent.

These nine alleged violations occurred on the Beardsley, Byram, Hamilton and Holm jobs, all performed by appellant's Pomona office and all substantially performed while that office was under the management of one Carter Griner. Briefly stated, appellant's misconduct, as determined by the trial court, consisted of the following actions. Appellant, in violation of section 7109, breached its salesman's oral promise to Mrs. Beardsley, made at the time of the execution of its written contract with her, that it would deduct from the contract price for any porches which did not require seal-off. Appellant likewise, in violation of sections 7109 and 7116, breached the oral promises made by its salesman to Byram that if Byram did certain of the work covered by written contract between appellant and Byram, he would receive a deduction from the contract price for such work, and also failed to give Byram a credit for certain other work done by him although their written agreement called for the credit. In addition, appellant, in violation of the same two sections, double-charged Byram $6.84 for certain lumber. Appellant, in violation of section 7116, overcharged Hamilton and Holm for Terminix, its insecticide. Appellant also, in violation of sections 7109 and 7116, built an inferior and unsatisfactory water drain for Holm and, in violation of sections 7109, 7113, 7116 and 7119, did a very poor and excessively costly re-stucco job upon his house, thereby breaching Griner's oral warranty to him that appellant would do the job as well and as cheaply as a competent stucco contractor would do it.

[2, 3] The trial court determined that appellant charged Hamilton and Holm, in violation of section 7116, for more Terminix fluid than was actually used on their jobs. Appellant challenges this conclusion upon the ground that the Contractors' License Law has never applied to nonstructural work and that the mere use of an insecticide has always been governed exclusively by the Structural Pest Control Act. In support of this position appellant points out that it is licensed under both statutes and that the treating of the premises of Hamilton and Holm, for which the questioned charges were made, came exclusively under the latter act (sec. 8505). Respondent replies that treating a building with Terminix is repairing and improving the building within the meaning of the statutory definition of the work for which a contractor's license is required (sec. 7026). We cannot agree that the word "improve" as used in the section can reasonably be interpreted as applying to the use of Terminix fluid, unconnected with any structural work. A construction of section 7026 which would bring all pest control work under the Contractors' License Law would render the Structural Pest Control Act unnecessary and superfluous. Consequently, we conclude that such treating and the charges for the fluid so used fall within the province of the Structural Pest Control Board rather than respondent, Contractors' State License Board. Accordingly, as to these overcharges for Terminix, the proceeding before respondent was unauthorized and its order is void.

[4, 5] As already noted, several alleged violations were predicated upon the failure of appellant to give effect to oral promises of its representatives. These were: (1) The failure to give credit to Mrs. Beardsley as orally promised by a salesman, for certain work which was found to be unnecessary; (2) the failure to give credit, as promised orally by a salesman, to Byram for the removal of debris and construction of a flash wall, which work he had done; and (3) the breach of the oral promise made to Holm by Griner, the branch manager, that appellant would do the re-stucco work on his house as cheaply and as well as a competent stucco contractor would do it. All these alleged violations must be rejected because they run counter to the fundamental principle of the law of agency, that if a third person has notice of a limitation upon an agent's authority, he cannot hold the principal responsible for a transaction with an agent in violation of such limitation.

[6] Appellant executed with Beardsley, Byram, and Holm, as it apparently did with all customers, standard written contracts. These contracts contained the following language in large clear type: "No representative has any power or authority to make any alterations of this contract or any promises or representations other than contained herein, and this contract contains the entire agreement of the parties." Respecting porches, the Beardsley fixed-price contract read: "Seal off all porches if necessary." The Byram contract, also for a fixed price, was silent as to deductions to be made if the customer himself removed the debris and installed the flashwall, although two similar deductions were specifically mentioned. The Holm contract was, by its written terms, simply a time and material contract with no price stated for appellant's work thereunder. Thus, in all three cases the oral promises relied on by respondent constituted variances from the terms of the written contracts. There was no finding that any of these promises were made without intention to perform it; hence no fraud was or could be found to have been committed by the representatives in making these promises. Civ. Code, secs. 1572, 1710.

[7] The effect of the language quoted from the three contracts was to notify the customers that as to them appellant's representatives were powerless to vary by oral promises the terms of the written contracts. The representatives had no authority to make to them the oral promises here involved, and appellant's responsibility to them did not extend beyond the terms of its written contracts with them. Civ. Code, sec. 2318; Rest. Agency secs. 166, 260, com. (c); Harnischfeger Sales Corporation v. Coats, 4 Cal.2d 319, 320, 321, 48 P.2d 662; Gridley v. Tilson, 202 Cal. 748, 751, 752, 262 P. 322; Hall v. Remp, 73 Cal.App.2d

377, 381, 166 P.2d 372; compare Rest. Agency, secs. 63 com. (f), 258 com. (e). It follows that since these oral promises were beyond the actual and the ostensible authority of appellant's representatives respondent cannot hold appellant for statutory violations based upon breach of them.

[8, 9] The remaining alleged violations and all of those which we have discussed up to this point, with the exception of the Beardsley overcharge, must fall because an essential element of each of them, material prejudice or substantial injury, is lacking. As can be readily seen from our previously presented summary of the four statutory provisions, sections 7109, 7113, 7116 and 7119, such prejudice or injury is expressly required, save for section 7113. However, we believe this requirement to be implicit in this section. It deals with fixed-price contracts only, and a material failure of the contractor to complete such a contract. Necessarily, in such a case, the owner will suffer to the extent of the cost of completion which must be done at his own expense. Aside from the unsatisfactory work done for Holm, appellant's claimed misconduct consisted of the making of certain direct and indirect overcharges which we have heretofore briefly stated. Yet, of the four customers involved, only Beardsley paid his bill as rendered. Long before the complaint herein was filed with respondent, both Byram and Hamilton made settlements with appellant which respondent's hearing officer characterized as "eminently fair" and which granted to them in credit adjustment substantially more than the trial court found was due to them. At the time of the hearing before respondent Holm had paid appellant nothing, and the record does not indicate any subsequent change in this situation. Thus Byram, Hamilton and Holm have suffered no injury or prejudice by reason of appellant's alleged overcharges. Accordingly, no cause for disciplinary action by respondent against appellant existed because of them. The asserted violation based upon the Beardsley overcharge, it will be recalled, has already been rejected on another ground.

[10] In the matter of the unsatisfactory work done for Holm, the situation, while differing factually, does not differ legally from those of Byram and Hamilton. While appellant has made no settlement with Holm, it offered, prior to the initiation of this proceeding before respondent, to settle with him on terms more favorable to him than he was entitled to under the findings of respondent's hearing officer.

Appellant had two basic written contracts with Holm. There was a time and material contract covering generally structural termite control work above-ground and a fixed-price contract in the amount of $330.10 covering generally treatment for subterranean termites. This latter contract was supplemented by an additional work authorization calling for, among other things, the construction of a "cement" drain for a total additional price of $48. In uncovering the infested portions of the house for treatment of the wooden timbers with Terminix, in excess of 60% of the stucco was removed from the walls. Two coats of new stucco were then applied before Holm stopped all work under the time and material contract because its cost was running far beyond what he had anticipated. The re-stucco work done was so poor that a finish coat could not correct its very substantial defects. The drain was likewise an inferior job; it was poorly constructed of used brick and cement. A good workmanlike stucco job will require the removal of all stucco applied by appellant's workmen, re-lathing, and the application of three coats of stucco. The drain, likewise, requires rebuilding.

Appellant presented to Holm an invoice in the amount of $1,625.23 for all of its work for him. Respondent's hearing officer determined that Holm was entitled to a credit adjustment on this job of $273.16 which, when applied, would leave Holm owing appellant $1,352.07, and that in addition appellant should redo the stucco job completely at no cost to Holm. After discussing the matter with appellant's representative, and months before the commencement of this proceeding before respondent, Holm wrote appellant a letter as follows: "Could you please send me a new

statement on the 'as is' settlement for $800 (eight hundred dollars) on the house. Also one for $1200 (twelve hundred dollars) to put the house in first class condition. I need this in order to get the job financed and as to which I can settle on." Appellant replied promptly, in part, "You may have your choice of either $800 and keep the house in its present condition or if you see fit to have us put the house back in good condition we will do same for $1200." Holm did not accept either proposition. A comparsion of the terms of this offer with what respondent found was due as between Holm and appellant establishes that completion of the job by appellant on the terms offered would have amounted to substantially more than complete performance or restitution, as defined by respondent. As long as the matter stands in the present status, appellant has been guilty of no violation of the act. Its offer in good faith, coupled with its admitted ability to complete the work for a fair price, must, under the circumstances, and for present purposes, be deemed the equivalent of performance.

[11] The statute does not penalize a licensee for making overcharges which the owner does not pay, nor for poor work which is done over to the satisfaction of the owner. A contractor cannot be held guilty of a violation of the act so long as he stands ready, able and willing to fulfill his contract.

[12, 13] It appears that this proceeding was instituted and has been prosecuted under a lamentable lack of understanding of the statute, but there is more to be said on that subject. Appellant's vice president and general manager in Los Angeles learned soon after the jobs in question were done, that some investigation had been undertaken by the Contractors' State License Board and the Structural Pest Control Board. With the attorney of the company he sought information from the representatives of the two boards respecting any complaints that had been made, but they were refused any information. They interviewed their customers, including those hereinbefore mentioned, asking whether they had any complaints on the work that had been done for them. The customers refused to discuss any matters with them and refused to pay anything on their bills. All together, some $6,000 was due appellant, which the customers refused to pay. This situation existed for the better part of a year before settlements were made with Byram and Hamilton and attempted with Holm. The representatives of the boards had taken it upon themselves to instruct the customers to pay no money to appellant and to enter into no agreements with it. The Structural Pest Control Board wrote to Hamilton in February, 1944, giving him such instructions and telling him he would be advised later as to what course he should pursue. Other customers received their instructions orally. Eventually the instructions were countermanded; the customers were then willing to talk with appellant and settlements were promptly arranged with Byram and Hamilton, which the hearing officer found to be entirely fair. This interference by representatives of the boards was unfair, officious and an abuse of authority. It evidenced a gross misconception of the duties of the board's representatives and a highly prejudiced attitude toward the appellant. Misunderstanding of the statute, in general, was exhibited throughout the entire proceeding. Although the hearing officer found that fair settlements had been made with Byram and Hamilton, he nevertheless found that appellant had violated certain sections of the statute, the legal affect being that appellant had been guilty of wilful and fraudulent conduct, or other conduct which had resulted in injury and prejudice to those owners. Except for the finding that the several sections had been violated, there was no finding by the hearing officers or the trial court that any of the owners had suffered injuries or prejudice. There was no evidence whatever of injury or prejudice suffered by any of the owners unless it can be found in the facts hereinbefore stated. Of course a debtor who has been overcharged by his creditors suffers no detriment unless he pays the overcharge. A contractor who has done inferior work is not a violator of the statute if, before he has made any settlement with the owner, he offers and is able and willing to replace

the inferior work with good work at no expense to the owner. In determining whether injury has resulted to the owner, the positions of the owner and contractor must be judged as of the time when their business is concluded. Although during the course of the work there may be mistakes and failures on the part of the contractor to keep his agreements, if, when the time for payment for the work arrives, he makes a fair and satisfactory settlement with the owner, he has been guilty of no breach of the law and the same, of course, is true if he corrects any overcharges whether they were made inadvertently or intentionally.

After an extended hearing the hearing officer made findings as to the merits of the claims of the owners, Byram and Hamilton, in their dealings with appellant, and specified the credits and allowances to which they were entitled, which, as we have said, amounted to less than they had received. The findings as to these owners and the findings as to the Holm job, with the undisputed evidence as to appellant's willingness to complete that job, leave no basis for disciplinary action by respondent. It will be for Mr. Holm to decide whether he wishes appellant to re-stucco his house and put it back in good condition on the terms offered by appellant. If he chooses not to have the work done, the case will be one for the courts and not respondent.

The erroneous application of the statute to the established facts requires setting aside of the order of the board pursuant to section 1094.5 (b) (e), of the Code of Civil Procedure, for the reasons hereinbefore stated. The acts of appellant as established by the findings of the trial court do not support its conclusions of law that appellant violated the statute and its judgment denying the writ was therefore in error.

The judgment is reversed for further proceedings in conformity with the views herein expressed.

VALLÉE, Justice pro tem., concurs.

WOOD, Justice (concuring).

I concur in the judgment. In my opinion, even though Mr. Holm had not paid for the unsatisfactory work, he suffered substantial injury as a result of the wilful and fraudulent conduct of appellant's branch manager, in that, such conduct caused Mr. Holm's house to be in bad repair, in poor structural condition, and unsightly for an extended period of time, which condition undoubtedly depreciated its value and detrimentally affected its salability and rentability. I think that discipline should not be imposed on appellant, however, under the circumstances in this case where, as a result of the disloyalty and deceitfulness of the manager of the branch office in Pomona, none of those in charge of appellant's main office in Los Angeles, nor any of its officers, had, or in the exercise of due diligence could have had, any actual knowledge of the branch manager's misconduct.

Hearing denied; TRAYNOR, J., dissenting.




84 Cal.App.2d 87

## KILLEEN et al. v. HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE & BARTENDERS' INTERNATIONAL LEAGUE OF AMERICA et al.

Civ. 7402.

Sac. 5844.

District Court of Appeal, Third District, California.

March 1, 1948.

Hearing Denied April 29, 1948.

1. Trade unions ⇐7

Where plaintiffs, in action to enjoin international union from taking over affairs of local union, had not exhausted their remedies within union and officers of international appeared to be working within authority conferred upon them by constitution of organization, trial court did not abuse its discretion in rescinding a temporary restraining order.

2. Trade unions ⇐7

A voluntary labor association affiliated with a parent association is bound by terms of by-laws and constitution of the latter, which are in nature of a contract between officers and members.

3. Trade unions ⇐7

Officers and members of local union could not complain of lack of notice of hearing of charges against them preferred by international officer where they were present at hearing and participated therein.

4. Trade unions ⇐7

Officers and members of local union were bound by constitution of international union providing for an appeal to general executive board from a determination of general president that an emergency exists in local union authorizing him to appoint a trustee and take charge of local affairs and from a finding that local officers and members are guilty of conduct detrimental to welfare of union, and local officers and members, having failed to take such an appeal, may not resort to civil courts to correct alleged mistakes of procedure before international union.

5. Associations ⇐7, 18

Generally, officers or members of either parent or affiliated voluntary association, including trade unions, may not resort to courts to review duly authorized decisions of officers of association unless they exhaust their appellate and other remedies provided by constitution of association.

6. Trade unions ⇐7

Complaint by officers and members of local trade union to enjoin international union from taking over affairs of local union and for other relief, which affirmatively disclosed that plaintiffs had not exhausted the remedies available to them within structure of the international union, failed to state a cause of action authorizing issuance of temporary restraining order.

7. Appeal and error ⇐954(1)
Injunction ⇐135

The granting or denial of a temporary restraining order rests in sound discretion of trial court, and its conclusions in that regard may not be disturbed on appeal except upon a clear showing of abuse of discretion.

---

Appeal from Superior Court, Solano County; Joseph M. Raines, Judge.

Action by Joseph Killeen and others, individually and in a representative capacity as members of and for and on behalf of Bartenders and Culinary Workers Union, Local 560, and the members thereof against Hotel & Restaurant Employees' International Alliance & Bartenders' International League of America and others for an injunction to restrain defendants from interfering with the property or management of the local union to which plaintiffs belonged. From an order setting aside a temporary restraining order, plaintiffs appeal.

Affirmed.

Gladstein, Andersen, Resner, Sawyer & Edises, of San Francisco, and Thomas J. Horan, of Vallejo, for appellants.

Clarence E. Todd and Gordon W. Mallatratt, both of San Francisco, for respondents.

THOMPSON, Justice.

The question to be determined on this appeal is whether the trial court abused its discretion in setting aside a temporary restraining order, upon a subsequent hearing of an order to show cause why it should not remain in force pending the trial of the case. Plaintiffs, as officers and members of Bartenders' and Culinary Workers' Union, Local 560, in Solano County, brought suit for permanent injunction against Hotel and Restaurant Employees' International Alliance and Bartenders' International League of America, an unincorporated association and international labor union, having its principal place of business at Cincinnati, Ohio, and its officers, to restrain them from interfering with the property or management of the Local Union. The Local Union is auxiliary to and affiliated with the International League, and is bound by its by-laws and constitution. Under Section 88 (a) of that constitution, the President of the International League sought to take charge of the Local Union on account of alleged dissension and conduct of its officers and members detrimental to the welfare of the labor union.

Upon the hearing of the order to show cause why the temporary restraining order

should not be set aside, it appeared that dissensions had previously arisen between the officers and members of the Local Union regarding control and operation of the organization. Some of the officers, including the plaintiff Killeen, were charged with conduct detrimental to the welfare of and which threatened to destroy, the Union. Those conditions were discussed in an open meeting of the Local Union held in Vallejo, December 18, 1945. The proceedings were reported by C. T. McDonough, a Vice-President of the International League, to that organization. He was instructed to investigate the local situation. He did so, and reported the result thereof to the President of the International League, confirming that report. In a general meeting of the Local Union, McDonough warned the members that "the dissension in the official family" must cease, or the Internatioial League would have to take charge. He told them that "he had a letter in his pocket from the General President instructing him to take over the local if matters didn't straighten up immediately." May 6, 1946, the General President sent McDonough a telegram instructing him to take charge of the Local Union as Trustee and to appoint temporary officers pursuant to Section 88 (a) of the constitution. The following day he received a letter from the President confirming his appointment as Trustee. McDonough was instructed to prefer charges against the Local Union and its officers for dissension and conduct tending to disrupt the union. He did so. John A. St. Peter was appointed by the President, pursuant to Section 155 (a) of the constitution, as referee or representative of the President, to hear the charges.

Anticipating that Mr. McDonough, the designated Trustee, would take charge of the affairs of the Local Union, plaintiffs filed this complaint in Solano County, May 10, 1946, to permanently enjoin him from doing so. The complaint alleges that McDonough threatened to take charge of the affairs of the Local Union and to appoint local temporary officers, as directed. The same day that complaint was filed a temporary restraining order was issued, containing an order to show cause on May 14th why a preliminary injunction should not issue restraining the threatened acts of the named Trustee pending the trial of the case on its merits. That order to show cause was continued from time to time. The defendants moved to set aside the temporary restraining order. Several hearings occurred. Much oral and documentary evidence was adduced. The transcript of evidence on those hearings consists of 300 pages. The matter was not determined until September 18, 1946, at which time the court ordered that the temporary restraining order be set aside on the chief ground that plaintiffs failed to appeal from the decision of the President of the International League, or to exhaust their remedies provided for in the constitution of that organization. From that order this appeal was perfected.

In the meantime the charges against the officers and members of the Local Union were heard at Vallejo, May 17, 1946, "pursuant to notice," before John A. St. Peter, who was deputized by the President for that purpose. The record of that hearing shows that Mr. McDonough, the International Vice-President was present, and plaintiffs Killeen and Allen were present, the former being Business Agent, and the latter Vice-President of the Local Union. There were also present, the President, Secretary, members of the Board of Trustees, members of the Executive Board and other members of the Local Union. Oral and documentary evidence was adduced. The Referee sustained the charges and reported the hearing to the General International President, who approved the same and decided that the officers and members of the Local Union were guilty of the charges. No appeal from the appointment of the Trustee or of the Referee, or from the decision of the General President was taken to the General Executive Board, or at all, as provided by Sections 88 (a), 155 and 156 of the constitution. The plaintiffs in this case failed to exhaust their remedies on account of such decisions.

The appellants in this case contend that the hearing of the charges was held without previous notice, that the decision of the General President of the International League appointing a Trustee and directing

him to take over the affairs of the Local Union was arbitrary, unlawful and without due process of law, and that the trial court, therefore, erred in setting aside the temporary restraining order.

It will be observed that the suit for injunction is still pending and that the merits of that action have not been determined. A demurrer to the complaint was overruled. The decision of the General President and the proceedings of the charges against the officers and members of the Local Union are merely evidentiary and incidental to the order of the trial court setting aside the temporary restraining order. They are material only in determining whether the court abused its discretion in rescinding that order.

[1, 2] We are of the opinion the court did not abuse its discretion in that regard. It is the settled rule of law that voluntary labor associations affiliated with parent associations are bound by the terms of the by-laws and constitution of the latter, which are in the nature of a contract between the officers and members. De Mille v. American Federation of Radio Artists, Cal.Sup., 187 P.2d 769, 774. In the case last cited it is said in that regard: "The articles of agreement, Constitution and by-laws of AFRA, both National and Local constitute a contract with the members, and are binding on the plaintiff. [Citing authorities.]"

[3] The plaintiffs in this case may not complain of a lack of notice of the hearing of charges against the officers and members of the Local Union for the reason that they were present at that hearing and participated therein. Smetherham v. Laundry Workers' Union, 44 Cal.App.2d 131, 136, 111 P.2d 948.

[4] The plaintiffs in this case are bound by the constitution of the International League, which provides for an appeal from the decisions of the General President determining that an emergency existed in the Local Union authorizing him to appoint a trustee and to take charge of the local affairs of the union, under Section 88 (2), and from his decision finding the local officers and members guilty of conduct detrimental to the welfare of the union. That constitution authorizes an appeal to the General Executive Board from such decisions. Sec. 88 (a); Secs. 155 and 156. No appeal was taken. The plaintiffs failed to exhaust their remedies provided for by the constitution. Having failed to do so, they may not resort to the civil courts or any other tribunal to correct alleged mistakes of procedure before the International League.

[5] It is the established rule of law, with some exceptions not here involved, that officers or members of either parent or affiliated voluntary associations may not resort to the courts to review duly authorized decisions of officers of the associations, in the absence of an appeal and the exhausting of their remedies provided for by the constitution of their organization. Stoica v. International Alliance of Theatrical Stage Employees, 78 Cal.App.2d 533, 178 P.2d 21; Bush v. International Alliance of Theatrical Stage Employees, 55 Cal.App. 2d 357, 365, 130 P.2d 788; Hughes v. American Trust Company, 134 Cal.App. 485, 25 P.2d 491; Dangel and Shirber on Labor Unions, p. 211, sec. 186; 31 Am.Jur. 865, sec. 70; 168 A.L.R. p. 1463, note; Oakes on Organized Labor and Industrial Conflicts, p. 68, sec. 63.

The General President of the International League was authorized by Section 88 (a) of the constitution to determine that the dissension and conduct of officers of the Local Union created a situation which was inimical to the welfare and best interests of the union, and therefore to appoint a Trustee to take charge of the affairs of the Local Union, from which decision an appeal lies to the General Executive Board. That section provides in part:

"88 (a). If the General President decides that any of the officers of a local union are dishonest or grossly incompetent, or that the organization is not being conducted for the best interests of the Local and International he may appoint a Trustee (receiver) to take charge and control of the affairs of the Local Union.

"The Trustee shall be authorized and empowered to take full charge of the affairs of the Local Union, to remove for the period of his trusteeship any or all officers, and appoint temporary officers during his

trusteeship, and to take such action as in his judgment is necessary for the preservation of the Local Union and its interests. The Trustee shall report from time to time on the affairs and transactions of the Local Union to the General President.
* * *

* * * * * *

"Such trusteeship may continue for one year.

"An appeal from a decision of the General President, establishing a trusteeship, shall be to the General Executive Board. But pending such appeal, the order of the General President shall remain in full force and effect."

When charges are made against members or officers of a local union of conduct which creates a situation imminently dangerous to the welfare of the Local Union, the General President is authorized to hear and determine such charges either in person or by a designated deputy or referee. An appeal from such decision also lies to the General Executive Board. Section 155 of the constitution provides in that regard:

"Sec. 155. Whenever charges involving a member or members, officer, or officers, Local Union, or Local Joint Executive Board create a situation imminently dangerous to the welfare of a Local Union, Local Joint Executive Board, or the International, the General President is empowered in his discretion, to assume original jurisdiction in such matters, regardless of the fact that charges have been filed with another body and are pending. Under such circumstances, the General President may hold a hearing upon giving not less than forty-eight (48) hours notice to the persons charged to appear before him at a place and time designated by him. He may then proceed to hear and try the matter and render judgment in accordance with the facts and circumstances presented to him. When the General President has so acted, an appeal shall lie from his decision to the General Executive Board, and from the General Executive Board to the Convention in the same manner as is provided for appeals in other cases. Pending appeal from the General President's action, his decision shall stand and be enforced.

"(a) When the General President deems it necessary to exercise the foregoing emergency power, he may deputize a representative to act for him in such matters. Such representative shall have the same powers as the General President, as herein provided. However, when a trial shall be conducted by a representative of the General President, such representative shall make his recommendations to the General President, orally or in writing, and the decision in the case shall be made by the General President himself."

Section 156 of the constitution provides that: "Sec. 156. Every affiliate, member, or officer thereof, or International officer against whom charges have been preferred, and disciplinary action taken as a result thereof, shall be obligated to exhaust all remedies provided for in this Constitution and by the International before resorting to any other court or tribunal."

Pursuant to the provisions of Section 155 (a), supra, John A. St. Peter was appointed by the President as his personal representative and heard the charges preferred against the officers and members of the Local Union, and made his report and recommendations to the General President, who approved the same and rendered his decision thereon.

All of the aforesaid proceedings of the appointment of the Trustee, and of the hearing and determination of the charges, were presented to the trial court on the order to show cause.

The case of Stoica v. International Alliance of Theatrical Stage Employees, supra, in which a hearing by the Supreme Court was denied, is decisive of the controlling issue of this case. The facts are almost identical with those of the present case. That was a suit for injunction to prevent a designated representative of the President of the International Union from taking charge and management of the affairs of a local union during an emergency created by dissensions and picketing of the local union, just as was done in the present case, with the exception of the picketing. A hearing of the charges of conduct of the officers of the local union, detrimental to the welfare of the associa-

tion, was held. The charges were sustained, and the President of the International Union appointed a trustee or representative to take charge of the property and management of the local union under a constitutional provision similar to section 88(a) which is involved in this case. The trustee took possession and appointed local temporary officers, as directed. The appellants in that case contended that seizure of the property and affairs of the local union was arbitrary, unlawful and without due process of law, as the appellants contend in the present case. The provisions of the constitution of the International Union, relied upon in that case, are quite similar to those which are involved in this suit. The constitution in that case provided for an appeal from the decision of the President to the General Executive Board, as it does in this case. In the Stoica case the complaint failed to allege that plaintiffs had appealed from the orders or decisions complained of, or that they had exhausted their remedies as provided for by the International constitution. At the trial of that case, defendants' objections to the introduction of evidence offered by plaintiffs were sustained on the ground that the complaint failed to state a cause of action. That suit was dismissed on the ground that plaintiffs failed to exhaust the remedies conferred upon them by the constitution of the International Union, and that the trial court therefore had no jurisdiction of the controversy. On appeal, the judgment was affirmed. The Appellate Court cited several California cases in support of the principle of law that a local unincorporated association, and its members, affiliated with a national or international organization, are bound by the articles, by-laws and constitution of the parent association. That is exactly what the De Mille case, supra, holds. The court said in the Stoica case, supra, quoting with approval from Simpson v. Salvation Army, 49 Cal.App.2d 371, 374, 121 P.2d 847, 848, that: "It is well-settled in this state that a member of an association of this type must first exhaust the rights afforded him by the tribunals of the association before he may secure redress from the courts."

[6] In the present case, for the reason that plaintiffs failed to appeal or exhaust the remedies provided for by the constitution of the International League, the trial court properly rescinded its former temporary restraining order. The complaint fails to state a cause of action authorizing the issuance of such restraining order.

[7] The granting or denial of a temporary restraining order is left to the sound discretion of the trial court. Its conclusions in that regard may not be disturbed on appeal, except upon a clear showing of abuse of discretion. General Distillers, Ltd. v. Wholesale Liquor Drivers, etc. Union, 57 Cal.App.2d 908, 135 P.2d 592; Palm Springs La Quinta Dev. Co. v. Kieberk Corp., 37 Cal.App.2d 642, 100 P.2d 346.

From the record in this case we are unable to say there was an abuse of discretion on the part of the trial court in setting aside the temporary restraining order.

The order is affirmed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; SHENK and CARTER, JJ., dissenting.




84 Cal.App.2d 100

**WILKINSON & CO. v. McKINLEY et al.**

Civ. 3570.

District Court of Appeal, Fourth District, California.

March 1, 1948.

**1. Contracts ⇐305(1)**

Owner of realty did not, by permitting driller of water well to commence drilling after time for performance under the contract had expired, waive, as a matter of law, his right under the agreement to damages resulting to barley crop because well was not completed in time, where owner of realty planted barley crop in January at a time when he had no knowledge that driller would not complete the well by February 1st, as agreed, and owner of realty was lulled into false sense of security by promises of driller that he would complete well as agreed.

**2. Contracts ⇐305(3)**

Payment by owner of realty of $1,250 to driller of water well on account of bill for $4,427.27 was not, as a matter of law, a waiver by owner of realty of any claim for damages for loss of barley crop because of driller's failure to complete the well within time agreed, where at time of payment owner of realty protested concerning the amount of the bill and informed driller's agent concerning losses due to driller's failure to complete well on time.

**3. Contracts ⇐305(1)**

Notation made by owner of realty on driller's report that water well was completed to satisfaction of owner of realty was not, as a matter of law, a waiver by owner of realty of his right to claim damages for driller's failure to drill well within time agreed on.

**4. Contracts ⇐299(1)**

Where contract specifying conditions of drilling of water well made no reference to time within which drilling was to be commenced or completed, but merely required a claim to be filed by owner of realty within ten days after "delivery" for any shortages or noncompliance with written order, owner of realty was not required to file written notice of driller's failure to drill the well within required time in order to be entitled to claim damages for driller's failure to drill well within time agreed on.

**5. Costs ⇐32(5)**

Where plaintiff recovered a net money judgment on his complaint in excess of jurisdictional amount of highest inferior court in county and, though defendant recovered damages on his cross-complaint for a cause of action growing out of the same transaction, above the limited amount, a net judgment in favor of the plaintiff in the sum of $1,977.20 remained, plaintiff was entitled to costs. Code Civ.Proc. § 1032.

**6. Costs ⇐237**

Where judgment was reversed on plaintiff's appeal insofar as it adjudged that none of the parties recover costs in the action, with directions to the trial court to allow plaintiff costs, but remaining portion of the judgment was affirmed, defendant was entitled to recover his costs on appeal. Rules on Appeal, rule 26.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Wilkinson & Company, a corporation, against A. B. McKinley and Max McKinley, to recover balance due under contract for drilling of water well, wherein the defendants filed a cross-complaint for damage to growing crop because well was not completed within agreed time. From a judgment for the plaintiff in an amount less than that to which plaintiff claimed to be entitled, the plaintiff appeals.

Judgment reversed in part and affirmed in part.

Mack & Bianco, of Bakersfield, for appellant.

Joseph A. Brown, of San Francisco, for respondents.

GRIFFIN, Justice.

This action involves an appeal by plaintiff from a judgment in its favor in an amount less than that to which it claims to be entitled.

On October 20, 1943, defendant A. B. McKinley, by Max McKinley, his agent (later relieved of personal liability), placed with plaintiff, a drilling corporation, an order to drill a water well and install casing at an agreed price of $3919.45. This written agreement was later modified and the costs increased to $4427.27, due to the size of the casings. $1250 had been paid on this indebtedness. The written order provided that "Seller shall not be liable for delays caused by act of God, * * * or any other cause beyond seller's control, including inability to secure material. Purchaser agrees to make all claims in writing for shortage or noncompliance with this order promptly upon delivery, and in the event purchaser does not make a claim in writing within ten days of date of delivery purchaser waives all claims for shortage or noncompliance with the above order * * *. Interest at 7 per cent will be charged on past due accounts. In the event seller places the collection of the amount owing hereunder in the hands of an attorney purchaser agrees to pay a reasonable attorney's fee in addition to the amount owing." On November 4, defendant and plaintiff company made application to the War Production Board

for authority to do the work and supply the material. The separate form shows: "Period of Construction—Beginning 12/15/43—Completion 2/1/44."

In the answer of defendant it was admitted that Max McKinley was acting only as agent; that certain changes in price and material were agreed upon, but it was claimed that defendant only agreed to pay plaintiff the original contract price of $3,919.45, and then only upon condition that the well be completed by February 1st, 1944. He admitted the payments on the account ($250 on April 15, 1944, and $1000 on August 17, 1944) and claimed by way of cross-complaint $10,536.80 damages to planted crops as an offset for failure of plaintiff to complete the well before February 1st, 1944.

After evidence was taken the trial judge authorized an amendment to the cross-complaint to conform to the proof. Paragraph 1 was amended to allege that defendant advised plaintiff that he planned to grow, in the cropping season of 1944, barley and other crops, if plaintiff could drill a water well to a depth of 600 feet by February 1st, 1944, or within a reasonable time thereafter; that relying upon said promise defendant planted 120 acres of barley.

The court then found that defendant executed the above-mentioned written order for materials and work and agreed to the change in price as indicated; that an attorney had been employed. Attorneys' fees in the sum of $250 were allowed. He then found that it was not true that on October 20, 1943, plaintiff orally agreed with defendant to drill and complete a water well on this land to a depth of 600 feet by February 1, 1944, but that it was true that defendant owned a certain parcel of land which was suitable for growing crops if water could be obtained to irrigate the same; that defendant advised plaintiff that he planned to grow, in the cropping season of 1944, crops on said land if the plaintiff would drill a well to a depth of 600 feet; that defendant did plant 120 acres of land to barley upon the promise of plaintiff made on or about October 20, 1943, to commence and *complete* said water well within a reasonable period of time. The court then found that a period of 12 weeks from October 20, 1943, was a reasonable time to *commence* drilling said well, and that a period of 6 weeks from the date of its commencement was a reasonable period within which to complete said well; that plaintiff waited until February 25, 1944, and was therefore negligent in failing to commence said well prior to that time; that plaintiff negligently delayed the completion of said well until August 10, 1944; that defendant did not have sufficient water to irrigate the potatoes, barley and alfalfa during the spring and summer of 1944, which were planted on said land; but found that "only said barley was planted on a reliance of a promise to commence to drill and complete said water well within a reasonable period of time" (as above determined), and that "said potatoes and alfalfa were not planted in reliance upon any such promise"; that it is true that defendant "permitted work to be commenced pursuant to said order after the time that it should have been completed and at no time made any claim for shortage or noncompliance with said order as therein provided and in accordance therewith." And the court accordingly found "That by virtue thereof, defendant waived any breach in the performance thereof as to the potatoes and alfalfa." It found that the defendant was damaged, in reference to the barley crop only, in the sum of $1200. After allowing this offset, judgment was entered that plaintiff recover a judgment in the amount of $1977.27, plus $250 attorneys' fees, and ordered that neither party recover costs.

On appeal plaintiff states that the sole issue is the propriety of allowing the offset of $1200 and the denial of costs to it for the reasons that: (1) Defendant permitted the work to be commenced after the time of performance under the contract had expired and thereby waived the time of performance and any damages resulting to any crops; (2) that damages were waived by the unqualified acceptance of the work; (3) that the contract required a written claim to be made for noncompliance and no claim in writing was made; (4) that the finding that the barley crop was planted in reliance on the promise to drill and com-

plete the well within the time found by the court is not supported by the evidence; and (5) that where a plaintiff recovers judgment in excess of the jurisdictional amount of the highest inferior court in the county costs are allowed as of course.

Max McKinley testified that he talked to Mr. Wilkinson a few days before he signed the purchase order; that he told him his father was developing new land next to his property; that it was "some time before we would have to have the water but he wanted to know for sure if he could get the water before he went too far along with it, and I asked him if he could drill the well and how long it would be before he could finish it. He said that he could not do it then—that his men were all busy, and I remember that was the latter part of October, and he would not be able to start on it until about the 15th of December, and I asked him how long it would take to finish the well, and he said that it would take about three to four weeks, but that he wanted to allow himself at least three weeks more to complete the well in"; that he told him he would discuss the matter with his father and that he came back and told plaintiff that his father had said "if he could get the well drilled at that time I could sign the purchase order for it"; that plaintiff did not start the drilling on December 15, 1943, as agreed; that he called on him approximately six times between then and February 15, 1944, and asked him when he was going to start on the well; that he told him his father had sent him in; that his father had purchased his seed and fertilizer and was ready to plant his potatoes; that he was worried because the work had not been commenced; that plaintiff, on each occasion, gave some excuse for not starting the work but assured him it would be soon; that plaintiff said: "After all, it will only take three weeks to drill the well and we will start right away"; that he definitely told him he could start on the well about December 15, 1943, and it would take three or four weeks to drill it; that he could have the well by February 1, 1944; that soon after February 15th he told plaintiff the rig had arrived on the property; that thereafter drilling operations were spasmotic and were delayed by breakdowns, etc; and that he went in each week until August 15th to complain about the progress being made.

The evidence shows that the barley crop, for the loss of which $1200 was allowed, was planted in the early part of January, 1944. The potato and alfalfa crop were planted the latter part of February. Defendant completed laying pipe from other wells about March 21, 1944, and watered, to some extent, the potato and alfalfa crops, but did not have sufficient water and he was unable to properly irrigate the barley crop from those wells.

For the reasons stated the trial court disallowed any damages resulting to the potato and alfalfa crops. No appeal has been taken by defendant in this respect. We will therefore not consider the merits of the reasons assigned by the trial court for denying damages for the claimed loss of the potato and alfalfa crops.

[1] While it might appear from the findings that the defendant permitted the plaintiff to commence drilling the well after the date when it should have been commenced, and a few days after the date it should have been completed under the original agreement, it is clear that defendant planted the barley crop in January, at a time when he had no knowledge that plaintiff would not complete the well. Each time defendant protested the delay he was more or less lulled into a false sense of security and he allowed the plaintiff to continue with the well drilling operations believing that it would take but three or four weeks to drill it and believing that plaintiff would fulfill his promise to commence and complete the well as agreed. From the evidence it appears that these promises of commencement of drilling and the completion thereof within three or four weeks therefrom were continuous and a matter of weekly occurrences, not only prior to but for many months after February 15, 1944. Drilling was not completed until August, 1944. By that time defendant had to abandon the barley crop as a loss. From this evidence it does not appear that there was any waiver by defendant, as a matter of law, of his right,

under his agreement, to damages that might result to his barley crop. The case of Brookings L. & B. Co. v. Manufacturers' Co., 173 Cal. 679, 161 P. 266, relied upon by plaintiff, is factually different.

[2] The payment of $1250 on the account did not, as a matter of law, constitute a waiver of any claim for damages where the payment was made under the circumstances related by defendant. He testified that when he paid the $1000, an agent of plaintiff presented a bill for $4,427.27; that he protested it and informed him that "it was not correct, * * *"; that "he would not pay it"; that he told him of his losses and "I told him that my losses were more than their losses to begin with"; that he wanted Wilkinson to "come out and we would try to reach a settlement on the account."

The argument that damages were waived by an unqualified acceptance of the work is predicated upon the signature of defendant to a drilling progress slip. Plaintiff employed one Smart, a drilling contractor, to drill the well to a depth of 600 feet. He was delayed in starting and encountered much difficulty. His work was taken over by one Williams, who was paid by plaintiff to complete the job. Williams had Max McKinley sign the driller's report showing the exact depth and formation changes at various depths. Under the word "remarks" is noted: "Well completed and measured out to my satisfaction."

[3] The trial court did not find that this amounted to a waiver of any claim for damages as to crops. There was nothing about the drilling operations that was not *finally* "completed and measured out." It cannot be said that the notation, considered with the other evidence, constituted a waiver, as a matter of law, of defendant's claim to damages for failure to drill *within the time agreed upon.*

[4] The writing signed by Max specifying the terms and conditions of sale, made no reference to the time within which the drilling was to be commenced or completed, but it merely required a claim to be filed within ten days from *delivery* for any shortages or noncompliance with the written order. No written notice of failure to drill the well within the required time was required under that clause.

Although plaintiff denied that he agreed to commence or complete drilling within any specified time and claimed that the delay was due to his lack of ability to secure drillers to perform the work, the evidence, as above related, supports the finding that the barley crop was planted in reliance on the promise to drill and complete the well within the time found by the court.

[5] The last contention is meritorious. Plaintiff recovered a net money judgment on his complaint in excess of the jurisdictional amount of the highest inferior court in the county. Under such circumstances costs are allowed as of course, even though defendant recovered damages on his cross-complaint for a cause of action growing out of the same transaction and above the limited amount. The amount of that recovery was offset against the amount of plaintiff's recovery, resulting in a net judgment in favor of plaintiff in the sum of $1977.20.

In Gerstein v. Smirl, 70 Cal.App.2d 238, 240, 160 P.2d 585, 586, the general rule, where both plaintiff and defendant seek to recover money judgments against each other, is stated to be:

"It is well settled that, where both plaintiff and cross-complainant recover money judgments, a defendant to whom the 'net result of the judgment' is favorable is entitled to recover all his costs. * * * If the 'net result' of a judgment is favorable to plaintiff, unless it (in its net amount) is one which 'could have been rendered by a municipal or inferior court within the same county,' plaintiff's costs are 'allowed of course'". Citing Code of Civil Procedure, sec. 1032; Hansen v. Covell, 218 Cal. 622, 24 P.2d 772, 89 A.L.R. 670. See, also, Shelley v. Hart, 112 Cal.App. 231, 243, 297 P. 82; Dobbins v. Horsfall, 58 Cal.App.2d 23, 27, 136 P.2d 35.

[6] The judgment, in so far as it adjudged that "none of the parties recover their costs in said action," is reversed, with directions to the court below to allow plaintiff its costs. The remaining portion of the judgment, that is, the portion other than the portion relating to costs, is af-

firmed. In the interests of justice defendant may recover his costs on appeal. Rule 26, Rules on Appeal.

BARNARD, P. J., concurs.




84 Cal.App.2d 61

**SPENCER v. NELSON et al.**

**Civ. 13486.**

District Court of Appeal, First District, Division 2, California.

March 1, 1948.

**1. New trial ⇐9**

A trial court has the power to grant a new trial on part of the issues only. Code Civ.Proc. § 657.

**2. Appeal and error ⇐933(1)**
**New trial ⇐170**

On new trial on one issue only, scope of new inquiry was required to be left to trial court, and District Court of Appeal was required to assume that trial court would use its discretionary power in a judicial and equitable manner. Code Civ. Proc. § 657.

**3. Corporations ⇐30(1)**

If defendants ratified agreement with plaintiff dealing with organization and management of a corporation, after defendants had knowledge of terms of agreement, then agreement would be binding on defendants, though agreement was allegedly tainted with deceit.

**4. New trial ⇐9**

Where judgment was entered for defendants in action for declaratory relief arising out of a controversy as to rights of parties with respect to a written agreement, which defendants claimed was tainted with deceit, covering organization and management of a corporation, trial court had right to grant plaintiff a new trial only on subsidiary issue whether defendants ratified agreement after having knowledge of alleged deceit, over objection that ratification was not a separable issue, and that limiting issue to be retried did not save time and expense or eliminate confusion and inconvenience. Code Civ.Proc. § 657.

---

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action for declaratory relief by Glenn H. Spencer against Ted Nelson and Alice M. Nelson. Judgment was entered for the defendants. From an order granting the plaintiff a new trial only on the issue of ratification, the plaintiff appeals.

Order affirmed.

See also 180 P.2d 886.

James R. Agee and Harold C. Holmes, Jr., both of Oakland, for appellant.

B. H. Muldary and Norman Elkington, both of San Francisco, and Hardin, Rank, Metzer & Fletcher, of Oakland, for respondent.

WARD, Acting Presiding Justice.

The complaint herein prays for declaratory relief arising out of a controversy as to the legal rights of plaintiff and defendants with respect to a written agreement covering the organization and management of a certain welding equipment corporation. Plaintiff alleges that defendants have caused royalties to be withheld form plaintiff and threaten to ignore the agreement. The answer pleaded lack of consideration and that during a certain period plaintiff occupied the position of attorney toward defendants and that during such period in their legal business relations he acquired an advantage to the detriment of defendants in the making of the agreement.

[1] The trial court found in favor of defendants and as a conclusion of law it declared that defendants were entitled to a judgment and decree to the effect that the main written instrument and an amendment thereto are both void, invalid and of no legal effect. Judgment was entered accordingly. Subsequently the court ordered "that said plaintiff's motion for a new trial be and the same is hereby granted on the issue of ratification." This order

was amended by a subsequent order as follows: "* * * it is now ordered by the Court that said minute order be and the same is hereby amended to provide the following, to-wit, that the judgment hereinbefore entered is vacated and a new trial granted on the issue of ratification." The notice of appeal designates that the "order vacated the judgment heretofore entered herein and granted plaintiff a new trial only as to the issue of ratification." A trial court has power to grant a new trial on part of the issues. Code Civ.Proc. sec. 657; Adams v. Hildebrand, 51 Cal.App.2d 117, 124 P.2d 80; Crandall v. McGrath, 51 Cal.App.2d 438, 124 P.2d 858.

The written agreement involved is dated September 5, 1942. All matters preliminary to or occurring on September 5, 1942, up to the precise time that the contract and an amendment thereto were executed and delivered, comprise a definite period upon which all issues pertaining to the validity of the agreement may be determined. The acts performed or statements made by the parties, particularly the defendants, subsequent to September 5, 1942, are matters that may be considered in determining ratification. The question whether the evidence supports the foregoing findings is not before this court. The question here is the propriety of a new trial on the issue of ratification. In examining the transcript of evidence to determine the propriety of separability, and whether the hearing of the motion for a new trial based upon one issue may be prejudicial, it appears that the court did not limit the examination to the subject of ratification, and plaintiff has not called attention to any such limitation.

Plaintiff has confined his appeal to the following questions: "I. Limiting a new trial to the issue of ratification is prejudicial to appellant. II. Ratification of the alleged wrongful acts is not a separable issue. III. Limiting the issue to be retried does not save time and expense or eliminate confusion and inconvenience."

[2] The third point may have some merit generally, as it often appears necessary practically to retry many issues when a new trial is granted on only one issue, but this question, namely, the specific scope of the new inquiry, must be left to the trial court. A reviewing court is unable to determine the admissibility of the evidence that may be offered in substantiation of the claim of ratification. It may be necessary to introduce part of the evidence covering the period prior to September 5, 1942 to show sequentially a ratification. It may only be necessary to refer to the previous findings. It must be assumed until a record proves the contrary that the trial court will use its discretionary power in a judicial and equitable manner.

That expense, confusion and inconvenience will occur do not appear affirmatively from the record before this court. Emerson v. Yosemite Gold Min. etc. Co., 149 Cal. 50, 85 P. 122. The execution of the agreement and its ratification thereafter are distinctly separable issues in this case as they are divided in time and in acts by a specific date. Inducements offered, lack of full information or lack of independent advice all may play a part in the execution of the agreement, but statements or acts tending to ratify the execution notwithstanding the alleged deceit stand as separate issues. Simply because the issue of ratification is a subsidiary issue does not make it non-severable. Its bearing on what the parties understood at the time of negotiations does not make it severable.

The contention of plaintiff appears in a more serious aspect when it is considered that plaintiff is a licensed attorney at law. The fact that he is an attorney can not change the rule. However, on the retrial he may be able to prove that when defendants had *knowledge* of the writing of September 5, 1942, they consented to and worked under the terms of the agreement. If such evidence is forthcoming, plaintiff will be entitled to a judgment enforcing the provisions of the agreement of September 5, 1942.

[3] It was held in Keogh v. Maulding, 52 Cal.App.2d 17, 21, 125 P.2d 858, 860: "The logical test, for the determination of such a question, would appear to be that, if a second trial, limited to one issue, might be prejudicial to either party, then obvious-

ly, to order such a retrial would be an abuse of discretion. And any doubt in that connection should be resolved in favor of a trial on all issues." In the present case if the court should find that defendants ratified the agreement though tainted with deceit, the judgment would necessarily be for plaintiff. If the court should find contrary to plaintiff's interest in the matter then he has a full remedy by appeal from the final judgment. According to the record the final judgment that was entered has been vacated, thereby making the new judgment when entered available for appeal.

[4] In view of the rule set forth in Code of Civil Procedure, sec. 657, the trial court had a right to grant a new trial on one issue. It has not been made apparent on appeal that plaintiff will be prejudiced thereby.

The order appealed from is affirmed.

BRAY, J., and FINLEY, Justice pro tem., concur.




84 Cal.App.2d 208

## UNION BANK AND TRUST CO. OF LOS ANGELES v. McCOLGAN Franchise Tax Com'r.

Civ. 7453; Sac. 5881.

District Court of Appeal, Third District, California.

March 3, 1948.

Rehearing Denied April 2, 1948.

**1. Trusts ⇐140(1)**

Under trust agreement conveying to trustee designated property including stock of corporation to which trustor was indebted, and directing that upon death of trustor the trustee should pay from accumulated income or corpus any balance then remaining unpaid to the corporation and that remaining corpus of trust together with any accumulated income remaining should be conveyed by the trustee to five named beneficiaries, stock dividends received by trustee after trustor's death vested in beneficiaries and were not to be resorted to for payment of balance due on debt.

**2. Taxation ⇐104**

Under trust agreement conveying to trustee designated property including stock of corporation to which trustor was indebted and directing that, upon death of trustor, trustee should pay from accumulated net income or corpus of the trust any balance then remaining unpaid to corporation and that remaining corpus of trust, together with any accumulated income remaining, should be conveyed by trustee to five named beneficiaries, stock dividends received by trustee after trustor's death were "currently distributable" within Income Tax Act, and were taxable as income of beneficiaries, notwithstanding that by specific direction of beneficiaries the dividends were applied by trustee on the debt to corporation. Revenue and Taxation Code, §§ 17001 et seq., 18133.

See Words and Phrases, Permanent Edition, for all other definitions of "Currently Distributable".

**3. Trusts ⇐172**

Trustee has duty to carry out terms of trust according to expressed intent of trustor.

**4. Taxation ⇐543(6)**

In action by trustee for refund of income taxes paid under protest, complaint alleging that beneficiaries had paid tax on the income involved, computed in the manner provided by law, and that trustee was compelled to pay under protest an additional sum which was illegally collected, stated a cause of action though payment made by beneficiaries may have been inadequate to cover entire amount legally due, since it should have been credited to the obligation and trustee would be entitled to recover any excess sum paid under protest regardless of whether the income involved vested in beneficiaries upon its receipt by trustee. Revenue and Taxation Code, §§ 17001 et seq., 18133.

Appeal from Superior Court, Sacramento County; Peter J. Shield, Judge.

Action by the Union Bank & Trust Company of Los Angeles, trustee, against Charles J. McColgan, Franchise Tax Commissioner of the State of California, substituted in the place and stead of Charles G. Johnson, Treasurer of the State of California, for refund of income taxes. Judgment for plaintiff, and defendant appeals.

Affirmed.

Fred N. Howser, James E. Sabine, and Irving H. Perluss, all of Sacramento, for appellant.

Dempsey, Thayer, Deibert & Kumler, of Los Angeles, for respondent.

THOMPSON, Justice.

The State Treasurer has appealed from a judgment for plaintiff, refunding income taxes levied against a trustee of an express trust under the Personal Income Tax Act of 1935 (Stats.1935, p. 1090, ch. 329, Revenue and Taxation Code, sec. 17001 et seq.), which were paid under protest. Defendant filed a general demurrer to the complaint. The demurrer was overruled and defendant was granted fifteen days to answer. He failed to answer the complaint. Upon motion of plaintiff the defendant's default was duly entered and judgment was rendered against him for the sum of $6,042.71, being the amount of income taxes which were paid by plaintiff under protest. From that judgment this appeal was perfected.

The complaint alleges that on June 28, 1935, Alice B. Keck executed an express trust agreement, conveying to plaintiff as trustee designated property including certain shares of the capital stock of The Limited Oil Company, for the benefit of her five named children. She then owed that company $127,324.21. Article VI of the trust agreement reads:

"Upon the death of the Trustor, unless this trust is theretofore revoked in a manner hereinafter provided, after making payments then due under paragraphs (a) and (b) of Article III hereof, the Trustee shall from the accumulated net income or corpus of the said trust, pay any balance then remaining unpaid to said The Limited Oil Company upon the indebtedness of Trustor referred to in Section 2 of Article II of the 'Keck Agreement' and pay any balance then remaining unpaid for any advancement made by W. M. Keck under Section 4 of Article II of the 'Keck Agreement', and the remaining corpus of the trust, together with any accumulated income remaining after paying the taxes provided for in Section 7 of Article I of the 'Keck Agreement' (which said taxes and charges said Trustee is hereby authorized and directed to pay), shall go to and be by the Trustee conveyed, share and share alike, to W. M. Keck, Jr., Howard Brighton Keck, Willametta Myron Keck, Alice Bertha Keck, and Theodore James Keck."

The complaint further alleges that the trustor died August 16, 1936; that subsequent to her death, on October 15, 1936, the trustee received as dividends from said Oil Company stock the sum of $62,500, of which payment it promptly notified the beneficiaries, who "thereupon severally directed the trustee to apply the said dividend against the indebtedness of the trustor to The Limited Oil Company," which the trustee, *pursuant to said direction by the beneficiaries,* did in 1936; that the trustee reported, in 1936, to the Franchise Tax Commissioner the death of the trustor, the vesting of the estate in the beneficiaries, and the application of said sum of $62,500, at the request of the beneficiaries, to said debt to the Oil Company; that the beneficiaries promptly reported to the said Tax Commissioner the receipt of funds, including said sum, "and paid a tax thereon [for the year 1936] *computed in the manner provided by law;*" that the Commissioner nevertheless imposed an income tax thereon for the year 1936, *against plaintiff as trustee,* in the further sum of $6,042.71, which was paid by plaintiff October 31, 1938, under protest. This suit was then instituted for the refunding of said sum, as previously stated.

In his opening brief the appellant states that the question on appeal is "Whether a trust or the beneficiaries of the trust are taxable upon income received by the trust and used to discharge an obligation of the trust during the taxable year 1936?"

[1] The real problem is whether the complaint states a cause of action for refunding taxes paid under protest. Incidentally, the question is presented as to whether the property in question vested in the beneficiaries "upon the death of the trustor." The determination of that question depends upon the construction of the trust agreement. The dividends received after the death of the trustor, in the sum of $62,500, were actually applied on the debt due to the Oil Company, *by direction of the beneficiaries.* In support of its contention that the property vested in the beneficiaries upon the death of the trustor, the plaintiff quotes the essential language of Article VI of the trust agreement as follows:

"Upon the death of the trustor * * * the Trustee shall *from the accumulated net income or corpus* of the said trust, pay any balance then remaining unpaid to said The Limited Oil Company * * * and the *remaining* corpus of the trust, together with any accumulated income *remaining* * * * shall go to and be by the Trustee conveyed, share and share alike," to five named beneficiaries.

The respondent construes that language to mean: That the trust agreement places no restriction on the vesting of the current income accruing after the death of the trustor; that the dividends vested in the beneficiaries at her death; that the debt mentioned therein is to be paid from the corpus and the income accumulated before the death.

That is a reasonable construction of the language. It refutes the suggestion of appellant that the trustor contemplated an accumulation of income after her death. It states, in effect, that, *at the death* of the trustor the balance of the debt to the Oil Company shall be paid "from the accumulated net income or corpus" then existing, and that the *remaining* income and corpus shall go to and be by the trustee conveyed to the beneficiaries. That means that the income of $62,500 paid as dividends on the oil stock *after the death of the trustor* was not to be resorted to for payment of the balance due on the debt, but was to become the property of the beneficiaries. That is the exact construction placed upon the language of the trust by both the trustee and the beneficiaries. It is immaterial that said sum of money, by subsequent specific direction of the several beneficiaries, was paid on that debt. The trustee did so as the agent of the individual beneficiaries, and not as trustee.

In support of his assertion that a trust will not be terminated until the purpose for which the trust was created has been fully performed, the appellant cites District Landowners' Trust v. Doherty, 94 Colo. 385, 30 P.2d 319; Williams v. Morris, 144 Or. 620, 25 P.2d 135; 2 Restatement of the Law of Trusts, p. 1011, sec. 334, and 3 Scott on Trusts, p. 1823, sec. 334. But that principle does not fit the facts of the present case. It is conceded this trust was not created to pay the debt to the Oil Company. This trust was not extended to cover receipts from dividends which were paid after the death of the trustor, as we have previously held. They were not a part of the trust.

[2] The appellant claims that even though the dividends in question, which were acquired after the death of the trustor, vested in the beneficiaries, they were nevertheless not "currently distributable," within the meaning of Section 12(c) of the California Personal Income Tax Act, Revenue and Taxation Code, § 18133, and taxable to the trustee as determined by the Circuit Court of Appeals in Commissioner of Internal Revenue v. First Trust & Deposit Co., 2 Cir., 118 F.2d 449. That case involved the creation of a trust as applied to Section 162(b) of the Federal Revenue Acts of 1932 and 1934, 26 U.S.C.A.Int. Rev.Code, § 162(b), which appellant asserts are the counterparts of Section 12(c) (2) of the California Income Tax Act. In that case the trustor conveyed to the trustee certain securities and life insurance policies, with direction to collect the income therefrom and pay the premiums as they became due, together with the expenses of administering the trust, and to apply the net income to the use of the grantor during his life, and upon his death to that of his wife. It was provided that upon her death, "the capital of the trust" should be divided and conveyed in equal shares to the children of the trustor. But

the court said that "The grantor of the trust *by its terms* reserved the right to charge the beneficiaries, so that the corpus was subject to estate taxes upon his death." The Commissioner of Internal Revenue levied taxes against the beneficiaries for the years 1933, 1934 and 1935. That levy was not sustained. It does not appear when the trustor died, or when his wife died. But that case was decided upon the statement of the court that "*Under the terms of the trust deed* the gift to the children, which became vested on the death of their parents, *was subject to the payment of taxes, commissions and expenses incident to the winding up of the trust.*" (Italics added.)

[3] The foregoing quoted language distinguishes that case from the present one as we have previously indicated. Other cases cited by the appellant upon that question are likewise similarly distinguished. It is, of course, the duty of the trustee to carry out the terms of the trust according to the expressed intent of the trustor. 54 Am.Jur. 242, sec. 305.

The respondent suggests that if it be assumed the conveyance of the property in question to the beneficiaries is deemed to be suspended for an uncertain period of time, during which the income may accumulate, the trust would become invalid, to that extent, under Sections 715 and 725 of the Civil Code, because the power of alienation would thereby be suspended beyond the lives of persons in being and twenty-five years. That may be questionable, since the trust in this case directs the payment of the debt in question from the corpus as well as from the accumulated income. When the payment of a debt is directed to be made from the corpus of an estate, that may authorize the sale of the property to pay the debt and thus prevent the suspension of the right to alienate the property beyond the prohibited time of lives in being and twenty-five years. But it is not necessary for us to determine that question, in view of our conclusion that the dividends in question vested in the beneficiaries.

[4] Independently of the question of the vesting in the beneficiaries of the stock dividends received after the death of the trustor, there appears to be another reason for holding that the complaint states a valid cause of action for the refunding of taxes paid by the trustee under protest. The complaint alleges that the beneficiaries paid upon said taxes for the year 1936 "his or her share of the said $72,561.99" which included taxes on said dividends received after the death of the trustor, in the sum of $62,500. It is alleged that they "paid a tax thereon *computed in the manner provided by law.*" The complaint also alleges that plaintiff was compelled to and did pay the defendant under protest an additional sum of said taxes for 1936 of $6,042.71, which was illegally collected, and which it seeks to recover. It is immaterial that the original payment of said taxes was made by the beneficiaries. According to the complaint they were accepted and retained by the defendant. Even though that payment may have been inadequate to cover the entire amount legally due, it should be credited to the obligation. It follows that, under the uncontradicted allegations of the complaint, plaintiff was forced to pay an additional amount far in excess of the taxes due to the State. The plaintiff would be entitled to recover in this action that excess sum which was paid under protest, regardless of whether the dividends in question vested in the beneficiaries. To that extent, at least, under any circumstances, the complaint does state a cause of action. If the defendant desired to raise the issue as to whether or not the original payment of taxes by the beneficiaries was adequate to cover the entire amount of taxes due for that year, he should have done so by filing an answer to the complaint within the time allowed by the trial court. He failed to do so. For the defendant to retain such grossly excessive amount of taxes would result in undue and illegal enrichment.

We conclude that the complaint states a valid cause of action for the refunding of taxes paid under protest.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

84 Cal.App.2d 126

## PEOPLE v. WEBER.

Cr. 4179.

District Court of Appeal, Second District, Division 1, California.

March 2, 1948.

Hearing Denied March 30, 1948.

1. Criminal law ⇐706, 1171(1)

In prosecution for contributing to minors' delinquency, question on defendant's cross-examination as to whether restaurant in which he worked was off bounds, so far as high school was concerned, was improper and prejudicial to defendant. Welfare and Institutions Code, § 702.

2. Infants ⇐20

Evidence was insufficient to support conviction of contributing to delinquency of minors. Welfare and Institutions Code, § 702.

3. Criminal law ⇐26

All crimes are against the state, and no affirmative action to prevent commission of public offense is required to be taken by any citizen except officials charged with such duty.

4. Criminal law ⇐655(1)

The trial court's statement, before pronouncing sentence on conviction of contributing to minors' delinquency, that defendant aided, abetted and assisted minors in commission of immoral acts, was improper as conclusion not supported by evidence or law. Welfare and Institutions Code, § 702.

5. Criminal law ⇐59(5)

Aiding and abetting commission of crime requires affirmative action, and person's mere knowledge and belief that crime is being committed or likely to be committed and his failure to take steps to prevent crime do not amount to aiding and abetting commission thereof.

6. Criminal law ⇐986

Administration of justice demands fair and impartial trial under law, which includes pronouncing of judgment.

---

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Joseph Jacob Weber was convicted of contributing to the delinquency of minors, and he appeals.

Reversed, with directions.

Paul E. Tapley, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

PER CURIAM.

Defendant was adjudged guilty by the court, a jury having been duly waived. Defendant was charged by information in the Juvenile Court with contributing to the delinquency of minors, an alleged violation of Section 702 of "Welfare and Institutions Code" in that defendant, on or about February 5, 1947 "did willfully and unlawfully encourage and permit certain minors, to-wit, Edwin J. Willard, Delores Lane, Dorothy Legg and Timothy West, minor persons under the age of twenty-one years, to-wit, of the ages of 17, 16, 16 and 17 respectively, to use and occupy a barn containing a quantity of hay and located on the southwest corner of Pioneer and Center Streets, Norwalk, for the purpose of committing sexual intercourse."

The information was filed April 30, 1947; the trial was had on June 2, 1947.

The record reveals that the defendant's mother and father were the owners of and operated a small restaurant or lunch counter in the town of Norwalk; they also sold hay. Their son is the defendant who is 20 years of age.

The defendant testified:

"Q. How long have you been working in the restaurant there? A. Ever since I was a little boy.

"Q. Practically all your life? A. I lived there all my life, and I was gone for a little over two years, I was in the Navy, and I come back and started helping my parents again."

The alleged offense occurred in the restaurant. On the afternoon of the day in question, about 3:30 p. m. three boys and three girls were at the restaurant lunch counter, their ages ranging from 16 to 18 years. The evidence, taking into consideration the conclusions of the witnesses and

replies to questions that called for hearsay, reveals that the three boys were lamenting the fact that they had no "car". One of them testified, referring to the conversation among them, "A. Well, I said if we had a car we could take the girls out and 'make' them in the car.

"The Court: 'And "make" them in the car'? A. Yes, sir.

"Q. By Mr. Ritzi (Deputy District Attorney): Was the defendant, Joe Weber, in the cafe at this time? A. I believe so.

"Q. While you were having this conversation was he near by in the same room, or what? A. Well, yes, he was in the same room, but he was, I'd say, two feet, three feet from us.

"Q. Did Joe Weber say anything as you were having this conversation? A. I can't remember.

"Q. Did you ask Joe Weber as to whether or not you could use the barn? A. I believe I stated something like that.

"Q. What do you mean, you stated something like that? Did you ask him? A. Yes, I did.

"Q. What did he say? A. I don't know whether he understood me or not, but he says something about, 'I guess it will be all right.'

"The Court: What did you say to him, young man? A. I said could we use the barn, I asked him if we could use the barn, and he said something like he didn't care, or something like that."

As an example of one of the questions that called for hearsay, the record reveals the following:

"The Court: Yes, what was said at that time. Just give us the conversation, Whatever was said by any one present. You just tell us what was said there, young man."

And another one by the court referring to what took place in the barn:

"The Court: Young man you just tell me what you were doing there and what you saw and what the other people were doing and what they saw."

The defendant's account of the foregoing is as follows:

"Well, one of them said—he said something about he wanted—wished he had a car, and didn't know where to go, and wanted to "make" the girls, or something like that; that is, that's after he asked me if the barn was open or not. I just took it as a jest from one of the boys; they all joke around; I didn't know whether to take him seriously or not. I don't take any of them seriously.

"Q. Did you talk to them any further? A. No."

The conclusion of the defendant's testimony is as follows:

"The Court: I will ask this last question. Mr. Weber, do you sell liquor at this restaurant that you own?

"The Defendant: No; we are too close to the high school to have a liquor license.

"The Court: You come within that provision of the law.

"The Court finds the defendant to be guilty of the offense of contributing to the delinquency of a minor as set forth in the information.

"Mr. Henry: May we ask leave at this time, your Honor, to file a petition for probation?

"The Court: Yes, I want you to file an application. I want to go into this matter very carefully."

Based on the foregoing, which is the substance of the record, the defendant was adjudged guilty and sentenced to one year in the County Jail.

When the defendant appeared for sentence, the court commented as follows: "The violation which occurred out there, and series of violations which have occurred, Mr. Weber, are unjustifiable. You participated not only in the commission of these acts, but you could well have been charged with a felony. Every one of the times these men went out there and had intercourse with these girls they were guilty of the offense of rape, and you aided and abetted and assisted."

[1] Incidentally, the first question on cross-examination of the defendant was as follows:

"By Mr. Ritzi:

"Q. Joe, this Weber's Cafe is off bounds as far as the school is concerned, isn't it?"

An objection to the question as improper cross-examination was sustained. Not only was the question highly improper but prejudicial. And in the presence of a jury would have, in all probability, been reversible error.

[2] The defendant's contention on appeal that the evidence is insufficient to support the judgment must be upheld.

Section 702 of the Welfare and Institutions Code provides, "Any person who commits any act or omits the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of twenty-one years to come within the provisions of any of the subdivisions of section 700 or which act or omission contributes thereto, or any person who, by any act or omission, or by threats, commands, or persuasion, induces or endeavors to induce any person under the age of twenty-one years to do or to perform any act or to follow any course of conduct or to so live as would cause or manifestly tend to cause any such person to become or to remain a person within the provisions of any of the subdivisions of section 700, is guilty of a misdemeanor * * *". Obviously there was no "duty" on the part of defendant to take any action whatever, in the circumstances. Nor does the evidence disclose any "act" committed by defendant that caused or encouraged any one to "come within the provisions of any of the subdivisions of section 700". Nor does the evidence reveal any conduct whatsoever on the part of the defendant that amounted to, "threats, commands, or persuasion, induces or endeavors to induce any person", to do anything.

[3, 4] It should be emphasized that all crimes are against the State and no citizen except those officials charged with the duty so to do, is required to take any affirmative action to prevent the commission of a public offense. The court's statement, therefore, above noted, that the defendant "aided and abetted and assisted" in the commission of the offense is without legal sanction. There was nothing in the evidence and there is nothing in the law that supports such a conclusion.

[5] It is well settled that aiding and abetting the commission of a crime requires some affirmative action. The mere knowledge or belief that a crime is being committed or likely to be committed, and the failure on the part of the one having such knowledge or belief to take some steps to prevent it, in no sense amounts to aiding and abetting. The foregoing is not to be understood as suggesting or even intimating that defendant had any such knowledge or belief. On the contrary, to attribute such a state of mind to the defendant in the light of the extraordinary proposal of the three boys would, in itself, do an injustice to defendant's character that the evidence by no means justifies. But, if there were any such doubt, the presumption of innocence would be sufficient to overcome it in the circumstances.

[6] The administration of justice has always demanded a fair and impartial trial under the law, which includes the pronouncing of judgment thereon. A defendant in a criminal action cannot be punished for general conditions and thus be made the victim of a transient and miniature crusade.

The judgment is reversed with directions to discharge the defendant.




84 Cal.App.2d 135

## ROOT v. PACIFIC GREYHOUND LINES, Inc.

Civ. 16178.

District Court of Appeal, Second District, Division 2, California.

March 2, 1948.

**Rehearing Denied March 19, 1948.**

**Hearing Denied April 29, 1948.**

**1. Automobiles ⇐246(38)**

In motorist's action for injuries sustained in intersectional collision, last clear chance instruction correctly stated the law.

**2. Automobiles ⇐245(91)**

In action by motorist for injuries sustained when struck by defendant's bus ap-

proaching from left at intersection, where evidence disclosed that driver of bus was at least 102 feet from point of collision when he realized that plaintiff was in dangerous situation, that collision could have been avoided by bus driver applying brakes in full or by driving straight ahead, but that instead driver turned to left and only partially applied brakes until it was too late to avoid collision, last clear chance doctrine was applicable and it became question for determination of jury whether bus driver, after realizing plaintiff's peril, acted as a reasonably prudent man similarly situated would have acted.

**3. Automobiles ⇐244(11)**

In action by motorist for injuries sustained when struck by defendant's bus approaching from left at intersection, verdict that bus driver was negligent was supported by substantial evidence.

**4. Trial ⇐296(1)**

Instructions must be read together.

**5. Trial ⇐296(3)**

In action by motorist for injuries sustained when struck by defendant's bus approaching from left at intersection, instruction regarding distinctive roadway markings and violation of law in driving to left thereof was not objectionable because of omission of element of proximate cause, in view of another instruction which fully and fairly advised jury relative to element of proximate cause. Administrative Code, Tit. 21, art. 2, §§ 1411, 1414; Vehicle Code, §§ 525(b), 552.

**6. Trial ⇐253(1)**

In a formula instruction purporting to contain all elements necessary for a verdict in favor of plaintiff, each element necessary to establish liability on part of defendant must be stated.

**7. Appeal and error ⇐1064(1)**

In action by motorist for injuries sustained in intersectional collision, giving of instruction regarding presumption of law that every person takes ordinary care of his own concern and that he obeys law, and regarding duty of jury to weigh evidence that conflicts with such presumption, was not prejudicially erroneous to defendant.

---

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Action by William A. Root against Pacific Greyhound Lines, Incorporated, for personal injuries resulting from a motor vehicle collision. Judgment for plaintiff and defendant appeals.

Affirmed.

Bauder, Veach & W. I. Gilbert, of Los Angeles (Robert E. Ford, of Los Angeles, of counsel), for appellant.

Carter, Young & Zetterberg, of Pomona, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before a jury in an action to recover damages for personal injuries resulting from a collision between a bus owned and operated by defendant and a truck in which plaintiff was riding, defendant appeals.

The evidence being viewed in the light most favorable to plaintiff (respondent), the essential facts are these:

On February 15, 1945, at about 9 a.m., plaintiff was driving in a northerly direction on Rebecca street toward Fifth street, an east-west thoroughfare, in the city of Pomona. As he stopped at the intersection he observed defendant's bus, eastbound, 50 to 100 feet west of Cypress, the street next west of and parallel to Rebecca street. He then looked east, observed that the thoroughfare was clear, and drove straight north. When the bus was approximately 102 feet west of the center line of Rebecca street the driver observed plaintiff, blew his horn and applied his brakes, but not with full force. He then turned the bus to the north so that the vehicle straddled the center line, and continued in a northward direction until the bus struck the truck in which plaintiff was riding, north of the center line of Fifth street. Just before the collision the driver of the bus applied his brakes with full force, skid-

ding some 35 feet prior to the impact of the two cars.

The bus was proceeding at about 25 miles per hour, and under the conditions that then obtained could have been stopped within 60 feet after the brakes had been fully applied. Likewise, had the bus been driven straight ahead instead of crossing north of the center line of Fifth street it would have missed the pickup truck operated by plaintiff.

Defendant urges that the trial court committed prejudicial error in giving the following instructions:

I

"There has grown up in our law a certain reasoning process that we sometime call to our aid in analyzing the facts of an accident case, and which is known as the doctrine of last clear chance. It is permissible to use the doctrine only after we first find, and you may not use it unless and until you first shall have found, that in the events leading up to the accident in question, both the plaintiff and the defendant were negligent.

"The doctrine of last clear chance may be invoked if, and only if, you find from the evidence that these six facts existed:

"First: That plaintiff, by his own negligence, got himself into a position of danger.

"Second: That thereupon, either it was physically impossible for him through the exercise of ordinary care to escape from the danger, or he was totally unaware of impending danger in his position.

"Third: That the defendant had actual knowledge of plaintiff's perilous situation.

"Fourth: That it appeared to the defendant, or would have appeared to him in the exercise of ordinary care, that plaintiff either was unaware of the danger impending in the situation or was unable to escape therefrom through the exercise of ordinary care.

"Fifth: That after the defendant acquired actual knowledge of plaintiff's perilous situation, he had a clear opportunity to avoid the accident and could have done so by exercising ordinary care.

"Sixth: That the defendant did not avail himself of that opportunity, but by negligent conduct proximately caused the accident.

"If all the conditions just mentioned are found by you to have existed with respect to the accident in question, then you must find against the defense of contributory negligence, because under such conditions the law holds the defendant liable for any injury suffered by the plaintiff and proximately resulting from the accident, despite the negligence of the plaintiff."

[1] The foregoing instruction correctly states the law. (Palmer v. Tschudy, 191 Cal. 696, 218 P. 36.)

[2, 3] Defendant's contention that the instruction was not applicable because the driver of the bus did not have a *last clear chance* to avoid injuring plaintiff by the exercise of ordinary care is without merit. From the evidence the jury impliedly found that when the driver saw plaintiff's truck he realized that plaintiff was in a dangerous situation from which he could not extricate himself. The evidence further discloses that at this time defendant's bus was at least 102 feet from the point of collision, and that the collision could have been avoided by the driver's applying his brakes in full or by driving straight ahead. Instead of following either course he turned to the north and only partially applied his brakes until it was too late to avoid the accident. The instruction was therefore applicable, and it became a question of fact for the determination of the jury whether or not defendant's driver, after realizing plaintiff's peril, acted as a reasonably prudent man similarly situated would have acted. The jury's determination that he did not so act but that his acts were negligent therefore finds substantial support in the evidence and will not be disturbed by us.

In Folger v. Richfield Oil Corp., 80 Cal. App.2d 655, 182 P.2d 337; Edwin v. Morris, 10 Cal.App.2d 168, 51 P.2d 149; Poncino v. Reid-Murdock & Co., 136 Cal.App. 223, 28 P.2d 932; and Bagwill v. Pacific Electric Ry. Co., 90 Cal.App. 114, 265 P. 517, relied on by defendant, the courts found that there was no evidence which would have sustained a finding that defendant had the *last clear chance* to avoid the

accident. As we have pointed out, the evidence is to the contrary in the instant case and therefore the cited cases are inapplicable.

II

"'The State Department of Public Works shall by regulation determine a distinctive roadway marking which shall indicate no driving over such marking, and is authorized either by such marking or by signs and markings to designate any portion of a State highway where the volume of traffic * * * renders it hazardous to drive on the left side of such marking or signs and marking. When such markings or signs and markings are in place the driver of a vehicle shall not drive along the highway to the left thereof, but this shall not prevent turning to the left across any such markings at any intersection or private driveway.'

"The following sections, quoted from the California Administrative Code, Title 21, were regulations of the California State Department of Public Works in force at the time of the collision:

"Article 2. 'Distinctive Markings for State Highways indicating no driving to the left thereof.

"'Section 1411. Said distinctive roadway marking is determined as the double line now in use on said highways. Said marking shall consist of two white stripes, or one white stripe and one yellow stripe, painted on the roadway, each stripe three inches wide, and the two stripes separated by a three-inch black stripe, except that where one yellow stripe is used, driving over the double line by the traffic proceeding on the same side of the highway as said yellow stripe shall not be prohibited by reason of said distinctive marking * * *.

"'Section 1414. Signs shall not be required in connection with said distinctive markings.'

"Conduct which is in violation of the Vehicle Code subsection 525(b) and Section 552 just read to you, and those portions of Article 2, Title 21, Administrative Code, just read to you, constitutes negligence per se. This means that if the evidence supports a finding, and you do find, that a person did so conduct himself, it requires a presumption that he was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence. In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to do likewise."

Defendant urges error in the giving of the foregoing instruction because it omits the element of proximate cause. Such criticism is unfounded for the reason that the trial court, after instructing the jury as above and relative to the provisions of section 552 of the Vehicle Code, further instructed the jury in these words:

"However, in this action, a violation of law is of no consequence unless it was a proximate cause of or contributed, in some degree as a proximate cause, to an injury found by you to have been suffered by the plaintiff."

[4, 5] It is a settled rule that instructions must be read together. Therefore, applying this rule, it is evident that the criticized instruction, when read in conjunction with the one last quoted, fully and fairly advised the jury relative to the element of proximate cause.

[6] Broun v. Blair, 26 Cal.App.2d 613 80 P.2d 95, and La Rue v. Powell, 5 Cal. App.2d 439, 42 P.2d 1063, relied upon by defendant, are not applicable to the present case for the reason that in the cited cases the instructions were formula instructions purporting to contain all the elements necessary for a verdict in favor of the plaintiff. In such an instruction it is of course the rule that each and every element necessary in order to establish liability upon the part of the defendant must be stated. In the present case, however, the instructions were not formula instructions but were separate instructions on individual elements and were to be read together, and as thus read they were not erroneous.

III

"At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption it is the jury's duty to weigh that evidence against the presumption and any evidence that may support the presumption, to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, my instructions on the burden of proof."

[7] The giving of the foregoing instruction was not prejudicially erroneous to the rights of defendant. In Speck v. Sarver, 20 Cal.2d 585, 588, 128 P.2d 161 et seq., a similar instruction was given predicated upon a situation analogous to that which obtains in the instant case, and the court held that the giving of such an instruction under the circumstances did not constitute prejudicial error. We likewise hold that the giving of the instruction in this case was not prejudicial.

The judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.




85 Cal.App.2d Supp. 817

## GILL v. WOLF.

No. 14331.

Appellate Department, Superior Court, San Diego County, California.

January 8, 1948.

1. Mortgages ⇐497(1)

Under Illinois law, judgment in action to foreclose trust deed securing bonds supplanted the chose in action and merged the security provisions of trust deed, and the judgment was property and part of trust res.

2. Mortgages ⇐567(1)

Under Illinois law, debtor under trust deed securing bonds became a judgment debtor as a result of deficiency judgment entered in action to foreclose trust deed, and was obligated to satisfy the judgment, and the deficiency cut off what equity debtors might have had in possible surplus of the proceeds of sale above obligations. Smith-Hurd Stats.Ill. c. 77, § 18.

3. Mortgages ⇐497(1)

Under Illinois law, trust deed, after entry of judgment in suit for foreclosure, remained in full force as related to legal relations of trustee and bondholders.

4. Mortgages ⇐559(9), 562

Under Illinois law, court entering deficiency judgment in action to foreclose trust deed had inherent authority to control execution and make its judgment effective, and its judgment was rendered for and on behalf of holders of bonds secured by trust deed.

5. Mortgages ⇐209

Under Illinois law, trustee of trust deed securing bonds was created for benefit of bondholders, and his office exists for their benefit, and his powers can be exercised only for their interest.

6. Judgment ⇐818(2)
Mortgages ⇐559(9)

Where deficiency judgment was entered in Illinois in action by trustee to foreclose trust deed securing bonds, trustee could thereafter assign a share of the deficiency to one of the bondholders, without serving notice on defendant in the foreclosure action, who had left state and went to California, and such bondholder after the assignment could maintain action on the Illinois deficiency judgment against such defendant in California. Smith-Hurd Stats.Ill. c. 77, § 6; c. 110, § 150; Code Civ.Proc. § 1963, subd. 15.

7. Judgment ⇐819

Even if Illinois court, being one of general jurisdiction, erred in its entry of deficiency judgment in trustee's action to

foreclose trust deed securing bonds, such error would not affect its power to enter the judgment, and hence judgment was entitled to full faith and credit in California courts.

**8. Judgment ⇐946**

In action on Illinois deficiency judgment entered in action to foreclose trust deed securing bonds, judgment would be entered for plaintiff for amount of Illinois judgment with interest from date of entry of Illinois judgment, at rate of 5 per cent. as provided by Illinois statute. Code Civ. Proc. § 1913; Smith-Hurd Stats.Ill. c. 74, § 3.

---

Appeal from Municipal Court of San Diego; E. S. Wattawa, pro tem.

Action by Albert Gill against May Wolf to recover on Illinois judgment. From a judgment for defendant, the plaintiff appeals.

Reversed and remanded with directions.

Henry C. Gardiner, of San Diego, for appellant.

Ward & Ward and Frank Pomeranz, all of San Diego, for respondent.

BURCH, Judge.

Appellant, Albert Gill, asserts the right to judgment on a duly exemplified copy of a judgment entered in his favor by the Circuit Court of Cook County, Illinois, of date December 6, 1944.

The action there was one by a trustee to foreclose a trust deed which resulted in a deficiency judgment, after confirmation of sale by a master, against defendant Wolf and others on April 29, 1940, "for and on behalf" of the bondholders. A return of execution unsatisfied and defendant shown not found was also evidenced by a duly exemplified copy. It is in evidence that defendant had moved to California at least as early as the forepart of 1942.

Defendant concedes the validity of the "decretal" order of April 29, 1940. We think this concession is fatal to her claim here that the December 6, 1944, order (1) was void for want of jurisdiction over her person and (2) that the court there lost jurisdiction over the subject matter with entry of the April 29, 1940, judgment.

By the challenged order the court recites that it had "full jurisdiction" and found that "Albert Gill is the owner of and entitled to a share of, the total deficiency judgment found by this court to be owing by the defendants to Albert C. Roos, Trustee, for the benefit of certain bondholders under the decretal order of April 29, 1940; * * *" Judgment is ordered thereon with interest to November 17, 1944, in the sum of $1733.42.

[1, 2] All issues between the defendant and the bondholders as far as concerned their respective rights and obligations, under the bonds and the deed of trust which secured them, became res judicata by the order of April 29, 1940. The judgment supplanted the chose in action and merged the security provisions of the trust deed. That judgment is property, and part of the trust res in an active and express trust. Defendant Wolf, now a judgment debtor, obligated to satisfy the judgment, has no other or different interest in the trust, and had become a stranger thereto. Boddiker v. McPartlin, 379 Ill. 567, 41 N.E.2d 756; Chicago Title & Trust Co. v. Rogers Park Apartments Building Corp., 375 Ill. 599, 32 N.E.2d 137. The deficiency cut off what equity she might have had in a possible surplus of the proceeds of sale above obligations. Brown v. Campbell, 100 Cal. 635, 35 P. 433, 38 Am.St.Rep. 314. The period of three months after master's sale in which she might have redeemed was past. Ch. 77, Sec. 18, Revised Statutes, Illinois, 1939 Ed. In lieu of satisfying the judgment she made herself execution proof and removed from the jurisdiction.

[3, 4] On the other hand, the trust deed remained in full force and effect as relates to the legal relations of the trustee and the bondholders. Chicago Title & Trust Co. v. Rogers Park Apartments Building Corp., supra; Boddiker v. McPartlin, supra. The court had inherent authority to control execution and make its judgment effective (Freeman, Executions, 3d Ed., Sec. 10), and its judgment was rendered

for and on behalf of the bondholders. By the law of Illinois new parties (if Albert Gill may be deemed a new party) may be added, by order of the court, at any state of the cause, before or after judgment, as the ends of justice may require (Ch. 110, Sec. 150, Sub. 26, R.S.); and an execution may issue within seven years (Ch. 77, Sec. 6, R.S.1939 Ed.).

[5, 6] The trustee was created for the benefit of the bondholders, his office existed for their benefit, and his powers could be exercised only for their interest. Samuels v. Meyerovitz, 270 Ill.App. 210. He was entitled to exercise dominion over the judgment because it was nominally in his favor, and also because it was property in the trust res. He was not, however, called upon to follow the defendant to California to collect payment thereon. In that situation he, still acting as trustee, collaborated with plaintiff, a real party in interest. He petitioned the court and was granted a common law judgment with power of execution in plaintiff's own name. The trustee's dominion over the judgment gave him that power. Freeman, Executions, 3d Ed., Sec. 21. Since defendant was not a necessary party no legal notice was required. San Diego Savings Bank v. Goodsell, 137 Cal. 420, 70 P. 299. The situation is in clear contrast with the adversary proceeding reported in Chicago Trust Co. v. Dorchester Terrace Bldg. Corp., 317 Ill.App. 293, 45 N.E.2d 1001, to force the trustee against its will to assign to plaintiff bondholder a share of the deficiency. In our case it is the reasonable presumption that the trustee was acting in the interest of the trust. C.C.P. § 1963, Sub. 15. There is no evidence to the contrary, and this is implicit in his petition, offering to credit payments on the deficiency.

[7] But even if the Illinois court, being of general jurisdiction, erred, that would not affect its power. Here we are concerned with power and not the regularity of its exercise. "And in states bound together by a Constitution and subject to the 14th Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." McDonald v. Mabee, 243 U.S. 90, 37 S.Ct. 343, 61 L.Ed. 608, L.R.A. 1917F, 458.

"It is a strong thing for another tribunal to say that the local court did not know its own business under its own laws. Even if no statute or decision of the supreme court of the state is produced, the probability is that the local procedure follows the traditions of the place. * * * A decree in equity against a defendant who had left the state after service upon him, and had taken all his property with him, would be entitled to full faith and credit where he was found." Michigan Trust Company v. Ferry, 228 U.S. 346, 33 S.Ct. 550, 552, 57 L.Ed. 867.

[8] We think judgment should be for plaintiff for $1733.42, with interest from December 6, 1944, at the rate of 5% as provided by the statute law of Illinois (1941 Edition Revised St., Ch. 74, Sec. 3. Hargett v. Gulf Ins. Co., 12 Cal.App.2d 449, 55 P.2d 1258; C.C.P. § 1913).

Reversed and remanded with directions to enter judgment accordingly.

TURRENTINE, P. J., and THOMPSON, J., concur.

84 Cal.App.2d 322

**NORDIN v. WEDLER et al.**
**Civ. 16168.**

District Court of Appeal, Second District, Division 1, California.
March 12, 1948.

**Specific performance ⇐114(2), 119**

Plaintiff was not entitled to specific performance of contract to sell realty, where there was no averment that contract was just and reasonable as to defendants or that it was supported by an adequate consideration, and there was no evidence as to value of realty.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by C. O. Nordin against Florence B. Wedler and Alma Louise Wedler, as executrices of the estate of Fred A. Wedler, also known as Fred Wedler, deceased, for specific performance of a contract to sell realty. From a judgment in favor of the defendants, the plaintiff appeals.

Judgment affirmed.

Feinfeld & Feinfeld, of Los Angeles, for appellant.

Emil Koehl and J. P. Patterson, of Los Angeles, for respondents.

BARTLETT, Justice pro tem.

This is an action by the plaintiff for specific performance of a contract to sell real estate. The appeal is from a judgment rendered in favor of defendant. There is no averment in the complaint that the contract is just and reasonable as to the other party or that it is supported by an adequate consideration. There is no evidence in the record as to the value of the land or any evidence upon which any estimate as to its value or the adequacy of the consideration could be based. As the remedy sought in an action for specific performance is an equitable one, it is encumbent upon the plaintiff to both plead and prove those matters which show he is entitled to specific performance of the contract. When he fails to do so, no such relief can be granted. Mayer v. Beondo, 83 Cal.App.2d 665, 189 P.2d 327; Windsor v. Minor, 24 Cal. 492, 57 P. 386; Salisbury v. Yawger, 184 Cal. 783, 195 P. 682; Caspar Lumber Co. v. Stowell, 37 Cal.App.2d 58, 98 P.2d 744; Haidopoulos v. Woollett, 5 Cal.App.2d 229, 42 P.2d 1056.

The attempted appeal from the order denying the motion for a new trial is dismissed.

The judgment is affirmed.

DORAN, Acting P. J., and WHITE, J., concur.






84 Cal.App.2d 243

**PHELPS et al. v. PACIFIC GAS & ELECTRIC CO. et al.**

**PACIFIC GAS & ELECTRIC CO. v. PHELPS et al.**
**Civ. 7425.**

District Court of Appeal, Third District, California.
March 4, 1948.
Rehearing Denied April 2, 1948.
Hearing Denied April 29, 1948.

**1. Public lands ⇐25**

An official approved survey of the United States government may not be impeached and declared fraudulent by a collateral attack thereon in an action between private parties to determine title to land.

**2. Boundaries ⇐10**

When lands are granted according to official plat of survey of such lands, plat itself, with all its notes, lines, descriptions, and landmarks, becomes as much a part of grant or deed by which they are conveyed, and controls, so far as limits are concerned, as if such descriptive features were written out upon face of deed or grant itself.

**3. Public lands ⇐26**

A "section" of a township is that which is made out on ground, and a patentee takes only such land as is included within survey

of plot conveyed, and he cannot later question survey as erroneous, although in fact line in question should have been placed elsewhere.

See Words and Phrases, Permanent Edition, for all other definitions of "Section".

**4. Public lands ⇐25**

A survey of public lands does not ascertain boundaries, but creates them.

**5. Public lands ⇐28**

Where mining claim, under survey of 1875, was not within section of land granted by government to railroad and to which electric company succeeded, electric company could not assert title to mining claim under 1941 resurvey, which included mining claim within such section, on theory that mining company was bound by resurvey, since electric company was bound by original survey.

**6. Public lands ⇐28**

The government may resurvey its lands for purposes of its own information or to locate adjoining boundaries, and in doing so may locate boundaries in new and different places and thus correct an erroneous former survey, but in doing so, rights of those who have acquired an interest in lands with reference to original survey may not be meddled with or otherwise affected.

**7. Boundaries ⇐37(1)**

Evidence that a former survey was inaccurate does not necessarily establish that it was fraudulent.

**8. Public lands ⇐28**

Evidence that surveyors, in making resurvey, in re-establishing section corner, disregarded call of former survey for such corner in relation to corner of another section and retraced lines of former survey solely with respect to courses, distances and quantity, disregarding calls for monuments, natural and artificial, established that resurvey was intended to be corrective rather than an attempt to locate on ground parcel of land patented with reference to former survey.

**9. Boundaries ⇐3(3)**

Quantity is the least reliable of all descriptions, and course and distance must yield to calls for monuments, natural and artificial.

**10. Public lands ⇐28**

Where original survey of section of land patented to electric company's predecessors in title excluded mining claim from section, and resurvey included mining claim within section, in quiet title action between mining company and electric company to determine ownership of mining claim, mining company's failure to appeal from order of land department dismissing protest to resurvey and abandonment of such protest was immaterial.

**11. Public lands ⇐28**

Where railroad, the rights to which electric company succeeded, took under its patent a particular parcel of land with reference to an approved survey of the United States government, rather than unsurveyed land by section and township, the principle that taker of unsurveyed land by section and township takes whatever might later be found to be included within that section by a survey had no application and did not justify claim by electric company to land which was excluded from section in original survey but was included within section on a resurvey.

---

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by Eugene D. Phelps, sometimes also known as E. D. Phelps, and others, individually and as copartners doing business under the firm name and style of Hatetna Mining & Exploration Company, against Pacific Gas & Electric Company and others and all other persons unknown claiming any right, title, estate, lien or interest in specified real property, to quiet title to such property and to recover damages for trespass and injury thereto, wherein defendant Pacific Gas & Electric Company cross-complained to quiet title. From a judgment quieting title in defendant Pacific Gas & Electric Company, plaintiffs appeal.

Reversed.

Clewe & Deahl, of Oroville, and Jack M. McPherson, of Chico, for plaintiffs-cross-defendants and appellants.

Robert H. Gerdes, Thos. J. Straub and W. R. Dunn, all of San Francisco, for defendants-complainant and respondents.

PEEK, Justice.

The plaintiffs and cross-defendants herein have appealed from a judgment in favor of the defendant and cross-complainant quieting title in the defendant to all of Section Twenty Seven (27), Township Twenty Three (23) North, Range Five (5), East, M. D. B. & M., in the County of Butte, State of California, as shown and delineated on the plat of the resurvey of said section approved by the General Land Office of the United States on March 17, 1941, subject only to an easement for highway purposes; and decreeing that plaintiffs take nothing by their action herein.

The plaintiffs as copartners doing business under the firm name and style of Hatetna Mining and Exploration Company are the successors in interest to a certain mining claim known as the Boulder Bar Placer Mining Claim located and filed by one Louis Lammet and one David Gramps in 1898. By their complaint, amendment thereto, and supplemental complaint, plaintiffs sought to quiet title to the above mentioned mining claim and to recover damages for trespass and injury to their property by the defendant. The action was dismissed in so far as it involved lands outside the boundaries of section 27 as described in the above mentioned resurvey of that section approved in 1941.

Defendant likewise prayed that its title to section 27 as above described be quieted as against the plaintiffs.

The controversy respecting the disputed title to the property in question arose out of the following factual situation: Section 27, together with other portions of Township 23, was officially surveyed in 1875 by one E. A. Von Schmidt. The field notes of this survey were incorporated into a plat conformable thereto and approved by the United States Surveyor General for California on November 24, 1875. By that plat section 27 was shown to be located in the mountains to the east of the Feather River, and according to the field notes made by Von Schmidt in laying out the section on the ground, neither the western nor the northern boundaries thereof touched upon said river.

Thereafter in 1880 the United States granted and patented all of said section 27 to the Central Pacific Railroad Company, to whom defendant is successor in interest.

In 1898, as above stated, presumably in reliance upon the survey of 1875, plaintiffs' predecessors located said mining claim on land believed to be outside and to the west of the western boundary of said section 27 and on unsurveyed public land.

In 1936, the defendant, in connection with a contemplated power project, requested a resurvey of section 27, and in 1938 the General Land Office ordered the same to be made, naming surveyors Wilson and Forrest to resurvey portions of Township 23, including section 27, and to extend the official survey into the remaining unsurveyed portions of said township. These surveyors proceeded, or attempted, to retrace the lines called for by Von Schmidt in his notes, but were unable to find many of the monuments or corners which Von Schmidt stated that he set. According to plaintiffs, if such monuments as wooden stakes were set they probably had been destroyed by various fires which had occurred subsequently in that vicinity.

According to the field notes and the official plat approved on March 17, 1941, Wilson and Forrest, in reestablishing the boundaries of section 27, found the same to extend over the North Fork of the Feather River and to include substantially all of the plaintiffs' mining claim. It is to be further noted that the topography called for in the resurvey of the western and northern boundaries of said section and in particular the northwest corner thereof is entirely different from that called for in the Von Schmidt field notes.

With respect to the survey of 1875 the trial court in its findings of fact held that: "Said survey so made by said Von Schmidt was in fact incomplete and fraudulent in that the westerly portion of the said section was not in fact surveyed, and in par-

ticular, the westerly line of said section was not surveyed or established or marked upon the ground."

In his memorandum of decision the trial court stated: "My decision that the defendant is entitled to judgment is based solely upon the fact that the Von Schmidt survey was not in a fact a survey of the land and that therefore the Railroad Company acquired title to section 27 as later surveyed by Wilson and Forrest."

[1, 2] The attention of this court has not been directed to any case nor has our independent research revealed any authority holding that an official approved survey of the United States government may be so impeached and declared fraudulent by a collateral attack thereon in an action between private parties to determine title to land. On the contrary, the cases appear to be uniform to the effect that an official survey may not be collaterally attacked as in the present case. Stoneroad v. Stoneroad, 158 U.S. 240, 15 S.Ct. 822, 39 L.Ed. 966; Russell v. Maxwell Land Grant Co., 158 U.S. 253, 15 S.Ct. 827, 39 L.Ed. 971; Horne v. Smith, 159 U.S. 40, 15 S.Ct. 988, 40 L.Ed. 68; Whitaker v. McBride, 197 U.S. 510, 25 S.Ct. 530, 49 L.Ed. 857.

"It is a well-settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions, and land-marks, becomes as much a part of the grant or deed by which they are conveyed, and controls, so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself." Cragin v. Powell, 128 U.S. 691, 696, 9 S.Ct. 203, 205, 32 L.Ed. 566, 567.

[3] A section of a township is that which is laid out on the ground, and a patentee takes only such land as is included within the survey of the plot conveyed and he cannot later question the survey as erroneous, although in fact the line in question should have been placed elsewhere. Bates v. Illinois Cent. R. R. Co., 1 Black 204, 66 U.S. 204, 17 L.Ed. 158; Gardner v. Bonestell, 180 U.S. 362, 21 S.Ct. 399, 45 L.Ed. 574; Horne v. Smith, 159 U.S. 40, 15 S.Ct. 988, 40 L.Ed. 68; Gleason v. White, 199 U.S. 54, 25 S.Ct. 782, 50 L.Ed. 87.

[4] "A survey of public lands does not ascertain boundaries; it creates them. Robinson v. Forrest, 29 Cal. 318, 325; Sawyer v. Gray, D.C., 205 F. 160, 163." Cox v. Hart, 260 U.S. 427, 436, 43 S.Ct. 154, 157, 67 L.Ed. 332, 337; Harrington v. Boehmer, 134 Cal. 196, 199, 66 P. 214, 489.

In Horne v. Smith, supra, the court states at page 45 of 159 U.S., page 990 of 15 S.Ct., 40 L.Ed. 70: "Although it was unsurveyed, it does not follow that a patent for the surveyed tract adjoining carries with it the land which, perhaps, ought to have been, but which was not in fact, surveyed. The patent conveys only the land which is surveyed, and, when it is clear from the plat and the surveys that the tract surveyed terminated at a particular body of water, the patent carries no land beyond it."

[5] Both respondent and appellants have urged in their own favor the previously mentioned rule that an official government survey may not be collaterally attacked. However, respondent insists that by virtue of said rule plaintiffs are bound by the resurvey of 1941 which reestablished the boundaries of section 27. Obviously such argument is not valid for it wholly disregards the fact that respondent's title is derived from a patent to land described and delineated by the Von Schmidt Survey of 1875 and not the resurvey of 1941. The present case is thus similar on its facts to Gleason v. White, supra, wherein it was held that a patentee who took his land with reference to an original but erroneous survey could not recover from a subsequent patentee who took under a resurvey which included, as being within the section, a tract of land lying to the east of the section as originally surveyed. To hold otherwise, it was said, would allow the first patentee to profit by a mistake of the government of which he must have been cognizant.

[6] It is unquestioned that the government may resurvey its lands for purposes of its own information or to locate adjoining boundaries, and in doing so may locate

boundaries in new and different places and thus correct an erroneous survey, but it is settled, that in doing so the rights of those who have acquired an interest in lands with reference to the original survey may not be meddled with or otherwise affected. Kean v. Calumet Canal & I. Co., 190 U.S. 452, 23 S.Ct. 651, 47 L.Ed. 1134; Lane v. Darlington, 249 U.S. 331, 39 S.Ct. 299, 63 L.Ed. 629; U. S. v. State Investment Co., 264 U.S. 206, 44 S.Ct. 289, 68 L.Ed. 639; Cragin v. Powell, supra.

[7, 8] It is clear from a review of the evidence in this case that undoubtedly the Von Schmidt survey was inaccurate, but it does not follow that it was fraudulent. From an examination of the 1941 resurvey it is readily apparent that Wilson and Forrest made no effort to retrace the inaccurate western lines set by Von Schmidt, but proceeded to make a corrective survey rather than to again mark upon the ground the lines of section 27 as surveyed in 1875. Particularly there is evidence in the record that in reestablishing the southwest corner of section 27, Wilson and Forrest disregarded the call of Von Schmidt that such corner was on a true north line from the southwest corner of section 34 common to section 33, which they found and which if they had followed would have placed the west line of section 27 at approximately the position shown by the plat of 1875 with respect to the Feather River. Also there is evidence that in resurveying section 27 they retraced the Von Schmidt lines solely with respect to courses, distances and quantity, disregarding calls and monuments, natural and artificial. In doing so the survey was obviously intended and shown to be corrective, rather than an attempt to locate on the ground the parcel of land patented to the respondent.

[9] It is a well established rule of law that quantity is the least reliable of all descriptions, and course and distance must yield to calls for monuments, natural and artificial. Ayers v. Watson, 113 U.S. 594, 5 S.Ct. 641, 28 L.Ed. 1093; Spreckles v. Brown, 212 U.S. 208, 29 S.Ct. 256, 53 L.Ed. 476; Horne v. Smith, supra; U. S. v. State Investment Co., supra.

[10] Respondent also asserts that appellants by failing to appeal from the order of the Land Department dismissing their protest to the survey of Wilson and Forrest, abandoned such protest and likewise thereby failed to exhaust their administrative remedies and consequently they are now precluded from attacking said survey. However, the point is immaterial here for the reason that appellants are neither attacking the resurvey nor the right of the government to make it.

As above stated, the right of the government to resurvey its lands and make corrections of former surveys is unquestioned. The present issue is one of title solely as between plaintiffs and defendant, and the conclusion herein reached is entirely consistent with a concession that Wilson and Forrest in their corrective survey placed the west line of section 27 where it should have been placed by Von Schmidt but in fact was not.

[11] The respondent further contends in support of the judgment that its predecessor in interest having been granted section 27 of Township 23, it took whatever might later be found to be included within that section by a survey, and that land may be so granted by township and section which at the time of the grant was unsurveyed public land. Reliance is placed upon numerous cases including Payne v. Central Pac. Ry. Co., 255 U.S. 228, 41 S.Ct. 314, 65 L.Ed. 598; Wisconsin C. R. R. Co. v. Price, County, 133 U.S. 496, 10 S.Ct. 341, 33 L.Ed. 687; U. S. v. Northern Pac. R. R. Co., 256 U.S. 51, 41 S.Ct. 439, 65 L.Ed. 825; West v. Edward Rutledge T. Co., 244 U.S. 90, 37 S.Ct. 587, 61 L.Ed. 1010; Edward Rutledge Timber Co. v. Farrell, 255 U.S. 268, 41 S.Ct. 328, 65 L.Ed. 623. Such cases, however, are not in point. In the first place respondent's argument assumes that the section in question was not surveyed at the time of the original grant to the railroad company, and secondly, the factual situation here is entirely dissimilar to cases wherein the land in question had never been surveyed, either correctly or incorrectly at the time of the grant and the grantee contracted to take a particular section, the extent of which was to be later

ascertained by a survey. In the present case the property granted and patented to the railroad had been surveyed prior thereto and the patent designated land with reference to the survey and the approved plat of 1875. The railroad did not take unsurveyed land by section and township. It took a particular parcel of land with reference to an approved survey of the United States government.

The conclusion is inescapable that the boundaries of section 27, in so far as the title of the respective parties to the land in controversy is concerned, were established by the survey and approved plat of 1875, and the conclusion of the trial court that the survey of Von Schmidt was fraudulent cannot be supported.

The judgment is reversed.

THOMPSON, J., and ADAMS, P. J., concur.




84 Cal.App.2d 250

## FIRST NAT. BANK IN SANTA ANA v. COAST CONSOL. OIL CO.

Civ. 3804.

District Court of Appeal, Fourth District, California.

March 4, 1948.

**1. Mines and minerals ⇐78(3)**

Affidavit that notice of default on oil and gas lease was mailed in envelope addressed to lessee corporation and return registered receipt signed on behalf of corporation by one signing as adressee's agent were sufficient to show proper notice of default, in view of statutory presumption that a letter duly directed and mailed was received in the regular course of the mail. Code Civ.Proc. § 1963, subd. 24.

**2. Mines and minerals ⇐54½**

Unrecorded agreement, by which record owner of land and lessee, without knowledge or consent of bank which was trustee and beneficiary under deed of trust on the land and which became purchaser at subsequent foreclosure sale, modified oil and gas lease so as to waive all defaults by lessee and postpone drilling requirement from the original 90 days to seven years, did not affect interest or title of purchaser at foreclosure sale, though original lease was prior in time and recordation to foreclosed trust deed, since purchase at foreclosure sale related back to date of trust deed. Civ.Code, § 863.

**3. Mortgages ⇐138**

A trust deed conveys legal title to property to trustee subject to the execution of the trust. Civ.Code, § 863.

**4. Mines and minerals ⇐54½**

Lessor, by extension agreement with lessee under oil and gas lease, could not, without notice, knowledge, or consent of beneficiary under deed of trust on the land, create a greater burden on the property or carve any estate therefrom other than that reserved to lessor under original lease, without making such extension agreement and its additional burdens subject to the superior rights of beneficiary under the trust deed. Civ.Code, § 863.

**5. Mortgages ⇐357**

Where trust deed provided that trustee might from time to time postpone sale by public announcement at time fixed by notice of sale and thereafter by announcement at time to which sale was postponed, no further notice of sale by posting or publication was necessary, even though sale was postponed from time to time to a date more than four years after date described in original notice. Civ.Code, § 2924.

---

Appeal from Superior Court, Orange County; Raymond Thompson, Judge.

Action to quiet title to land by First National Bank in Santa Ana, a national banking association, against Coast Consolidated Oil Company and others. From an adverse judgment, named defendant appeals.

Judgment affirmed.

L. M. Cahill, of Los Angeles, for appellant.

Forgy, Reinhaus & Forgy, of Santa Ana, for respondent.

GRIFFIN, Justice.

On March 30, 1938, Elmer Clark and wife executed a deed of trust in the sum of $180,092.03, to secure an obligation to the plaintiff and respondent First National Bank in Santa Ana. It was recorded July 11, 1938. Prior to that time the Title Insurance & Trust Company, predecessor in interest of the Clarks, executed an oil and gas lease dated November 16, 1937, and recorded December 28, 1937, to defendant and appellant Coast Consolidated Oil Company, as lessee. It was for a term of 20 years and so long thereafter as oil or gas should be produced.

Parapraphs 5 and 6 thereof provided generally for the rental to be paid and "lessee agrees to commence the actual erection of a steel derrick upon said land within 60 days from date hereof and actual drilling operations * * * within 90 days," etc.

Paragraph 21 provides that if lessee defaults thereunder and after written notice thereof, the lessor may terminate the lease in its entirety.

On January 20, 1939, Dana Point Corporation became the owner of the property described in the complaint. Title Insurance & Trust Company also transferred of record, the oil lease to it. On January 30, 1940, plaintiff executed and delivered to the trustee under the deed of trust a declaration of default and demand for sale. For some undisclosed reason this sale was postponed, from time to time, to March 27, 1944. A few hours before the foreclosure sale was held, the record owner of the property, Dana Point Corporation, and the defendant, lessee under the oil lease, executed an agreement in writing for the modification of the oil lease. This agreement provided that lessor waived any and all defaults upon the part of lessee existing under their lease dated November 16, 1937, and that lessee was relieved of all liability for said defaults and the said lease was declared to be in full force and effect; that said lease was modified and amended by the omission of all of paragraphs 5 and 6 thereof and there was substituted in place therof the following: "Lessee agrees to commence * * * drilling * * * within seven years from date hereof" and that the lease may be assigned without consent of lessor. The written agreement above mentioned, and which is before us, does not bear evidence of having been recorded. Apparently it was executed without the knowledge of plaintiff. The sale was held and the plaintiff, beneficiary, purchased the property and received a trustee's deed dated March 27, 1944, and recorded March 31, 1944.

On April 13, 1945, plaintiff mailed to defendant a notice that plaintiff was and had been the owner of the premises since March 27, 1944, and that defendant had not paid to it the $625 per month as provided in paragraph 5 of the oil lease; that there was $8125 due thereunder; that defendant had not complied with the drilling requirements specified in paragraph 6 of the oil lease which was dated November 16, 1937.

On December 9, 1946, this action was filed alleging only the simple allegations of a quiet title action against defendant and appellant and others. Defendant and appellant answered and denied generally the allegations of the complaint. It concedes that plaintiff is now the owner of the real property in question but the answer denies plaintiff's right to possession thereof by reason of the original lease and the written amendment thereto which was set up in defendant's answer.

The cause proceeded to trial on the issues thus raised. No oral testimony was taken. Plaintiff introduced the trustee's deed and a certified copy of a final decree in an action quieting plaintiff's title against Dana Point Corporation to the real property involved, which decree was dated November 16, 1944. Plaintiff rested. Defendant introduced the oil and gas lease dated November 16, 1937, and modification of lease dated March 26, 1944, and rested. Plaintiff then introduced, without objections, a claimed copy of a notice to Coast Consolidated Oil Company, setting forth the terms of the trust deed, and recorded lease, alleging that the oil company was in default "under said lease," and specified the particulars; that it was required to remedy each of the defaults within 30 days from April 20, 1945, or the lease would be terminated

in its entirety according to its terms. Attached to said copy is an affidavit that the affiant, on April 13, 1945, placed a copy of the "within notice of default" in an envelope addressed to Coast Consolidated Oil Company, c/o Arthur Holliday, Dana Point, California, which is the address of the said corporation, and mailed it. Attached thereto is a return registered receipt signed "Coast Consolidated Oil Co., ... Mrs. Arthur Holliday," under which name are the printed words: "Signature of Addressee's Agent." It was dated April 16, 1945.

The trial court found generally in accordance with the facts above related; that plaintiff was the "owner and *entitled to the possession* of the" described real property; that the claims of defendant were without right and that defendant never complied with any of the terms of said lease requiring drilling or the payment of any rentals; that plaintiff duly gave notice of default under said lease; that plaintiff thereafter terminated said lease in accordance with its terms by reason of said defaults; that the agreement of March 26, 1944, was never recorded and was entered into without the knowledge or consent of the plaintiff herein, the plaintiff being both trustee and beneficiary under said trust deed; that the agreement was in derogation of plaintiff's title and therefore void as against the plaintiff and that said contract of March 26, 1944, between said Dana Point Corporation and the defendant Coast Consolidated Oil Company was of no force and void as against the plaintiff herein. Judgment was entered accordingly.

Defendant, in its brief, admits the judgment is amply supported by the findings of fact and conclusions of law, but maintains the judgment cannot stand because the findings and conclusions upon which it is based are not supported by the evidence and in some instances are contrary to all the evidence. It is also argued that plaintiff's *right to possession* is not sustained but is subject to defendant's rights under the oil and gas lease of November 16, 1937, because defendant's lease is prior in time and in recordation to the foreclosed trust deed.

[1] In this connection it is likewise suggested that there was not sufficient evidence as to who Mr. and Mrs. Holliday might be, or that the notice received by her was a proper notice to defendant corporation and in accordance with the notice required under the oil and gas lease. We see little merit to this contention in so far as it pertains to the original oil and gas lease, particularly in view of the terms of the notice received in evidence, without objection, and the return receipt card and affidavit of mailing attached thereto. Under section 1963, subdivision 24 of the Code of Civil Procedure there is a presumption "That a letter duly directed and mailed was received in the regular course of the mail." See, also, Wright v. Western States Life Insurance Company, 61 Cal.App. 488, 490, 214 P. 990; 59 Amer.Jur. p. 249,sec. 28.

Since this appeal was perfected plaintiff moved to take additional evidence. A stipulation of fact resulted. The evidence now fully supports the court's finding that defendant was in default and had not remedied such default at the time this action was commenced.

Defendant, in its pleadings and in the trial court proceeded upon the theory that even though it was in default under the original lease, its rights now depended on the lease as modified by the agreement of March 26, 1944.

Although there are certain other minor points attempted to be raised on this appeal, the real point which was raised by the defendant, presented and decided by the trial court, resolved itself into the question whether the defendant and the Dana Point Corporation had the right, under the circumstances related, to change and modify the original recorded lease and agreement by an amended unrecorded agreement and thereby waive all defaults, forfeitures and penalties under the original lease and to postpone the drilling requirements from the original 90 days to seven years, to the detriment of the rights of plaintiff, who was not a party to the amended agreement. Defendant strenuously argues the point but cites no cases in support of it.

[2] Plaintiff's position is, and the trial court found, that the modification of the lease did not bind the trust deed purchaser; that as between the lessor and lessee it

might be true that they could make a valid modification agreement, but as to the rights of plaintiff, who was trustee and beneficiary under the trust deed and also purchaser at the sale foreclosing the trust deed, the modification did not affect its interest and its title since the purchase *related back to the date of the trust deed.* Citing Bank of America National Trust & Savings Ass'n v. Hirsch Mercantile Co., 64 Cal.App.2d 175, 148 P.2d 110; Rorex v. Karcher, 101 Okl. 195, 224 P. 696. Respondent therefore argues that since it did not know of the "full nature of the attempted sabotage" until the time of trial, it should not be bound by the secret agreement pleaded.

[3] Our research has not disclosed, nor do counsel point to any California case directly bearing on this question. However, we are convinced that the cited case of Rorex v. Karcher, supra, is sufficient authority to support respondent's contention. There, a landowner executed an oil and gas lease to defendants on November 1, 1913. On December 11, 1917, and while defendant's lease was still in force, the landowner executed a lease to plaintiff for a period of 1½ years. Defendant's lease would have expired on November 1, 1918, but on September 26, 1918, the defendant procured an extension of the lease for a period of one year. It was held that the lease executed by the owner of the fee to the plaintiff was a valid lease, although executed while there was a valid lease on the property, and the defendant's rights under the extension agreement were subject to the superior rights of the plaintiff under his lease. If it should be held otherwise, the Dana Point Corporation and the defendant lessee, by secret agreement, might well have extended the oil drilling lease here involved for many years, and may have waived all future payments or drilling requirements. This would greatly reduce the value, the property interests, and also the security for the trust deed holder and should not be permitted without its consent or agreement to such subordination. See Bank of America National Trust & Savings Ass'n v. Hirsch Mercantile Co., supra, where this Court also held that the title of a purchaser at a trustee's sale related back to the date of the trust deed. A trust deed conveys the *legal title* to the property to the *trustee,* subject to the execution of the trust. Civ. Code sec. 863; 25 Cal.Jur. 38, sec. 27.

[4] Therefore, we must conclude that the lessor, by the extension agreement with the lessee, could not, without notice, knowledge or consent of the plaintiff, create a greater burden on the property, or carve any estate therefrom, other than that reserved to it under the original lease, without making such extension agreement and its additional burdens subject to the superior rights of the plaintiff under the trust deed.

In Tropical Investments Co. v. Brown, 45 Cal.App. 205, 187 P. 133, it was held that where a trust deed to secure a loan is taken without notice of a lease of the premises (in this case it was an extension of time within which to commence drilling and the waiver of default under the original lease), the lessee's interest under such lease is foreclosed by the foreclosure of the deed of trust. See, also, 14 A.L.R. 676 and 680.

[5] The only other point worthy of note is the contention that plaintiff failed to comply with section 2924 of the Civil Code in reference to the sale of the property under the trust deed. It is claimed that the proceedings taken by the trustee were defective, invalid, and did not pass title and possession of the property to the beneficiary because from a recitation in the trust deed it appears that the sale of the property was postponed, from time to time, to a date more than the four years after the date prescribed in the notice of sale. No authority is cited by defendant in support of the argument. There is no merit to this contention. The trust deed in evidence specifically recites that "3. Trustee may postpone sale of all, or any portion, of said property by public announcement at the time fixed by said notice of sale, and may thereafter postpone said sale from time to time by public announcement at the time fixed by the preceding postponement; and without further notice it may make such sale at the time to which the same shall be so postponed. * * *"

In Cobb v. California Bank, 6 Cal.2d 389, 57 P.2d 924, it was definitely held that

where deeds of trust provide that the trustee may from time to time postpone a sale by proclamation made at the time of postponement, no further notice need be given by posting or publication. See, also, Alameda County Home Investments Co. v. Whitaker, 217 Cal. 231, 18 P.2d 662; Bertschman v. Covell, 205 Cal. 707, 272 P. 571.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.




84 Cal.App.2d 295

**DAVIS v. BOLTZ et al.**

**Civ. 16081.**

District Court of Appeal, Second District, Division 1, California.

March 9, 1948.

**Action ⊂=6**

A complaint, merely alleging that plaintiff secured financing for expansion of defendants' business in accordance with agreement providing for compensation of plaintiff, if he obtained proceeds of $1,000,000 of securities for corporate defendant's expansion and individual defendant accepted terms of investment bankers, was demurrable as not sufficiently specific to state cause of action for declaratory relief, in view of defendant's reservation of right to determine whether such terms were acceptable. Code Civ.Proc. § 1060.

Appeal from Superior Court, Los Angeles County; Allen W. Ashburn, Judge.

Action by Louis Davis, Jr., against F. Walker Boltz and another for declaratory relief and damages for breach of contract. From a judgment of dismissal, plaintiff appeals.

Affirmed.

James E. Pawson, and William Kinley, both of Long Beach, for appellant.

Overton, Selig & Wilson and Paul Overton, all of Los Angeles, for respondents.

DORAN, Justice.

The complaint in the within action contains two causes of action, one for declaratory relief and one for damages for breach of contract. A demurrer, general and special, was sustained. Plaintiff having failed to amend, the action was dismissed under Section 581 of the Code of Civil Procedure. Plaintiff appeals from the judgment of dismissal.

It is contended on appeal that, "the complaint disclosed an actual controversy under a written instrument, which would entitle the plaintiff to a declaration of rights under the provisions of section 1060 of the Code of Civil Procedure of the State of California."

The basis of the action consists of two letters: One by plaintiff to defendant, and defendant's reply thereto. They related to a financing plan for the purpose of expanding defendant's business, the sale of a portion of defendant's stock to plaintiff and the employment of plaintiff by defendant; compensation for plaintiff's services in obtaining the capital for expansion referred to in the correspondence was also included.

The complaint merely alleges, "That plaintiff relied upon said agreement so made and for the compensation set forth therein and actually performed the services so agreed upon and set forth in said agreement and was successful in securing for defendants the financing in accordance with said agreement," and, "That the defendants, and each of them, have refused and still refuses to carry out their portion of said agreement although demand has been made upon them to do so prior to the filing of this action."

The complaint includes as exhibits the letters or agreement referred to. An examination thereof reveals that in plaintiff's letter to defendant the following appears, "Should I be successful in accomplishing the sale of the 49% interest in the

shares owned or controlled by you and obtain the proceeds of $1,000,000.00 of securities for the expansion of the company and you accept the terms of the investment bankers, I shall be compensated in the following manner * * *."

Thus it will be seen that the defendant reserved the right to determine whether "the terms of the investment bankers" were acceptable. There is nothing ambiguous or uncertain in the writings and in the absence of allegations more specific than the complaint contains, a valid cause of action for declaratory relief is not set forth. The decisions relied on by appellant are not in point. The demurrer was properly sustained.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.




84 Cal.App.2d 115

**JAMES v. JAMES.**

**Civ. 15889.**

District Court of Appeal, Second District, Division 1, California.

March 2, 1948.

**1. Execution ⇐73**

A judgment creditor seeking to enforce his judgment more than five years after its entry must show, by affidavit, that he exercised reasonable diligence to enforce judgment during statutory period in which he might have obtained a writ of execution as a matter of right. Code Civ.Proc. § 685.

**2. Appeal and error ⇐1024(4)**

Whether judgment creditor, seeking to enforce his judgment more than five years after its entry, exercised reasonable diligence to enforce judgment during statutory period in which he might have obtained a writ of execution as a matter of right is for trial court to determine in its discretion, and its decision upon conflicting affidavits will not be disturbed. Code Civ. Proc. § 685.

**3. Appeal and error ⇐983(3)**

If on appeal from judgment granting or denying judgment creditor's motion for a writ of execution to enforce judgment, sought more than five years after entry, it is doubtful whether excuse offered by judgment creditor for delay is sufficient, judgment will not be disturbed, except for a clear abuse of discretion. Code Civ. Proc. § 685.

**4. Execution ⇐73**

The purpose of the 1933 amendment of statute relatng to issuance of execution more than five years after entry of judgment was to place upon creditor, seeking to enforce an old judgment, burden of showing why he was not able to satisfy his claim within the five-year statutory period during which he is entitled to execution as matter of right. Code Civ. Proc. §§ 681, 685.

**5. Execution ⇐73**

Under statute relating to issuance of execution more than five years after entry of judgment, court is authorized to give creditor an execution only if, during five years following entry of judgment, creditor had exercised due diligence in locating and levying upon property owned by debtor or in following available information to a point where a reasonable person would conclude that there was no property subject to levy within that time. Code Civ. Proc. § 685.

**6. Execution ⇐73**

Under statute relating to issuance of execution more than five years after entry of judgment, upon showing by debtor of circumstances occurring subsequent to five-year period upon which, in exercise of sound discretion, court should conclude that creditor is not entitled to collect judgment, court may deny execution notwithstanding that creditor proceeded with due diligence to enforce his judgment. Code Civ.Proc. §§ 681, 685.

**7. Divorce ⇐263**

Denial of divorced wife's motion for a writ of execution to enforce an interlocu-

tory divorce decree with respect to alimony payments falling due more than five years prior to filing of motion on ground that wife did not proceed with due diligence to enforce decree was not abuse of discretion, although both parties were not within jurisdiction of California for a period of more than five years immediately following entry of decree, where both parties were within California for several years thereafter and husband showed by affidavits that he was working during those years having a substantial income. Code Civ. Proc. §§ 681, 685.

**8. Execution ⇐73**

Under statute providing that a party in whose favor judgment is given may, at any time within five years, after entry thereof, have a writ of execution issued for its enforcement, a creditor is entitled as matter of right to execution on judgment payable in installments, for all amounts which had accrued within five years from date of the application therefor. Code Civ.Proc. § 681.

---

Appeals from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action for divorce by Ellen James against Whitney Sapp James. From an order denying plaintiff's motion for a writ of execution to enforce an interlocutory decree of divorce, requiring defendant to pay certain monthly alimony and also denying defendant's motions to quash the execution, both parties appeal.

Affirmed.

Roy A. Linn, of Los Angeles, for appellant.

John H. Poole, of Pasadena, for respondent.

YORK, Presiding Justice.

Both plaintiff and defendant appeal from the order of October 14, 1946, whereby the court denied the motion of plaintiff for a writ of execution to enforce an interlocutory decree of divorce entered on November 20, 1928, requiring defendant to pay to plaintiff $50 per month as alimony, and whereby the court also denied the motions of defendant to quash execution.

Plaintiff's motion for issuance of execution under section 685, Code of Civil Procedure, was made to enforce the payment of alimony for the period from November 1, 1928, to and including August 1, 1941. In addition to such motion, plaintiff also filed a petition for the issuance of such writ of execution pursuant to section 685, supra.

In support of the motion and said petition, plaintiff filed her affidavit dated July 26, 1946, which avers that both the interlocutory and final decrees of divorce provide for the payment to her of $50 per month beginning November 1, 1928, but that defendant has made no payments whatsoever, although affiant has made numerous requests and demands for such payment; that defendant has always told affiant that he had no funds and could not make such payments; that affiant was unable to discover any funds from which she could collect by means of execution; that prior to 1943, defendant was an automobile salesman and affiant was unable to find any property upon which she could levy execution; that on February 28, 1943, affiant moved to, and since that time has been a resident of, Macomb, Illinois; that at no time has affiant had sufficient funds to attempt to locate any property of defendant; that affiant relied upon defendant's representations that he had no money and could not pay the alimony; that defendant stated he was unable to support their two children and caused affiant to send them to the home of defendant's sister. Plaintiff further avers that she "has just ascertained that the defendant had become the owner of a new and used automobile business known as the James Motor Company; that said defendant is a Dodge and Plymouth dealer; that plaintiff had not known these facts and had been unable to ascertain them sooner. That in order to prevent the plaintiff from attempting to collect said alimony defendant has represented to plaintiff and convinced plaintiff that he had no funds and no property and that he was unable to make the $50.00 a month payments to plaintiff herein. That by reason of his representations

of no funds, and no property the defendant prevented the plaintiff from levying execution and thereby collecting her alimony. That the defendant, within the past few years, has made large sums of money and has invested same in the automobile business and is in a position to pay said back alimony."

In opposition to plaintiff's motion, defendant filed his affidavit in which it is averred that "at no time has plaintiff exercised the diligence necessary to entitle her to have execution issue on the judgment in this matter should she be otherwise entitled thereto"; that at frequent intervals since 1928, affiant and plaintiff had "seen each other or conversed with each other"; that "plaintiff has at all times been able to locate defendant either through her own knowledge and conversations with defendant or by reason of her constant contact with defendant's family and relatives. That from the years 1930 to 1936 affiant was employed by the Merchant's Protective Agency of Kansas City and was earning in excess of $300.00 per month. That in 1936, plaintiff met affiant in Peoria, Illinois, and took him to his mother's home in Macomb, Illinois, where plaintiff was then residing. That at that time plaintiff suggested that she and affiant forget their differences and remarry. That from the years 1936 to 1941 affiant was employed in Los Angeles by the Commercial Discount Company and was earning in excess of $400.00 per month. That plaintiff was familiar with affiant's whereabouts and had plaintiff caused records to be searched the records would have revealed automobiles standing in affiant's name. That from the years 1941 to 1945 affiant was employed by Flaws & McGhie, automobile dealers, as their manager and was earning in excess of $400.00 per month. That plaintiff was familiar with affiant's occupation and failed to take any action. That from time to time since 1936, affiant had a side business in selling used cars which he bought with his own funds. That plaintiff was familiar with this business and at one time telephoned affiant to determine whether he would sell her an automobile more cheaply than she could obtain one elsewhere. That at no time has affiant hidden any assets from plaintiff and has at no time avoided plaintiff. That plaintiff never sought execution of her claims for alimony for the reason that under an agreement with affiant's sister, plaintiff agreed to forego such claims as long as affiant's sister took the minor children of the parties hereto into her home and gave them an education. That from time to time affiant's sister and brother-in-law supported plaintiff and gave her money although they were under no obligation so to do. That this was done by reason of the friendliness which arose by virtue of the working of said agreement and the mutual satisfaction obtained therefrom. That plaintiff preferred to accept the benefits of the said agreement to the right to the amounts allowed her under the decrees in this action.

"That the only time which affiant can recall in which the plaintiff requested money from him occurred in 1942 or 1943 when the plaintiff called affiant by telephone and stated that she was going East and asked if he would give her $150.00 to help her. That affiant refused such request, not on the grounds that he had no funds but on the grounds that he understood that his sister had sent her money for the trip and that if he gave her any she would spend it uselessly.

"That plaintiff has stated no reason why she did not seek execution under section C.C.P. 681 and affiant reasserts the reason was because plaintiff was accepting benefits greater than she would have obtained had she sought execution."

Thereafter, to-wit, on October 11, 1946, plaintiff filed a counter-affidavit in which she averred that in 1929 she attempted to collect from defendant through orders to show cause and became convinced that he was then without funds or property; that thereafter defendant went to Kansas City and was employed in the middle west from 1930 to 1936 and that she did not know what he was earning; that he never informed her of his earnings during that period; and that during said time he was without the jurisdiction of the California courts. That she did not know where he was employed from 1936 to 1941, never knew what his earnings were and that de-

fendant at all times informed her that he was barely making enough to exist and that he had no property; that defendant "has at all times hidden from plaintiff any property that he might have and that affiant never knew defendant was operating a side business of selling used cars"; that she never agreed to forego any of her claims under the alimony judgment and that she did not obtain greater benefits than she would have obtained had she sought execution; that on the insistence of defendant's sister, Mrs. R. J. Neal, affiant "permitted both her children to live with Mrs. Neal. That affiant was never asked to waive any of her rights under the judgment herein and never did waive any rights under said judgment. That this affiant resided in the home of Hazel J. Neal and also resided in the home of defendant's mother about two years in the capacity of housekeeper without compensation. That affiant was told by defendant W. S. James on many occasions that he was barely breaking even and that he had no money, and upon occasions he asked this affiant to loan him money as he was having trouble supporting himself.

"That no agreement whatsoever was ever entered into between plaintiff and members of defendant's relatives, wherein the relatives would provide support and education for the children in lieu of the sum to which plaintiff was entitled by reason of the divorce decree. That the support of the children was not made in consideration that the plaintiff would take no steps to enforce the decree or until the children reached their majority. That no agreement in reference to waiver of alimony was ever discussed between the plaintiff and the defendant or between the plaintiff and the defendant's sister." Plaintiff also averred that she was away from the State of California from the Fall of 1933 to February, 1937, and from February 28, 1943, to date of making the instant affidavit, and that during these periods she remained in Macomb, Illinois.

"That said defendant, because of his absence from the State and because of his claiming that he had no funds and could not support the affiant herein and could not make the payments of alimony and because of the absence of affiant from the State of California from 1933 to 1937 and since February 1943, as aforesaid, and because of misrepresentations by the said defendant and the representations that he was without funds to make any payments and because of his insistence that said children be left with the sister of said defendant and his statements that he could not afford to pay for their support, and affiant believing said statements, this affiant affirms that she was excused from making any effort to reach the property of this defendant, having no knowledge of same and no money to expend for a search."

Plaintiff submits that the trial court abused its discretion in refusing to issue execution under section 685, Code of Civil Procedure, because (1) any attempt on her part to have execution levied during the first five years when defendant was absent from California would have been an idle act; (2) that the reasons presented by her for not obtaining an execution during the five-year period are sensible and logical; and (3) the judgment has never been satisfied or paid.

[1, 2] Our Supreme Court held in John P. Mills Organization v. Shawmut Corporation, 29 Cal.2d 863, 864, 179 P.2d 570, 571, that "A judgment creditor seeking to enforce his judgment more than five years after its entry must show, by affidavit, that he exercised reasonable diligence to enforce his judgment during the statutory period in which he might have obtained a writ of execution as a matter of right. Butcher v. Brouwer, 21 Cal.2d 354, 132 P. 2d 205; Beccuti v. Colombo Baking Co., 21 Cal.2d 360, 132 P.2d 207; Hatch v. Calkins, 21 Cal.2d 364, 132 P.2d 210. Whether he exercised such diligence is for the trial court to determine in its discretion, and its decision upon conflicting affidavits will not be disturbed. Beccuti v. Colombo Baking Co., supra; cf. Kraner v. Snow Mountain Water & Power Co., 203 Cal. 126, 127, 262 P. 1094."

[3] In McNabb v. McNabb, 47 Cal.App. 2d 623, 627, 118 P.2d 869, 871, it was stated: "The discretion referred to in this section

(685, Code Civ.Proc.) is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles and intended to subserve and not to impede or defeat the ends of substantial justice. If, on appeal, it be doubtful whether the excuse offered is sufficient or not judgment of the trial court will not be disturbed, and its decision will not be reversed except for a clear abuse of discretion. McClelland v. Shaw, 23 Cal.App.2d 107, 72 P.2d 225."

The motion here under consideration was made to enforce execution as to the alimony payments falling due within the period from November 1, 1928, to and including August 1, 1941. Plaintiff's affidavit avers that in 1929 she attempted to collect through orders to show cause and became convinced that defendant was then without funds or property. It is undisputed that defendant was absent from this state from 1930 to 1936, and that plaintiff also was away from California from the fall of 1933 to February, 1937, and again from February, 1943, to about October 1, 1946. It is apparent from this that both parties were within the jurisdiction of the courts of this state from February, 1937, to February, 1943, during which period defendant avers he was working and earning in excess of $400 per month.

If it be conceded that it would have been an idle act for her to attempt to execute on her judgment during defendant's absence from California, as plaintiff now contends, it must also be conceded that for the succeeding six years intervening from February, 1937, to February, 1943, plaintiff failed to use the slightest diligence to uncover assets of defendant subject to execution. Apropos of this phase of the case, the Supreme Court in Butcher v. Brouwer, 21 Cal.2d 354, 357, 132 P.2d 205, 206, construed section 685, Code of Civil Procedure, as amended in 1933, to the following effect:

"Section 685 of the Code of Civil Procedure, before it was last amended, provided in part as follows: 'In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion * * *.' As so worded, it has many times been construed by the appellate courts which held that although the enforcement of a dormant judgment by execution issued in response to the creditor's motion was a matter within the sound discretion of the trial court * * * mere lapse of time was not in itself a sufficient ground for the denial of the motion. * * * Nor did the failure of the judgment creditor to make any effort to enforce his judgment within five years after its entry, or at a later time, afford a ground for the denial of the motion. * * * And the motion was properly granted although, during the five years following the judgment, the judgment debtor possessed property which could have been discovered and subjected to the judgment. * * * As a practical matter, therefore, by this construction of the statute a creditor, almost as a matter of right, might obtain an execution many years after the five-year period fixed by section 681.

"In 1933, the Legislature added to the section the requirement that a creditor desiring an execution at a time more than five years following the entry of judgment must take his motion 'after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code. The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion.' St.1933, p. 2499. Section 681 provides: 'The party in whose favor judgment is given may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement.'

[4-6] "Considering the strict construction against the debtor which the appellate courts had placed upon section 685 before the change and the requirements added at that time, it is clear that the principal object of the new enactment was to place upon a credior seeking to enforce a judgment more than five years after its entry, the burden of showing why he was not able to satisfy his claim within the statutory period during which he is entitled to an

execution as a matter of right. § 681, Code Civ.Proc. * * * in view of the legislative and judicial history of section 685, its present provisions should be construed as authorizing the court to give a creditor an execution only if, during the five years following entry of judgment, he exercised due diligence in locating and levying upon property owned by the debtor, or in following available information to the point where a reasonable person would conclude that there was no property subject to levy within that time. *And even though the creditor may have satisfied the court that he has proceeded with due diligence to enforce his judgment under section 681, the court may still deny him its process if the debtor shows circumstances occurring subsequent to the five-year period upon which, in the exercise of a sound discretion, it should conclude that he is not now entitled to collect his judgment.*" (Emphasis added.)

[7] In the circumstances here presented, including the conflicting affidavits of the parties, it cannot be said that the court abused its discretion when it denied plaintiff's motion.

[8] Turning to defendant's cross-appeal from the order of October 14, 1946, denying his motions to quash the writ of execution issued pursuant to order of Court on August 30, 1946, it appears from cross-appellant's opening brief that plaintiff (cross-respondent) "obtained on August 30, 1946, an *execution for the period of five years immediately preceding* August 1, 1946, together with interest thereon alleging that no payments had been made on such judgment. Defendant (cross-appellant) sought to quash the issuance of such execution by filing his motion to quash and recall based on Shields v. Superior Court, 138 Cal.App. 151, 31 P.2d 1045. * * * Said motion was subsequently denied by stipulation on October 14, 1946." Cross-appellant admits that this court is bound by the decision in Lohman v. Lohman, 29 Cal.2d 144, 150, 173 P.2d 657, to the effect that *a creditor is entitled, as a matter of right, to execution on a judgment payable in installments for all amounts which have accrued within five years from the date of the application therefor,* and disapproving Shields v. Superior Court, 138 Cal.App. 151, 31 P.2d 1045. (Emphasis added.)

For the reasons stated, the order of October 14, 1946, denying plaintiff's motion for writ of execution and denying defendant's motions to quash execution, is affirmed.

WHITE and DORAN, JJ., concur.




84 Cal.App.2d 269

## ECKLES v. JUSTICE'S COURT OF BEVERLY HILLS TP.

Civ. 16161.

District Court of Appeal, Second District, Division 2, California.

March 8, 1948.

**1. Corporations ⇐503(3)**

A corporation is entitled to a change of venue to the county in which its principal place of business is located.

**2. Corporations ⇐666**

A foreign corporation resides at its principal place of business in the state, as designated in the statement which is required by code section to be filed in the office of the Secretary of State, and is entitled to a change of venue for the same reasons that are applicable to domestic corporations. Civ.Code, § 405.

**3. Courts ⇐484**

Where foreign corporation's principal place of business was in Los Angeles, corporation's obligation was contracted to be performed in Los Angeles, and breach, if any, of obligation took place in Los Angeles, municipal court of Los Angeles was the proper court for trial of action against corporation on the obligation, and action was properly transferred to that court by justice's court of Beverly Hills Township in Los Angeles County. Code of Civ.Proc. § 395, sub. 2; Const.art. 12, § 16.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Petition for writ of mandate by J. Marvin Eckles, petitioner, against the Justice's Court of Beverly Hills Township, County of Los Angeles, State of California, for a writ of mandate to compel the Justice's Court to exercise jurisdiction over action by the petitioner against the Filtex Corporation (the real party in interest). From a judgment denying the writ of mandate, the petitioner appeals.

Judgment affirmed.

George I. Devor, of Los Angeles, for appellant.

Meserve, Mumper & Hughes, Shirley E. Meserve and Robert A. Stewart, Jr., all of Los Angeles, for respondent

WILSON, Justice.

Petitioner-appellant commenced an action in the Justice's Court of Beverly Hills Township, a Class "A" Justice's Court, to recover the sum of $1,000 from the Filtex Corporation, organized under the laws of Michigan and qualified to do business in California. The defendant corporation made a motion for a change of venue to the Municipal Court of the City of Los Angeles on the ground that its principal place of business was in the latter city. Affidavits were presented showing that the corporation's principal place of business in California was in Los Angeles, that the obligation sued on, if performable, was to be performed there, and that the breach, if any, occurred in Los Angeles. No counter-affidavits were filed. The motion was denied but the Justice's Court, on its own motion and on the ground that it had no jurisdiction over the action, ordered it transferred to the Municipal Court of Los Angeles.

Appellant filed in the Superior Court a petition for a writ of mandate to compel the Justice's Court to exercise jurisdiction over the action. The writ of mandate was denied and petitioner has appealed.



Appellant contends that a corporation has no right to a change of venue on the ground of residence, and that where the corporation is sued in one of the places provided in section 16 of Article XII of the Constitution, other than its principal place of business, it is not entitled to a change of venue to the place of its residence, citing Cook v. Ray Mfg. Co., 159 Cal. 694, 115 P. 318. That provision of the Constitution and the case cited relate to the county in which a corporation may be sued and not to the particular court in the county. Furthermore, it appears from the opinion in the Cook case that the merchandise was sold and the contract breached in the county in which the action was commenced.

[1, 2] A corporation is entitled to a change of venue to the county in which its principal place of business is located. De Campos v. State Compensation Ins. Fund, 75 Cal.App.2d 13, 22, 170 P.2d 60; Norins Realty Co. v. Consolidated A. & T. G. Co., 80 Cal.App.2d 879, 182 P.2d 593. A foreign corporation resides at its principal place of business in this state, as designated in the statement which it is required by section 405 of the Civil Code to file in the office of the Secretary of State, and is entitled to a change of venue for the same reasons that are applicable to domestic corporations. Bohn v. Better Biscuits, Inc., 26 Cal.App.2d 61, 65, 78 P.2d 1177, 80 P.2d 484.

[3] Subdivision 2 of section 395 of the Code of Civil Procedure determines the proper court within the county for the trial of an action. By reason thereof, since it is undisputed that the city of Los Angeles is (1) the city in which respondent corporation resides, (2) in which the obligation was contracted to be performed, and (3) in which the breach, if any, took place, the Municipal Court of the City of Los Angeles is the proper court for the trial of the action.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

## BARLOW v. CITY COUNCIL OF CITY OF INGLEWOOD et al. *

Civ. 15811.

District Court of Appeal, Second District, Division 1, California.

Feb. 27, 1948.

Rehearing Denied March 25, 1948.

Hearing Granted April 27, 1948.

1. Judgment ⇐304

While a court has power to set aside judgments and orders inadvertently made, which do not actually result from exercise of judgment, court may not correct judicial error other than by recourse to appropriate statutory procedure.

2. Judgment ⇐355

Where trial court sustained demurrer to evidence without leave to amend petition and judgment was entered, court could not upon a re-examination of same matters resulting in conclusion that error had been made in exercise of judgment set aside judgment on petitioner's motion.

3. Municipal corporations ⇐951, 965

Obligations of city under Improvement Bond Act of 1915 to tax upon demand to provide funds to pay delinquent assessment for which property was sold if treasury contains no available funds and in event city purchases lands sold for delinquent assessments and any succeeding installments of assessment become delinquent, to transfer to redemption fund when due, the amount of such future assessment do not arise until property is sold to state for nonpayment of taxes or assessments. Streets and Highways Code, §§ 8800–8807, 8809.

4. Mandamus ⇐154(4)

Petition for writ of mandate to require transfer of surplus moneys in general fund of city to Improvement Bond Redemption Fund, not alleging that any parcels of property were tax sold to state for either nonpayment of taxes or assessments, or that city did not transfer into redemption fund a sum equal to all delinquent assessments and tax sold properties purchased by city, or that there was not sufficient money in the redemption fund to pay petitioner's bonds in full, or that city at any time had any available funds raised by taxation was fatally defective. Streets and Highways Code, §§ 8800 and 8802–8807, 8809.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Petition by Robert Barlow against City Council of the City of Inglewood and others, for writ of mandate to require officials of city to comply with claimed requirements of Improvement Bond Act. From an order vacating a judgment, setting aside a ruling on demurrer, and granting petitioner leave to file amended petition, respondents appeal, and petitioner appeals from the judgment.

Order reversed and judgment affirmed.

Clyde Woodworth, of Inglewood, and John F. Bender, of Los Angeles, for appellants.

Ernest A. Oswald, of Los Angeles, for respondent.

WHITE, Justice.

This litigation was commenced through the filing of a petition for a writ of mandate. There are two appeals in the case. Respondents in the trial court have appealed from the order made therein, vacating judgment, vacating decision, and granting petitioner in the trial court leave to file second proposed amended petition for writ of mandate. The petitioner in the trial court has appealed from the judgment. In the interest of clarity we shall in this opinion designate respondents in the lower court as "respondents", and the petitioner in the lower court as "petitioner".

With respect to respondents' appeal from the order vacating the judgment, vacating the decision, and granting leave to petitioner to file his second proposed amended petition, the facts are as follows:

The original petition for writ of mandate was filed February 4, 1946. Respondents filed their demurrer on February 21, 1946, upon the grounds: (a) that both the first and second causes of action of the petition did not state facts sufficient to constitute a cause of action against respondents or either of them; (b) that the proceedings in both purported causes of

* Subsequent opinion 197 P.2d 721.

action were barred by the provisions of sections 337 and 338, Civil Code of Procedure, and by the provisions of section 8701, Streets and Highways Code (formerly section 11, subdivision (a), of the Improvement Bond Act of 1915).

The demurrer was overruled on March 8, 1946. On June 28 of the same year, the cause was duly called for trial, opening statements were made to the court, and the respondents thereupon renewed their demurrer and objected to the introduction of any evidence upon the foregoing grounds as set forth in said demurrer. The trial court thereupon sustained said demurrer to the evidence without leave to amend. Petitioner made no request to the court for leave to amend. The judgment was signed and filed by the trial on July 2, 1946, and was entered July 5. Notice of entry of judgment was served on July 17, 1946. Fifteen days after the judgment was signed, petitioner filed his notice of motion to set aside ruling on demurrer and for leave to file amended petition. The proposed amended petition was filed July 24, 1946. The trial court, on the same day, denied said motion.

On August 8, 1946, petitioner filed his notice of motion to set aside judgment, to set aside ruling on demurrer, and for leave to file proposed amended petition for writ of mandate. This motion was based only upon the records and files of this action and the authorities as therein set forth. The notice of motion contained no statement as to the ground upon which the same was made and no affidavits were filed in support of the motion. On August 23, 1946, the court by minute order granted the motion.

It is from that order that respondents prosecute their appeal herein. They contend that the court was without power to vacate the judgment rendered, to vacate the decision, and to grant leave to petitioner to file amended petition for writ of mandate. This contention is well taken.

Petitioner's notice of motion did not state the grounds upon which the same was made, other than to state that the same would "be based upon the records and files in the above entitled action and on the points and authorities hereinafter set forth". No affidavits were filed. Other than a citation of authorities to support his claim that the judgment was erroneous, the only other theory advanced upon which the motion was made, is the citation in the "points and authorities" accompanying the notice of motion, of section 473 of the Code of Civil Procedure. No showing was made of mistake, inadvertence, surprise, excusable neglect, clerical error, or that the judgment as entered did not express the actual judicial intention of the court at the time it was rendered and signed. The judgment was not void.

[1] We are satisfied that the instant case presents an attempt to correct judicial error. Where, as here, all of the matters before the court at the time of the making of the order appealed from had been considered by the court at the time of the rendition of the judgment, it cannot, simply because upon a re-examination of the same matters it has reached a different conclusion, give effect to the second determination of the same issue by annulling or setting aside the original judgment. While a court has power to set aside judgments and orders inadvertently made which do not actually result from the exercise of judgment, it is without power to correct judicial error other than by recourse to appropriate statutory procedure. The case at bar does not present a situation wherein the judgment as entered by the clerk was not the judgment rendered by the court; where the court failed to express its intention by the judgment actually rendered; where there was an irregularity which made the judgment premature; nor where the court was in ignorance of some fact material to the action taken by it.

[2] Apparently, the court, in granting the motion herein, arrived at the conclusion that it had made an error in the exercise of judgment. But the error, being a judicial one, is not subject to change by the trial court in the manner indicated by the record before us. The order appealed from by respondents must therefore be

reversed. McMahan v. Baringer, 49 Cal. App.2d 431, 432, 122 P.2d 63, and cases cited therein.

The second appeal is by petitioner from the foregoing judgment in favor of respondents which the court erroneously vacated and set aside.

The question presented is whether the trial court erred in sustaining the respondents' demurrer to petitioner's petition upon the grounds above set forth.

Petitioner's action was one to compel the officials of the City of Inglewood in Los Angeles County to comply with the claimed requirements of section 12 of the Improvement Bond Act of 1915, now sections 8800 and 8802–8807, inclusive, Streets and Highways Code. The Improvement Bond Act of 1915 was repealed prior to the commencement of this action, and Division 10, Streets and Highways Code, which included said provision, was approved April 4, 1941. Because there appears to be no material change of the statutes as contained in section 12 of the Improvement Bond Act of 1915 and the present applicable sections 8800–8807, Streets and Highways Code, we shall hereinafter refer to said section.

Having concluded, as aforesaid, that the order of the trial court vacating the judgment rendered in favor of respondents upon petitioner's original petition for a writ of mandate must be reversed, it necessarily follows that a consideration of petitioner's appeal herein must be confined to his original petition.

In the first cause of action of his original petition for a writ of mandate, petitioner alleged that on May 3, 1926, the City of Inglewood issued certain street improvement bonds to defray the expense of improving certain public highways within said municipality, pursuant to the terms and provisions of the "Improvement Bond Act of 1915". Attached to the petition as exhibits are several bonds owned by petitioner together with a statement of the amount of payments theretofore made upon the matured interest and the unpaid principal, and interest due upon said bonds; that "interest has accrued and will continue to accrue upon the principal of said bonds at the rate of 7% per annum from and after July 2, 1945, until paid". That all the improvement bonds were then due and unpaid with interest thereon at the rate of 7% per annum from the date of maturity until date of payment. It is then alleged that if there is insufficient money to pay the matured interest and principal due on any of said bonds, that pursuant to the provisions of section 12 of the "Improvement Bond Act of 1915" it is the duty of the duly authorized officials of said municipality to "transfer all surplus moneys in the general fund of the city to the said Bond Redemption Fund". There is then set forth the amount of the unpaid assessments due in the assessment district encumbered by the bonds, and the years in which the same became due. That pursuant to section 3756 of the Political Code and section 4103 of the Revenue and Taxation Code of the State of California, the foregoing assessments bear interest and penalties at the rate of one percent per month for a period five years after the date of delinquency, and further interest and penalties from and after said five years at the rate of ½ of one percent until paid; that all of said assessments together with interest and penalties thereon were due and wholly unpaid.

It is then alleged that an auditor's report filed on October 9, 1945, in the office of the Clerk of the City of Inglewood, disclosed that as of said date, the municipality had an unencumbered current surplus in the amount of $301,581.57 on June 30, 1945; that at the time of filing of the petition herein there was an unencumbered current surplus in excess of $250,000 in the surplus fund of said city, and that said unencumbered current surplus is money in excess of all charges due or to become due in the fiscal year 1945–1946; that said unencumbered current surplus constitutes "available funds" within the meaning of section 12 of the "Improvement Bond Act of 1915".

The second cause of action proceeds upon the same theory as does the first, except that it is based upon an issuance of Street Improvement Bonds on August 2, 1926, to defray the cost of improving highways within said city other than those mentioned in the first cause of action.

We are persuaded that petitioner's original petition is fatally defective in that it does not contain allegations sufficient to bring it within the purview of section 12 of the "Improvement Bond Act of 1915" (now sections 8800 and 8802–8807 of the Streets and Highways Code).

Insofar as here pertinent, sections 11 and 12 provide:

(1) The assessments shall be liens upon specific parcels of real property situated within the assessment district;

(2) Upon default in the payment of any installment of principal or interest in any assessment, the land securing such installments shall be sold in the same manner in which real property in such city is sold for the nonpayment of general city taxes;

(3) In cases where the municipal property tax is collected by county officials (which is the case as to the assessments and taxes levied by the City of Inglewood) the State shall be the purchaser of the lands so sold for delinquent assessments but it holds the title acquired at such sale upon behalf of the city;

(4) If there are no available funds in the treasury with which to make payment of the amount of the delinquent assessment and interest for which the property was sold, demand shall be made upon the city to levy a tax as provided by section 16, subdivision (a) of the Improvement Bond Act of 1915 (now section 8809 of the Streets and Highways Code) for the purpose of providing funds with which to make such payment; and

(5) In the event such purchase is made by the municipality and any succeeding installments of assessments become delinquent, the city shall, from time to time when due, pay and transfer to said redemption fund the amount of any such future delinquent assessments.

[3] From the foregoing it is manifest that the obligations of the city under the "Improvement Bond Act of 1915" do not arise until the property is sold to the State for nonpayment of taxes or assessments. The allegation of the original petition that there are unpaid assessments in the district will not suffice because, even though the city did make the advancement of funds in a sum equal to all future delinquent assessments, and further assuming that such funds were used from the redemption fund to pay in full all outstanding bonds, nevertheless, such assessments would continue to be delinquent and unpaid as alleged in the original petition, and would so remain until a resale was made by the city or the property redeemed and from such resale or collections the city was reimbursed for such advancement. That the method employed by the statute is an advancement or loan of funds only, which the city may normally be expected to recover upon resale of the land procured at the delinquent sales, and is not a payment of the assessments, was the holding in American Co. v. Lakeport, 220 Cal. 548, 562, 32 P.2d 622; and Hammond v. City of Burbank, 6 Cal.2d 646, 656, 59 P.2d 495.

[4] In the original petition for a writ of mandate now before us, there is no allegation (a) that any parcels of property were tax sold to the State for either nonpayment of taxes or assessments; (b) that the city did not transfer into the redemption fund a sum equal to all delinquent assessments on tax sold properties purchased by it; (c) that there is not sufficient money in the redemption fund to pay petitioner's bonds in full; and (d) that the city at the time of the filing of the petition, or at the time of the hearing, or at any time, had any available funds raised by taxation.

By reason of the foregoing it must be held that the court, in the absence of any request by petitioner for leave to amend, did not err in sustaining respondents' demurrer to the evidence without leave to amend, and in sustaining respondents' objection to the introduction of any evidence under the original petition. (Section 12, Improvement Bond Act of 1915, now sections 8800 and 8802–8807, inclusive, Streets and Highways Code; American Co. v. Lakeport, supra; Hammond v. City of Burbank, supra.)

The foregoing conclusions at which we have arrived renders it unnecessary to discuss or decide respondents' claim that petitioner's petition, and both causes of action therein pleaded, are barred by the provi-

sions of sections 337 and 338 of the Code of Civil Procedure, and by section 8701, Streets and Highways Code, formerly section 11, subdivision (a), Improvement Bond Act of 1915.

For the reasons herein stated, the order of August 23, 1946, entered August 28, 1946, vacating the judgment, vacating the decision and granting leave to petitioner to file his second proposed amended petition, is reversed. The judgment entered July 5, 1946 is affirmed.

YORK, P. J., and DORAN, J., concur.




84 Cal.App.2d 281

## PEOPLE v. BIANCO.

Cr. 4190.

District Court of Appeal, Second District, Division 3, California.

March 8, 1948.

1. Larceny ⇐65

Evidence disclosing that defendant paid part of purchase price of dwelling house and then made successive leases of property, receiving therefor certain sums as advance rental, and thereafter did not conclude purchase of property nor return to lessees sums received from them, sustained convictions for grand theft.

2. Larceny ⇐66

Evidence sustained conviction for attempted grand theft.

3. Criminal law ⇐1172(1)
Larceny ⇐70(1)

In grand theft prosecution against defendant who paid part of purchase price of dwelling house then made successive leases of property receiving advance rentals but did not conclude purchase of property nor return advance rentals to lessees, instruction that a purchaser of realty under contract may in good faith lease it, yet if default is made by purchaser the tenant's rights are thereby rendered void, was not a correct statement of law, since the word "void" was inaptly used, but instruction was not prejudicial.

4. Criminal law ⇐814(1)

In grand theft prosecution against defendant who paid part of purchase price of dwelling house then made successive leases of property receiving advance rentals but did not conclude purchase of property nor return advance rentals to lessees, refusal to give defendant's requested instruction as to civil rights of defendant or her lessees was not error.

5. Criminal law ⇐1137(5)

In grand theft prosecution against defendant who paid part of purchase price of dwelling house then made successive leases of property receiving advance rentals but did not conclude purchase of property nor return advance rentals to lessees, defendant could not complain of admission of evidence of action brought by vendor to terminate contract and recover possession where defendant was the first one to place in evidence the fact that such action had been brought.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Winifred Helen Bianco was convicted of grand theft and attempted grand theft, and she appeals.

Affirmed.

Leola Buck Kellogg, of Los Angeles (Montgomery G. Rice, of Los Angeles, of counsel), for appellant.

Fred N. Howser, Atty. Gen., and Ruth Bernfeld, Deputy Atty. Gen., for respondent.

SHINN, Acting Presiding Justice.

Appellant was charged by information filed by the District Attorney of Los Angeles County with three counts of grand theft and one count of attempted grand theft. The first count charged the theft of $600 from A. Speyer on or about November 25, 1946; the second count charged the theft of $1,200 from Roy G. Kabat and Ruth M. Kabat on or about November 27, 1946;

the third count charged an attempted theft of $3,600 from George E. Malcolm and Ethel M. Malcolm on or about December 2, 1946; and the fourth count charged the theft of $2,150 from Herbert L. Krause and Mollie Krause on or about December 3, 1946. Appellant pleaded not guilty, and upon trial by a jury was found not guilty on count one and guilty on the other three counts. Thereupon appellant moved for a new trial which motion was denied, and appellant was sentenced for the term prescribed by law as to counts two, three, and four, such sentences to run concurrently.

This appeal is from the judgments of conviction and order denying appellant's motion for a new trial, and is based upon the grounds of (1) insufficiency of evidence, (2) error in the admission of evidence as to a certain civil suit, and (3) error in the refusal to give several instructions concerning real estate law.

As will appear more fully hereafter, appellant paid $2,000 as a part of the purchase price of a three-bedroom dwelling house, on East 66th Street, in Los Angeles, was to make certain installment payments for four months, and then was to pay the remainder of the purchase price which would amount to something over $11,000; she then made successive leases of the property, receiving therefor certain sums as advance rental. She did not conclude her purchase of the property nor return to her lessees the sums received from them. Her defense is that she acted at all times in good faith.

Her agreement to purchase the property was entered into September 14, 1946. Prior to that time she had entered into an agreement to purchase another property in North Hollywood, which she had lived in for some months. The details of this purchase were not gone into but it appeared that appellant was making monthly payments on the purchase price. On October 6th, appellant agreed to lease the North Hollywood property to Mrs. Doris Edwards for two years at a rental of $125 per month, and upon the following day she received from Mrs. Edwards $3,000 rental paid in advance. Some two weeks thereafter, Mrs. Edwards went to the premises and found a sheriff's notice of execution of writ of possession; she thereupon contacted appellant, demanded the return of her money, and received from appellant a personal check for $3,000, which was dishonored when presented for payment. On October 18, appellant paid Mrs. Edwards $1,000, and gave her a $2,000 personal check and a promissory note; the check was dishonored by the bank. On December 3rd or 4th, appellant paid Mrs. Edwards the balance of $2,000. Appellant's transactions with Mrs. Edwards were entirely aside from her later transactions in connection with the 66th Street property, but should be borne in mind in considering her operations in connection with the latter property.

In the latter part of August, 1946, Henry A. Herbst, then the owner of a 3-bedroom house located at 1702 West 66th Street, Los Angeles, listed this property for sale with Sol Cowen, a real estate broker. Soon thereafter, appellant, using the name of Helen Massi, spoke to Mr. Cowen about this property and was told that the owner wanted a $5,000 down payment and that the purchase price was $13,750. She stated that she thought she could pay only $2,000 down and Mr. Cowen told her that he would speak to the owner about it. At that time she also gave Cowen, according to the latter's testimony, a personal check in the sum of $100 as deposit. Subsequently, during several meetings of appellant with Mr. Herbst and Mr. Cowen the parties agreed upon the following terms: Appellant was to pay the purchase price of $13,750 by making a $2,000 deposit, followed by four monthly installments of $100 beginning October 13. During these five months appellant was to arrange for a first mortgage on the property which she told Mr. Cowen and Mr. Herbst she could get in the amount of $9,500, or $8,500, and payment of the full balance of the purchase price was to be made by appellant at the end of the fifth month, i.e., on February 13, 1947. It was further agreed that the contract should be put in writing; but that it should not be recorded and that Herbst would not give appellant a deed until she paid $5,000 on the contract. Furthermore, according to the testimony of Mr. Herbst, there was an oral agreement that appellant was not to lease the property except to the extent of renting

out rooms on a weekly basis. In that connection Mr. Herbst testified that when he told appellant that he did not want her to lease the property "she said definitely she would not lease it, that she had no intention of leasing it, that she wanted it for a home for her and the baby and that all she wanted to do was to make a little extra money to help her make the payment." He further testified that on November 27th he called on appellant at 1702 West 66th Street and told her that he had heard that she was going to rent the property and told her that she could not do so because of their verbal agreement and that she replied that she was not planning to lease the property but merely wanted to rent out part of the house on a weekly basis.

On September 14, the parties signed a written contract for the sale of the property, which appellant signed by the name of Helen Massi. Among the provisions included in the contract was a clause making time of the essence and providing that: "* * * If the buyer fails to make any of the payments at the times and in the manner above provided, or fails to comply with any of the terms hereof on his part to be done or performed, then * * * at the seller's option the buyer shall be deemed to have forfeited all rights hereunder and all right to the money theretofore paid upon this agreement, which money may be retained by the seller * * *." Some time before October 10, appellant gave Mr. Cowen a cashier's check in the sum of $2,000 and took possession of the property. At the time of receiving the cashier's check, Mr. Cowen returned to appellant her check for $100 previously received as a deposit because it had not been honored by the bank by reason of insufficient funds. On October 10, an escrow with respect to the sale of the property was opened at the Security-First National Bank with escrow instructions signed by appellant and Mr. Herbst, upon appellant's request, extended the time of the first payment from October 13 to November 13. However, Herbst testified he did not waive the time of essence clause contained in the sales contract except as to this first payment. Appellant at no time made any payment on the property in addition to the first $2,000 and on December 2, Mr. Herbst served appellant with a 30-day notice of termination and forfeiture of the sales contract, a copy of which he mailed to her on December 3.

After taking possession of the property at 1702 West 66th Street, appellant leased, or attempted to lease, the premises to four different parties for terms ranging from one to three years, all of which terms were to commence at some time in December. Each lease and the advance rent collected thereon by appellant (or in one case, attempted to be collected) forms the basis of one count of grand theft herein.

In aid of our subsequent detailed statement of the evidence in support of the verdicts and judgment, we shall first present the following chronological table of the pertinent transactions and events: September 14, execution of contract for sale of property at 1702 West 66th Street; October 3, taxes due; October 10 (or earlier), $2,000 paid; November 13, first $100 installment due; November 25, Speyer lease (one year) executed, term to commence December 21st; November 26, appellant receives $600 advance rent on Speyer lease; November 27, Kabat lease (one year) executed. Appellant receives $1,200 advance rent; December 1, Malcolm lease (three years) executed. Malcolms agree to pay $3,600 in advance rent on the next day; December 2 (morning), Malcolms rescind lease; December 2 (evening), Herbst serves appellant with notice of termination and forfeiture; December 3, Herbst mails copy of notice of termination and forfeiture to appellant; December 3, Krause lease (three years) and chattel mortgage executed. Appellant receives $2,150 from Krauses; December 4 or 5, Krauses rescind lease; December 5, taxes delinquent; December 10, Kabats take possession; December 10-21, at some time between these dates, Speyers rescind lease.

*Speyer Lease.* The advance rent obtained by appellant from the Speyers formed the basis of the grand theft charge of Count I of which appellant was acquitted. It will, therefore, not be necessary to relate this transaction except insofar as the conduct of appellant in connection therewith and the fact of the execution and existence of this lease have a bearing upon the other three

counts of which appellant was convicted. The Speyers learned that the premises at 1702 West 66th Street, then occupied by appellant, were for rent through Mr. Duff, a real estate agent, whose office had received a call to that effect on November 20. Prior to contacting the Speyers, Mr. Duff had had a conversation with appellant in which she told him that she was ill and had to go to a sanitarium in Illinois and that she wanted to rent the property for $100 a month for one or two years, and wanted to get as much rent in advance as possible. Further, in answer to Mr. Duff's inquiry as to the ownership of the property, she told him that she was the owner of the property and that she owed about $4,000 on it. In the preliminary conversations with the Speyers, appellant told them that she needed the advance rent because she was ill and had to make a substantial payment to a sanitarium in Glendale and that she could not give them possession until about December 21 because she had to wind up her affairs and attend to certain business relating to her home.

The Speyers were desperately in need of housing and they agreed to rent the property for $100 a month on a one-year lease, $600 rent payable in advance, the term to begin December 21 "or sooner." The written lease embodying these terms was executed by the parties on November 25. The lease also contained a clause that "if the lease for any reason is terminated before expiration date, all moneys unused shall be returned to the lessee immediately." This provision was written in by appellant herself who at that time stated to the Speyers that she put it in "to show that she was on the level." At the time of the execution of the lease the Speyers gave appellant a check in the amount of $600 and the next day, on November 26, Mrs. Speyer cashed this check and handed appellant the money. A few days before the term of the lease was to commence, Mrs. Speyer went to the premises and found them occupied by Mr. and Mrs. Kabat who showed her a one-year lease dated the 27th of November between them and appellant. Thereupon Mrs. Speyer called appellant and told her that appellant had gotten the money under false pretenses and that she wanted it back, to which appellant did not reply except to agree to meet with the Speyers. At that meeting, which took place at the office of appellant's attorney, appellant promised to pay back the money but stated that she would have to telegraph home for it and stated that Mr. Elowitt (her attorney) was holding certain jewelry of the value of $1,100 for his fee, and that she would give these jewels to the Speyers until she could pay the $600, which she promised would be in a few days. Subsequently an agreement to that effect was executed by the parties and the Speyers were given the jewelry. However, its value was appraised as being only $400 by one jeweler, and as being worth no more than $100 by another. In spite of frequent demands for the money, the Speyers did not get their money back, and at the time of the trial, were still holding the jewelry.

*Kabat Lease.* Mr. Kabat first met appellant on November 25, when he went to the premises at 1702 West 66th Street in response to a telephone call from appellant in which the latter had inquired whether it was true that he was looking for a piece of property, and offered to lease the 66th Street property. In the preliminary conversations with respect to the lease of these premises, appellant repeatedly stated that she was the owner of the property and had clear title to it; that she had owned the property for about a year and that she had a right to lease it. At that time the Kabats were desperately in need of housing (Mr. Kabat was sleeping in his car and his wife and new baby had just gotten out of the hospital), and Mr. Kabat agreed to lease the property for $100 a month for one year, the full rental payable in advance, appellant having told him that she needed the money because she was ill and had to make arrangements to take care of her son before she could get medical attention, and that she was going to the Mayo Clinic in Minnesota.

The written lease which was executed by the parties on November 27 contained a clause respecting a possible termination similar to that contained in the Speyer lease and this provision was added upon appellant's suggestion. On the date the lease was executed the Kabats gave appellant a check in the sum of $1,200 and took possession of

the premises on December 10. Thereafter a lawsuit was commenced against them by Mr. Herbst relating to the property in which Mr. Kabat filed an answer. This suit was an action to determine the interests of the various parties in the property and also named appellant as one of the defendants. The complaint was served on appellant on December 13; however, no answer was filed on her behalf and a default was entered as against her.

Mr. Kabat testified that when he paid the $1,200 to appellant he believed that she had a right to lease the property for one year, and that he would not have signed the lease if he had known that on November 25 appellant had leased the same property to the Speyers for approximately the same period of time and had received $600 rent in advance thereon.

*Malcolm Lease.* Mrs. Malcolm first contacted appellant on December 1 in answer to an advertisement in the "Southwest Ways" which stated that "cash was urgently needed and that the person advertising would lease her six-room house in exchange for a loan." The Malcolms were going to be in need of a home shortly and they agreed to pay appellant $3,600, being three years rental, at the agreed price of $100 per month, and it was further agreed that at the end of two years the Malcolms were to have an option to terminate the lease and have the last year's rental refunded, or if rents had come down, to have three and one-half years to absorb the three years rental. In the preliminary conversation, appellant told Mr. and Mrs. Malcolm that she had owned the property for about a year, had lived there for that length of time, and that she needed the advance rent because she had an operation coming up and was taking her child east, and that she also had some bills to settle.

The lease was drawn and the Malcolms agreed to meet appellant the next morning at the bank and to pay her $3,600. At that time they fully intended to do so, and to go ahead with the lease; however, before that time Mr. Malcolm investigated the ownership of the property, and also spoke to Mr. Herbst, who informed him that appellant had opened an escrow on the property but that so far the terms had not been carried out. Malcolms did not keep their appointment with appellant and did not pay her the money.

*Krause Lease.* On December 2, 1946, appellant telephoned Mrs. Krause in answer to the latter's advertisement for a house to rent. Mr. and Mrs. Krause met appellant that night in the latter's home on 66th Street and discussed their leasing the premises. Appellant stated that she wanted to rent the house for $100 a month on a three-year lease, the full rent payable in advance, stating that she needed the money for an operation and that she also had a sick child and was trying to get him to Baltimore. The Krauses did not want to give appellant the full $3,600 without some security, and it was agreed that $1,800 of this sum would be considered as rent and the balance as a loan, to be secured by a chattel mortgage on appellant's furniture in the house. Questioned whether she was the owner, appellant replied that she was, and thereupon the Krauses gave appellant a $20 check as a binder and the parties agreed to meet the next morning when the lease and chattel mortgage were to be executed and the Krauses were to give the money to appellant. The next morning, i. e., on December 3, the parties met and the Krauses questioned again whether appellant owned the property; she again replied that she did and that she had free and clear title, except that she still owed a small debt on it, about one or two thousand dollars on which she was making $20 monthly payments. On that morning, in the presence of a Mr. Cooper, who had accompanied appellant, the parties executed the three-year lease and the chattel mortgage on certain furniture listed by appellant. Thereupon Mr. Krause handed appellant a cashier's check in the sum of $2,150 with the understanding that he would pay appellant the balance of the $3,600 within a few days.

Thereafter the Krauses had the title to the property searched and also had a conversation with Mr. Herbst, whom they found from the records to be the owner, in which conversation the latter told them that he had sold the property to appellant but that she had defaulted and that he had sent

her a 30-day notice that her interest was terminated. The Krauses further found out that there was an attachment on the furniture to which appellant had given them a chattel mortgage. In that connection Mr. Lyon, manager of the Seaboard Finance Company, testified that on July 26, 1946, appellant had executed a promissory note in the sum of $5,500 which was secured by a chattel mortgage on certain enumerated furniture which at that time was at 10918 Bloomfield Street, North Hollywood, but was later moved to 1702 West 66th Street; that this note had never been paid off and was in effect on December 5, 1946.

Late in the evening of December 4, the Krauses called on appellant and told her what they had found out about the title and the furniture and demanded the return of their money. Appellant replied that she had given the check to a certain John Sheppard who had cashed it and had taken $150 out of it and turned $2,000 over to her attorney, Mr. Elowitt; further that she had gotten into trouble and needed $2,000, but would get the money back for the Krauses. However, she did not repay the money.

Mrs. Krause further testified that if she had known that appellant was not the owner of the property and not in a position to give a year's lease she would not have given her the money, and that likewise, she would not have given appellant this money if she had known that the property had been leased to other persons before and that the leases had not been cancelled.

On December 5, Officer Workman, a police officer, had a conversation with appellant in the presence of Mrs. Krause. At that time Mrs. Krause told him of appellant having leased the same property two or three times, to which appellant merely stated that there had been a misunderstanding and that she would get the money back to the Krauses, but that she would have to send to Catalina Island for it and therefore would not be able to return the money until that afternoon.

Appellant admitted the execution of the various leases and receipt of advance rent thereunder; she denied that there was an oral agreement with Mr. Herbst not to lease the premises, and when questioned as to certain items listed in both chattel mortgages, stated that she owned two sets of these items and that the set covered in the Seaboard Finance Company's mortgage was at the time of the trial at 10909 Bloomfield Street, North Hollywood. She further testified that she intended to give the Speyers and Kabats their money back and terminate their leases, and give the Malcolms possession if they had gone through with their lease. She admitted not having told the subsequent lessees of the prior leases and that by December 3 she had not spoken to either the Speyers or the Kabats that she was going to cancel their leases and lease the premises to the Krauses. She further stated that she had not returned the money to the Krauses because, "* * * You don't pick money out of trees either; you have got to have time to get the money together and if people don't want to give it to you there is nothing you can do." She further testified that at the time of executing the leases she had not been ill and denied having made the statements testified to by all the lessees as to her illness and contemplated operation and trip east. Appellant further admitted that on December 2 Mr. Herbst personally gave her a notice of termination and told her that he would give her 30-days written notice of it, but she testified that at that time, she offered to pay the installment. Mr. Herbst denied that appellant had made such offer.

[1, 2] The foregoing statement of the evidence establishes its sufficiency to support the verdicts. Appellant entered upon her machinations to defraud the complainants with an obligation to refund to Mrs. Edwards a balance of $2,000 which had been obtained from her by the same sort of a scheme. She did return this sum to Mrs. Edwards and she used none of the $3,950 which she received from her lessees to reimburse them or to complete her purchase of the property. Her actions throughout furnished the best guide to her intentions. Her frauds were the more wicked because she took advantage of the pressing necessities of her lessees.

[3] Appellant complains of an instruction given at the request of the People to

the effect that a purchaser of real property under contract may in good faith lease it, yet if default is made by the purchaser the tenant's rights are thereby rendered void. It is contended that the instruction stated the law incorrectly and that the court should have given instead several of defendant's requested instructions respecting the civil rights of the parties in interest.

[4] The instruction that was given was not a correct statement of the law, but we do not regard it as a serious matter. Defendant's requested instructions related to such matters as the legal right of a purchaser under contract to lease the property, the right of the tenant to remain in possession until the contract of purchase is rescinded by the parties or the lease is terminated by act of the parties, the right of a lessor to terminate a lease if it gives him that right and thereafter to make a new lease, that the questions of the right of the tenant to a refund in case of termination of the lease is for the civil courts, that a contract for the purchase of real property may be rescinded for cause but that the contract remains in force until terminated by suit in equity, and that a purchaser under contract has a legal right to retain and use any money recieved as rent of the premises even though he has not paid the purchase price. The requested instructions omitted the element of good faith in the exercise of the rights which were defined in the instructions. They emphasized the civil rights of defendant, which were not in issue, and if given would have diverted the minds of the jurors from the question of criminal intent. The charges lodged against defendant did not accuse her of acts illegal in themselves but only of committing the described acts with the intention of defrauding the complainants. There was no question as to her right to lease the property, as long as she acted in good faith, and did not deceive her lessees. It was not necessary to instruct as to the civil rights of defendant or her lessees. The jury would have understood that those rights necessarily depended upon compliance by defendant with her contract of purchase. The word "void" was ineptly used in the instruction that was given, but an instruction that breach of the contract of purchase by defendant would have given Herbst the right to terminate it and to recover possession from defendant and her lessees, while legally unobjectionable, would have been equally unwelcome to defendant. Needless to say, she did not propose such an instruction. As we say, defendant's right to make one or more leases in good faith and without misrepresentation was not in question. Money may be obtained by false pretenses through acts otherwise legal, as well as by those that are illegal.

[5] Another point urged by appellant is that the court admitted, over her objection, proof of an action brought by Herbst to terminate the contract of sale and to recover possession of the property. This was but circumstantial evidence of a cumulative nature that defendant had defaulted in her purchase contract, but as she did not make any claim that she had performed it, and as Herbst admittedly had declared her in default, it was quite immaterial whether he had brought suit. But the claim of error in this respect is unavailable to defendant, inasmuch as she was the first one to place in evidence the fact that suit had been brought. She did not offer the court file in evidence, but she did prove by Herbst that suit had been instituted by him against defendant and others.

The verdicts of guilty were fully warranted by the evidence. In fact, in judging as to the honesty of defendant's intentions by weighing her actions against her protestations of good faith, the jury could not reasonably have reached any other conclusions.

The judgments and the order denying defendant's motion for new trial are affirmed.

WOOD, J., and VALLÉE, Justice, pro tem., concur.

## In re ABILA'S ESTATE.

## ABILA v. SPENDRUP. *

Civ. 15840.

District Court of Appeal, Second District, Division 3, California.

March 2, 1948.

Hearing Granted April 29, 1948.

**1. Divorce ⇐172**

Final decree of divorce conclusively establishes previous validity of marriage only as between parties and their privies.

**2. Divorce ⇐172**

A final divorce decree is conclusive upon all persons as to existence of status of subsequent singleness of marital parties to action, but is not conclusive as to prior condition of marriage between such parties except between persons who have actually litigated precise issue. Code Civ.Proc. § 1908.

**3. Divorce ⇐172**

Final decree of divorce from second husband did not conclusively establish validity of marriage as between divorced wife claiming as widow of former husband who died after entry of decree and beneficiaries under his will.

**4. Marriage ⇐40(10)**

Presumption as to validity of marriage arising from proof thereof was not conclusive and was dispelled by proof of previous marriage of wife to another and that no final decree of divorce had been entered in divorce action instituted by former husband.

**5. Marriage ⇐40(6)**

Record showing no entry of a final decree of divorce constituted affirmative evidence that none was entered and no presumption could be indulged to the contrary, since the presumption is that official duty has been regularly performed and the law obeyed. Code Civ.Proc. § 1963, subds. 15, 33.

**6. Marriage ⇐40(10)**

Presumption of validity of second marriage could not prevail over testimony of wife and recorded certificate of previous marriage to another so as to preclude wife from claiming as widow of first husband.

**7. Divorce ⇐172**

Interlocutory decree of divorce was res judicata as to previous validity of marriage and its continuance to date of decree in subsequent proceeding to determine right to deceased husband's estate as between wife claiming as widow and beneficiaries under decedent's will.

**8. Marriage ⇐50(2)**

Wife's testimony supported by presumption of validity of second marriage and adjudication of validity of such marriage in interlocutory decree of divorce established annullment of previous marriage, though no record evidence of annulment was produced.

---

Appeal from Superior Court, Los Angeles County; Newcomb Condes, Judge.

Proceeding in the matter of the estate of Jose Maria Abila, deceased, upon the petition of Emelina V. Abila, also known as Emelina V. Moser, to be decreed to be decedent's widow and to have his estate assigned to her, which petition was opposed by M. V. Spendrup. From an adverse judgment, and order denying her motion for a new trial, petitioner appeals.

Appeal from order denying a new trial dismissed and judgment reversed.

Prior opinion, 184 P.2d 958.

Jesse Bach Porter, of Los Angeles, for appellant.

MacDonald, Wallace, Cashin & Arrington and W. W. Wallace, all of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

Jose Maria Abila died in Los Angeles County in December, 1943, leaving a will which was duly admitted to probate. He left a parcel of real estate to Juana G. Lopez and the remainder of his estate to his sister, Josefa Abila, and his niece, Rebecca Camacho. Some months after the admission of the will to probate, appellant herein, Emelina V. Abila, filed her petition to determine heirship under section 1080,

* Subsequent opinion 197 P.2d 10.

Probate Code, alleging that she married decedent in 1910 and remained married to him until his death; that the estate was of the value of less than $2,500; that she was entitled to have it assigned to her under section 640 et seq., Probate Code, and praying that she be decreed to be the widow of decedent and that she be granted any other proper relief. The hearing was opposed by the administrator-with-will-annexed, the issue as to appellant's claimed widowhood was tried, the court made a finding that appellant was not the widow of decedent and entered a decree adjudging that she was not entitled to take anything under the will. She appeals.

There was evidence of the following facts: Appellant and decedent intermarried on March 31, 1910. They separated and Abila obtained an interlocutory decree of divorce from appellant in March, 1913, but no final decree. The administrator-with-will-annexed of his estate petitioned the court for the entry of a final decree nunc pro tunc, but this petition was denied. In September, 1915, appellant went through a ceremony of marriage with one Gus Moser and this purported marriage was ended by final decree of divorce in appellant's favor, entered in May, 1930. Appellant testified that she resumed marital relations with Abila in the year 1930 and continued them until his death in 1943.

The foregoing facts as to plaintiff's marriage to Moser were found by the court in the instant proceeding, but there was no finding that appellant had or had not married Jose Maria Abila. The court, however, made the following finding: "The Court finds that at the time of the death of Jose Maria Abila the said Emelina V. Moser was the divorced wife of Gustave Moser, and was not the wife of Jose Maria Abila after her marriage to Gustave Moser, and was not his widow at the time of his death." As a conclusion of law, the court found that "Emelina V. Moser was not the widow of Jose Maria Abila, deceased, at the time of his death, but was a divorced wife of Gustave Moser."

[1-3] Respondent advances two theories, either of which, it is contended, furnishes support for the judgment: (1) that the decree of divorce in the Moser action conclusively determined, as between the parties to that action and also as between the parties to the instant proceeding, that appellant and Moser were legally married; and (2) that by virtue of that adjudication and of the presumption of validity of appellant's marriage to Moser, it will be presumed conclusively that appellant never married Abila or that a final decree of divorce was signed in the Abila action and later lost. We cannot give such sweeping effect to the decree in the Moser case. Respondent relies upon the rule stated in Petry v. Petry, 47 Cal.App.2d 594, 118 P.2d 498, 499, that "It is well established in this state that a final decree of divorce conclusively determines, as between the parties thereto, that they were legally married; and this regardless of the true fact * * * and seemingly despite the most flagrant fraud practiced by one of the parties." In Estate of Hughes, 80 Cal.App. 2d 550, 182 P.2d 253, the rule was applied and a judgment of divorce was given effect as a final adjudication of the validity of the marriage of the parties, binding upon them and upon others who were parties to the action and in privity with one of the parties to the divorce. The principle of these cases would be applicable here if the controversy were between the parties to the Moser action or their privies. Such, however, is not the case. Jose Maria Abila was a stranger to that action and those who claim under his will are likewise strangers. The rule, as quoted from the Petry case, is not extended to third persons unless they stand in privity with one of the parties. This was held directly in Blumenthal v. Blumenthal, 97 Cal.App. 558, 561, 564, 275 P. 987. The supporting authorities are discussed at length in the Blumenthal opinion and further discussion of the cases may be found in Note, 45 A. L.R. 925. The general rule as to judgments in rem with respect to status has been stated as follows: "(1) In a proceeding in rem with respect to a status the judgment is conclusive upon all persons as to the existence of the status. (2) A judgment in such a proceeding will not bind anyone personally unless the court has jurisdiction over him, and it is not conclu-

sive as to a fact upon which the judgment is based except between persons who have actually litigated the question of the existence of the fact." Rest., Judgments, sec. 74; cf. Code Civ.Proc. sec. 1908; Richardson v. Borders, 246 Ky. 303, 54 S.W.2d 676, 87 A.L.R. 196, 203. Applying this rule to a divorce decree, such a decree is conclusive upon all persons as to the existence of the status of subsequent singleness of the marital parties to the action, but is not conclusive as to the prior condition of marriage between such parties except between persons who have actually litigated this precise issue. In re Holmes' Estate, 291 N.Y. 261, 52 N.E.2d 424, 428, 429, 150 A.L.R. 447, 452, 453. The effect of a judgment upon the privies of the parties to an action is set forth elsewhere in the Restatement (secs. 83–92). The binding effect upon privies of an adjudication of marriage as a consequence of a judgment of divorce is recognized in the California cases.

[4] The judgment is not sustainable upon the second ground urged by respondent. A presumption arose from proof of the Moser marriage that it was a valid marriage, but this was not a conclusive presumption and it was dispelled by proof of the prior marriage to Abila and the fact that no final decree of divorce had been entered in the action instituted by the husband.

[5] Respondent would have us presume that a final decree was signed but that it was not entered because it was lost. A sufficient answer is that there are presumptions that official duty has been regularly performed and that the law has been obeyed. Code Civ.Proc. sec. 1963(15), (33). Where the record shows no entry of a final decree of divorce it constitutes affirmative evidence that none was entered and no presumption can be indulged to the contrary.

[6] It is suggested that the presumption of validity of the Moser marriage, also, is proof that appellant was never married to Abila, but this presumption cannot prevail, since the Abila marriage was established by the testimony of appellant and also a duly recorded certificate of marriage.

[7] The interlocutory decree in the the validity of the Abila marriage and its subsistence to the date of the decree, to the extent stated in Petry v. Petry, supra. By that adjudication the parties to the action were bound and the parties to the instant proceeding are likewise bound, since they both lay claims to the estate of Jose Maria Abila. It was established by the evidence, beyond peradventure, that appellant was married to Abila and that the marriage was not dissolved except by his death.

[8] It is suggested further by respondent that appellant admitted having married one Ortega before she married Abila and that there was insufficient proof to show that that marriage had been dissolved. Appellant, while admitting the marriage, testified that it had been annulled, although no record evidence of the annulment was produced. Her testimony was fortified by the presumption of the validity of her marriage to Abila and also by the adjudication of the validity of that marriage in the interlocutory decree, since, under the rule first stated, the parties to the present proceeding are bound by it.

The findings and judgment to the effect that appellant is not the widow of Abila rest solely upon the effect erroneously given to the decree in the Moser action. The finding that appellant is not the widow of Jose Maria Abila is without any support in the evidence.

The judgment is reversed for further proceedings in accordance with the views herein stated. The attempted appeal from the order denying motion for new trial is dismissed.

VALLEE, J. pro tem., concurs.

84 Cal.App.2d 81

## HURT v. BASALT ROCK CO., Inc. et al.

Civ. 7399.

District Court of Appeal, Third District, California.

March 1, 1948.

As Modified on Denial of Rehearing March 30, 1948.

Hearing Denied April 29, 1948.

1. New trial ⇐163(2)

Where order is regularly made and entered granting a new trial on conditions therein set forth, trial court's power thereafter to correct, amend, or vacate that order is ended, except that by statute, an inadvertent entry can be set aside by a proper showing, or if as entered it was not the order as made, the minutes can be corrected to make them speak the truth, but subject to such exceptions, such an order is reviewable only on appeal.

2. New trial ⇐163(2)

In slander action, where trial court granted defendant's motion for new trial conditioned on plaintiff's taking judgment for $300 in lieu of $12,500 award, court was without power six days later to enter an unconditional order granting defendant a new trial on grounds that damages were excessive, that evidence was insufficient to justify verdict, that verdict was against law, and that errors in law occurred and such an order was void.

3. New trial ⇐161(1)

Trial court has power to grant or deny motion for new trial conditioned upon the performance of certain specified acts.

4. New trial ⇐161(4)

Where court entered an order granting defendant a new trial conditioned on plaintiff's acceptance of $300 damages in lieu of $12,500 award, and within six days thereafter and before plaintiff had accepted, entered a second void unconditional order granting new trial, from both of which plaintiff appealed, original conditional order was not converted into an unconditional order granting new trial by plaintiff's failure to accept conditions thereof but was to be construed as requiring performance of the conditions on demand.

5. Appeal and error ⇐979(2)

Order granting a new trial upon insufficiency of the evidence will not be disturbed on appeal in absence of a clear showing of abuse of discretion and only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment.

6. Libel and slander ⇐123(7)

In action by mining and metallurgical engineer for slander, conflicting evidence as to truth of defendant's accusations to the effect that the engineer was dishonest, violated ethical standards of and was a disgrace to his profession and was a liar in denying that he had attempted to bribe an employee to give him a sample of secret raw materials was for the jury.

7. New trial ⇐161(3)

In action by mining and metallurgical engineer for slander, order granting new trial conditioned on plaintiff's acceptance of $300 damages in lieu of $12,500 award was proper as within court's discretion.

---

Appeal from Superior Court, Napa County; Mervin C. Lernhart, Judge.

Actions by E. P. Hurt against Basalt Rock Company, Inc., a corporation, A. G. Streblow, and others, for alleged slander and assault. From two orders granting defendant's motions for a new trial plaintiff appeals.

Order conditionally granting new trial affirmed, and unconditional order annulled.

Fink & Keyston, of San Francisco, and King, King & Ghidella, of Napa, for appellant.

Clarence N. Riggins and Nathan F. Coombs, both of Napa, for respondents.

PEEK, Justice.

This is an appeal by plaintiff from certain orders of the trial court; the first conditionally granting defendants' motion for a new trial, and the second unconditionally granting said motion.

Plaintiff is a mining and metallurgical engineer. At the time of defendants' alleged slander and assault he was employed

by a firm of mining and metallurgical and chemical engineering consultants who had been then engaged by defendant Rock Company to conduct research in connection with the development of a light weight aggregate as a constituent of building blocks. Plaintiff's duties in furtherance of such capacity were confined to laboratory work at defendants' plant near Napa, California.

The pertinent portions of the two complaints filed by plaintiff—one for slander, the other for assault, which were consolidated for the purposes of the trial—allege that on October 22, 1946, A. G. Streblow, president of defendant company, accompanied by a laborer, one Bennett, entered the laboratory where plaintiff was working, and in the presence of Bennett uttered the alleged slander and committed the alleged assault. Streblow accused plaintiff of attempting to bribe one of the employees of defendant company to give him a sample of raw material (other than the material upon which plaintiff was working) upon which experiments were being conducted. He also accused plaintiff of being dishonest and betraying the defendant company, that he had violated the ethical standards of and was a disgrace to his profession, and that he was a damn liar. Streblow then struck the plaintiff's brief case from his hand, ripped it open and dumped the contents on a table, and thereafter he and Bennett, each taking plaintiff by an arm, escorted him off the premises.

The truth or falsity of the accusations made by Streblow against the plaintiff, first in the presence of Bennett and later during a telephone conversation with plaintiff's employers, is much disputed. It appears that the plaintiff's research was confined to work on pumice, but that the company at the time was conducting experiments on another material of a secret nature. Plaintiff prior to the alleged slander had been given a piece of the processed material, but not the raw material. Plaintiff testified that he wanted a piece of the raw material for testing and was motivated solely by his interest in behalf of the company.

An employee of the company, Ray Gilmore, testified that the plaintiff had asked him to get some of the raw material for him and that he (plaintiff) would make it worth his while. Streblow was later informed of the incident by another employee and confirmed it with Gilmore. It was this incident which gave rise to the alleged slander.

At the conclusion of the hearing the jury returned a verdict in favor of plaintiff in both actions assessing damages for the assault in the sum of $1 and for slander in the sum of $12,500.

Defendants' motion for a new trial in the assault action was denied. However, in the slander action the motion was granted as previously mentioned, and it is these orders which are now before this court for review.

On December 20, 1946, the trial court prepared and filed a memorandum in connection with the granting of defendants' motion wherein it was stated: "For the purpose of permitting this unfortunate litigation to end, in order to secure to the plaintiff the vindication from wrongdoing which the jury has given to him and in order to save all litigants the expense and inconvenience of further litigation the court *has concluded to give plaintiff the option to take judgment for Three hundred Dollars as damages or a new trial, such option to be exercised by plaintiff before the expiration of the sixty days within which the court has jurisdiction to grant a new trial and before the close of business December 24th, 1946.*" (Italics ours.)

The memorandum concluded with the following order:

"It is therefore ordered as follows:

"1. That in action Number 10239 (the slander action) the motion for a new trial is denied, but conditionally nevertheless that plaintiff file appropriate legal documents herein effectuating his consent that he take judgment in the sum of $300.00 or in lieu of $12500.00 and that the judgment may be reduced from $12500.00 to $300.00 and that plaintiff will give a good and sufficient satisfaction of judgment upon the payment to him of $300.00 together with costs, otherwise and in the event the plaintiff does not exercise the option hereby extended to him the motion for a new

trial is hereby granted, and in this regard the court specifies said motion for a new trial has been granted upon the grounds of insufficiency of the evidence.

"2. That in action Number 10240 (the assault action) the motion for a new trial is denied."

On December 26, 1946, the court made and entered its order unconditionally granting the motion for a new trial in the slander action as follows:

"Order Granting Motion for New Trial

"The motion of Basalt Rock Company, Inc., a corporation, and A. G. Streblow, defendants in the above entitled action, for an order vacating and setting aside the verdict rendered in the above entitled action and granting a new trial of said cause having been heard and duly submitted, and good cause appearing therefor, It is ordered that said motion be and the same is hereby granted upon all the grounds set forth in the notice of intention to move for new trial, served and filed in the above entitled court and cause, and specifically upon the ground of the insufficiency of the evidence to sustain the verdict, and said verdict is hereby set aside and a new trial granted of said action."

On the same day, December 26, 1946, the court specified the grounds on which the motion for a new trial was granted as follows:

"Specification of Grounds on Which Motion for New Trial Has Been Granted

"The Court having heretofore made and entered an order setting aside the verdict rendered in the above entitled action and granting a new trial of said cause, now specifies the following grounds upon which the new trial was granted, said grounds being as follows:

"1. Excessive damages, appearing to have been given under the influence of passion or prejudice;

"2. Insufficiency of the evidence to justify the verdict;

"3. That the verdict is against law;

"4. Errors in law, occurring at the trial and excepted to by the defendants making the application."

[1, 2] The trial court having regularly made and entered its order of December 20, granting a new trial on the conditions therein set forth, its power to thereafter correct, amend or vacate that order was ended, except as provided by statute, i. e., if inadvertently entered it could have been set aside by a proper showing, or if as entered, it was not the order as made, the Minutes could have been corrected so as to make them speak the truth, "but, subject to these exceptions, [such] order is reviewable only on appeal." Holtum v. Greif, 144 Cal. 521, 526, 78 P. 11, 12. It necessarily follows from the rule enunciated in the cited case that the second, or unconditional order of December 26th, as entered by the trial court herein, was void and of no effect.

[3] The power of a court to grant or deny a motion for a new trial conditioned upon the performance of certain specified acts cannot be questioned. Holtum v. Greif, supra; Gloria v. A Colonia Portuguesa, 128 Cal.App. 640, 18 P.2d 87.

It is to be noted that although the memorandum opinion of the trial court stated that the plaintiff should be given until December 24, within which to accept the $300 or a new trial would be granted, the order as entered failed to include the sixty day provision as mentioned in the memorandum opinion.

[4] A similar situation was presented in Holtum v. Greif, supra. There also the trial court originally entered a conditional order and upon refusal of the moving party to accept the terms thereof the court by a second order in which it attempted to vacate and annul the previous order, unconditionally granted the motion. On appeal it was held that the condition contained in the first order was an essential part thereof, that when the power of a court to set aside the order for a new trial ceases, likewise "its power to eliminate one of the substantial terms of the order must, for the same reasons, be held to have ended", and that an order once regularly entered can be set aside only in the method prescribed by statute. It necessarily follows that by reason of the appeal herein the original conditional order of the trial

court has not been converted into an unconditional order granting a new trial by failure of plaintiff to accept the conditions thereof, and therefore by reason of our conclusion herein said conditional order of December 20 is to be construed as requiring performance of the conditions on demand. Holtum v. Greif, supra, 144 Cal. at page 526, 78 P. at page 13.

[5] The only issue remaining for determination relates to the validity of the order granting a new trial upon the insufficiency of the evidence. The rule is well established that such an order will not be disturbed on appeal in the absence of a clear showing of an abuse of discretion and only where it can be said "as a matter of law that there is no substantial evidence to support a contrary judgment." Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 163 P.2d 689, 690. See also 20 Cal. Jur. 106 et seq.

[6, 7] An examination of the record before us discloses that the evidence on the question of the truth or falsity of the defamatory remarks, if such they were, is in decided conflict, and upon this ground alone the jury could well have found in favor of the defendants. Likewise the question of damages: These and other matters unnecessary in this appeal, appear to have been carefully considered by the trial court as evidenced by the complete discussion of the entire transcript appearing in its memorandum opinion. Hence under the facts and circumstances herein presented it cannot be said as a matter of law that there is no substantial evidence to support a contrary judgment. Furthermore under such conditions it cannot be said that there was any abuse of the discretion of the trial court in granting defendants' motion for a new trial upon the conditions contained in its order of December 20.

The original order of December 20, 1946, conditionally granting the new trial is affirmed, and the unconditional order of December 26, 1946, is annulled. Each party to stand his own costs.

ADAMS, B. J., and THOMPSON, J., concur.

Hearing denied; EDMONDS, TRAYNOR, and SCHAUER, JJ., dissenting.

84 Cal.App.2d 271

## JACOBY v. JOHNSON.

Civ. 16198.

District Court of Appeal, Second District, Division 2, California.

March 8, 1948.

**1. Appeal and error ⇐1008(1)**

In action for injuries sustained by pedestrian who, while crossing street in middle of block, was struck by automobile, whether motorist was negligent, pedestrian was contributorily negligent, and whether contributory negligence, if any, was proximate cause of injuries, were questions for trier of facts.

**2. Automobiles ⇐217(3)**

Mere crossing of street by pedestrian in middle of block is not contributory negligence precluding recovery of damages if injured by automobile.

**3. Appeal and error ⇐996**

Where actions of injured party are such that two reasonable and impartial persons would reach opposite conclusions as to whether he had exercised ordinary care, contributory negligence is question for trier of facts.

**4. Automobiles ⇐160(4)**

Motorist's duty to exercise due care for safety of pedestrian crossing street at other than marked crosswalk or intersection does not arise only when motorist sees pedestrian, but is constant duty which is breached if under circumstances motorist fails to see what an ordinarily prudent person exercising due care would have seen. Vehicle Code, § 562.

**5. Appeal and error ⇐1008(1)**

Whether a pedestrian crossing street at other than regular crosswalk exercised proper degree of care is question for trier of facts, unless pedestrian was so careless that it can be said that he was negligent as a matter of law. Vehicle Code, § 562.

**6. Automobiles ⇐206**

Although pedestrian in crossing roadway at point other than crosswalk must yield right of way to oncoming vehicle, pedestrian nevertheless may recover damages if

injured while vehicle is being operated at excessive speed. Vehicle Code, § 562.

**7. Automobiles ⇐244(35)**

In action for injuries sustained by pedestrian who, while crossing street in middle of block, was struck by automobile, evidence that motorist was driving at excessive speed sustained recovery, particularly in view of evidence that motorist knew of custom of market patrons to cross street at point of accident. Vehicle Code, § 562.

---

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Edward C. Jacoby against Pete Johnson for personal injuries. Judgment for plaintiff, and defendant appeals.

Affirmed.

Ernest P. Morgan, of Los Angeles, for appellant.

W. N. Deatherage, of Long Beach, for respondent.

WILSON, Justice.

This action for personal injuries was tried by the court without a jury. Findings and judgment were entered in favor of plaintiff. Defendant appeals.

Appellant contends that the evidence is insufficient to sustain the findings (1) that his negligence was the direct and proximate cause of respondent's injuries, and (2) that respondent was not guilty of contributory negligence.

Clark Avenue is a public street extending northerly and southerly in the Mayfair District of Bellflower. It is 60 feet in width, with a double white line in the center, on each side of which, ten feet from the center, is a single white line marking traffic lanes. There is a space of 20 feet between each single white line and the adjacent curb. The accident occurred between Ashworth Street and Rose Avenue, both of which extend easterly and westerly crossing Clark Avenue.

On the afternon of December 15, 1945,, respondent parked his car near the middle of the block on the east side of Clark Avenue next to the curb and opposite the entrance to a market which was on the west side of the street. He went to the market, made a purchase, and between 5:30 and 5:45 o'clock P. M., walked to the curb on the west side of Clark Avenue. He looked north and south for traffic and saw one car coming from the north. He waited until it had passed, then walked easterly to the double white line. There being no traffic coming from the north, he looked toward the south all the time while he was traversing the westerly half of the street. When he reached the center line he stopped. He saw two cars coming from the south in the lane next to the double white line, the first being a Model T. Ford coupe which was traveling slowly. The driver stopped and motioned respondent to cross in front of the Ford. Respondent also observed a second car (appellant's) in the traffic lane behind the Ford coupe at a distance of about 350 or 375 feet. Upon receiving the signal from the driver of the Ford respondent proceeded easterly and when he had taken about three steps beyond the Ford the second car swerved from the inside lane in which it had been traveling and passed to the right of the Ford. Respondent was struck at a point approximately 10 feet west of the east curb line and was propelled approximately 15 feet. Two witnesses who had crossed the street immediately in front of respondent testified that appellant's car was traveling between 35 and 40 miles per hour (this was a 25 mile zone) and that appellant's car skidded at least 35 feet, as shown by skid marks on the pavement. Appellant testified that he was traveling at a rate of about 25 miles per hour. This conflict, as well as all other conflicts in the evidence, has been resolved in favor of respondent by the findings of the trial court.

Appellant testified that he was traveling on the inside lane and "when I saw this man over on the line I swerved out but then I kept on going again." There were no marked crosswalks at the intersection of either of the streets intersecting Clark Avenue north and south of the point of the accident, and there was no marked crosswalk in the middle of the block. It was a custom well known to appellant that patrons of the market crossed the street at the point of the accident in going to and

from the market on the westerly side of the street. Appellant testified that he passed this point every day and that he had "seen probably a thousand people walk across there * * *. They always used that crossway there by the entrance."

[1-3] Whether or not (1) appellant was negligent, (2) respondent was contributorily negligent, and (3) respondent's negligence, if any, was a proximate cause of his injuries, were questions of fact to be determined by the trier of facts. Fuentes v. Ling, 21 Cal.2d 59, 62, 130 P.2d 121; Tomey v. Dyson, 76 Cal.App.2d 212, 220, 172 P.2d 739. The mere crossing of a street by a pedestrian in the middle of the block does not constitute contributory negligence that would preclude him from recovering damages if injured by an automobile. Fuentes and Tomey cases, supra. Whether or not in the circumstances existing here respondent was contributorily negligent is a question of fact to be determined by the trial court. Gett v. Pacific G. & E. Co., 192 Cal. 621, 627, 221 P. 376. If the actions of the injured party are such that two reasonable and impartial persons would reach opposite conclusions as to whether he had exercised ordinary care, the question of contributory negligence must be left to the trier of facts. Wahlgren v. Market Street Ry. Co., 132 Cal. 656, 663, 62 P. 308, 64 p. 993; Kapitan v. Smith, 70 Cal.App.2d 454, 456, 161 P.2d 270; Kienlen v. Holt, 106 Cal.App. 135, 140, 288 P. 866; Griffiths v. Crawford, 10 Cal.App. 2d 543, 546, 52 P.2d 548.

[4-6] Subdivision (a) of section 562 of the Vehicle Code requires that every pedestrian crossing a roadway at a point other than that marked with a crosswalk or within an unmarked crosswalk at an intersection, shall yield the right of way to vehicles. This provision is qualified, however, by subdivision (b) of the same section, to the effect that the requirement of subdivision (a) "shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway." In Quinn v. Rosenfeld, 15 Cal.2d 486, 491, 102 P.2d 317, the court said that the duty of a driver to exercise due care does not arise only when he sees the pedestrian but is a constant duty which would be breached if under the circumstances he failed to see what an ordinarily prudent person exercising due care would have seen, and that under those circumstances it could not be said that before proceeding across the street the plaintiff should have waited for the vehicle to pass. In Bays v. Clugston, 71 Cal.App.2d 55, 59, 161 P.2d 953, it is said that even if the plaintiff, a pedestrian, failed to yield the right of way to a vehicle the driver of the vehicle was not relieved from the duty to exercise due care for the plaintiff's safety. The question as to whether a pedestrian crossing a street at other than a regular crosswalk exercised the proper degree of care is one for the trier of facts, unless he was so careless that it can be said that he was negligent as a matter of law. Brannock v. Bromley, 30 Cal.App.2d 516, 524, 86 P.2d 1062. Although a pedestrian in crossing a roadway at a point other than a crosswalk is required to yield the right of way to an oncoming vehicle, he nevertheless may recover damages if injured while the vehicle is being operated at an excessive speed. Genola v. Barnett, 14 Cal.2d 217, 223, 93 P.2d 109. The court found in the instant case that the location where the accident occurred is a restricted 25-mile zone and that appellant was driving at an excessive rate of speed.

[7] The duty imposed upon appellant by section 562(b) of the Vehicle Code, to exercise due care for the safety of pedestrians upon the highway, is emphasized by his evidence, to which we have referred, that he well knew that it was the custom of patrons of the market to cross the street near the middle of the block where the accident took place.

The findings of the court that appellant was negligent and that respondent was not cannot be disturbed by a reviewing court.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

84 Cal.App.2d 141

## LOEB v. LOEB.

Civ. 15329.

District Court of Appeal, Second District, Division 3, California.

March 2, 1948.

Rehearing Denied March 23, 1948.

Hearing Denied April 29, 1948.

1. Divorce ⇐214(1)

While better practice is to grant temporary support pendente lite only after application, notice and hearing, trial court had jurisdiction to make such an award on its own motion on former wife's petition for allowance of suit money in her action for division of community property and permanent support. Civ.Code, § 137.

2. Divorce ⇐209, 211, 221

Court's discretion in awarding temporary support is governed by the same considerations as those controlling its discretion in awarding suit money and the proper basis for both awards is the necessity therefor. Civ.Code, § 137.

3. Divorce ⇐211, 214(4), 223, 226

Pendente lite allowances of support and suit money are not a matter of absolute right and may be granted in sound discretion of trial court, but statute relating thereto does not empower court to make such award except upon a finding of necessity. Civ.Code, § 137.

4. Divorce ⇐200

The powers of court in matters of alimony pendente lite and support are derived from the statutes relating thereto and are not within the court's general equity powers. Civ.Code, §§ 137, 139.

5. Divorce ⇐209, 221

The purposes of pendente lite allowances to wife are to enable her to live in her accustomed manner pending the disposition of action and to provide her with whatever is needed by her to litigate properly her side of the controversy. Civ. Code, § 137.

6. Divorce ⇐209, 221

Generally, the propriety of pendente lite allowances to a wife turns primarily upon the sufficiency of her showing of need for them, and if she possesses independent means sufficient to enable her to live in her accustomed manner and to litigate properly her side of controversy, the allowances should not be granted, but she need not first impair the capital of her separate estate. Civ.Code, § 137.

7. Divorce ⇐231

The object of permanent allowances to wife for support is to make an equitable apportionment between the parties, and award of permanent support to wife is in the nature of compensation for the wrong done her and in that sense is a "penalty" imposed upon the husband, the statutory measure of the punitive damages so awarded being found in the circumstances of the parties respectively. Civ.Code, § 139.

See Words and Phrases, Permanent Edition, for all other definitions of "Penalty".

8. Divorce ⇐209, 221

Pendente lite allowances under the statute relating to support of wife on divorce for husband's offense are not made on the same basis as permanent allowances and may be made under that statute only on a showing of necessity, which is the same basis as allowances are made under the statute relating to alimony pendente lite. Civ.Code, §§ 137, 139.

9. Divorce ⇐214(3), 226

Evidence of former wife's income and large capital resources negatived existence of necessity for award of temporary support and suit money, and award under such circumstances was abuse of discretion. Civ.Code, §§ 137, 139.

10. Divorce ⇐211, 223

Although grant or denial of pendente lite allowances of temporary alimony and suit money rests in trial court's discretion, that discretion, should not be exercised arbitrarily. Civ.Code, §§ 137, 139.

11. Divorce ⇐214(3), 226

Wife's necessity for temporary support and suit money may be proved only by showing that her need for proper support and expenses of litigation exceed her available resources, which requires that trial court be informed in detail not only

as to her needs but also as to her resources. Civ.Code, §§ 137, 139.

**12. Divorce ⇐214(3), 226**

Evidence was insufficient to establish that award of temporary support and suit money in favor of wife was necessary in order to avoid impairment of the capital of wife's separate estate. Civ.Code, §§ 137, 139.

**13. Divorce ⇐212, 224**

Wife is not entitled to temporary support and suit money merely because husband is wealthier than she. Civ.Code, §§ 137, 139.

**14. Divorce ⇐209, 221**

The statute authorizing court to withhold allowances to prevailing party applies to award of temporary alimony in situations meeting conditions of the statute but does not apply in any event to an award of suit money. Civ.Code, § 142.

WOOD, J., dissenting.

---

Appeal from Superior Court, Los Angeles County; Benjamin C. Jones, Judge.

Action by Bessie Brenner Loeb against Edwin J. Loeb for division of community property and for permanent support. From an order awarding plaintiff $500 per month temporary alimony and $1,500 suit money on account, defendant appeals.

Reversed.

Prior opinion, 185 P.2d 42.

Lewinson & Armstrong and Herman F. Selvin, all of Los Angeles, for appellant.

Guy T. Graves, and Sheppard, Mullin, Richter & Balthis, all of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

This is an appeal by Edwin J. Loeb from an order awarding his former wife, Bessie Brenner Loeb, $500 per month temporary alimony and $1,500 suit money (including counsel fees) on account, in her action against him for a division of their community property and for permanent support. Jurisdiction over these two matters was expressly reserved in both the interlocutory and final decrees of divorce. The latter decree was entered on March 1, 1937.

Appellant seeks a reversal of the order awarding respondent pendente lite allowances for her support and for suit money on three grounds: (1) The award of temporary support went beyond the issues presented and was therefore in excess of the court's power; (2) the showing of necessity required for both awards was not made; (3) section 142 of the Civil Code prohibits the awards. Before discussing the validity of appellant's several contentions it may be noted that the reasonableness in amount of the awards is not questioned and that appellant's ability to pay them is likewise conceded.

Appellant's first contention is not sustainable. Section 137 of the Civil Code, which is the only code section specifically authorizing pendente lite allowances for support and suit money, does so in the following terms: "When an action for divorce is pending, the court may, in its discretion, require the husband or wife, as the case may be, to pay as alimony any money necessary to enable the wife, or husband, to support herself and her children, or to support himself and his children, as the case may be, or to prosecute or defend the action." The two children of the Loebs are adults and their support is not involved.

In her petition initiating these proceedings respondent prayed for, among other things, an allowance of suit money, and for "such other and further relief" as the court might deem equitable and proper. The matter was thereafter heard upon an order for appellant to show cause why he should not be required to pay reasonable suit money. Throughout the hearing, counsel for both parties and the trial judge indicated on various occasions that the sole issue being tried was suit money. Nevertheless, the trial judge included in his order, sua sponte, an award of temporary support. Appellant challenges this award as being beyond the power of the court because no application therefor was made and because appellant had no notice at any time that the issue of temporary support was involved.

[1, 2] It is to be noted that the applicable portion of section 137, which we have quoted in full, contains no requirement of either application or notice. There is dicta in the decisions of our courts that an award of temporary support may be made ex parte. See Mudd v. Mudd, 98 Cal. 320, 321, 33 P. 114; Arnold v. Arnold, 215 Cal. 613, 614, 12 P.2d 435; Reed v. Reed, 40 Cal.App. 102, 104, 180 P. 43. The meager authority elsewhere on the point at issue is divided. See note, 152 A.L.R. 445, 457. While it undoubtedly is the better practice to grant temporary support only after application, notice, and hearing, we do not think that the trial court here, in departing from that practice, committed reversible error. The considerations governing the court's discretion in awarding temporary support are identical with those controlling its discretion in awarding suit money. (17 Am.Jur. 452; Nelson, Divorce and Annulment (2d Ed. 1945), sec. 12.06.) The language of our statutory authority, section 137, is also identical as to the proper basis for both awards, namely, necessity. It follows that when appellant made his defense against an award of suit money, he thereby made his defense against an award of temporary support. As a consequence, he suffered no substantial prejudice from the court's failure to inform him that the court considered the question of temporary support to be before it as well. We conclude that under the circumstances of this case the trial court possessed the power to make on its own motion an award of temporary support. Cf. Willey v. Willey, 51 Cal.App. 124, 126, 127, 196 P. 101.

[3] A proper evaluation of the merit of appellant's second contention, that a sufficient showing of necessity for pendente lite allowances of support and suit money was not made, calls for a general statement of the law governing such allowances and of the facts relied upon by respondent. These allowances are not a matter of absolute right. They may be granted in the sound discretion of the trial court, but section 137 does not empower the court to award temporary support and suit money except upon a finding of necessity.

[4] Appellant contends that section 137 governs exclusively. Respondent replies that the awards were made under the general equitable powers of the court in accordance with the procedure specified in section 139, as well as section 137, Civil Code. The powers of the court in matters of divorce to which these sections relate are derived therefrom, and are not within the general equity powers. Grannis v. Superior Court, 146 Cal. 245, 255, 79 P. 891, 106 Am.St.Rep. 23.

[5, 6] A discussion of the respective contentions as to the proper construction of these sections calls for an examination of the functions of such awards. The manifest purposes of pendente lite allowances to a wife are to enable her to live in her accustomed manner pending the disposition of the action and to provide her with whatever is needed by her to litigate properly her side of the controversy. Mudd v. Mudd, supra, 98 Cal. 320, 322, 33 P. 114; Busch v. Busch, 99 Cal.App. 198, 202, 278 P. 456; Locke Paddon v. Locke Paddon, 194 Cal. 73, 81, 227 P. 715. If she possesses independent means sufficient for these purposes the allowances should not be granted. Mudd v. Mudd, supra. However, she is not required first to impair the capital of her separate estate. Farrar v. Farrar, 45 Cal.App. 584, 586, 188 P. 289. These principles of California law accord with the law prevailing generally elsewhere. Westphal v. Westphal, 122 Cal.App. 379, 385, 10 P.2d 119; Notes, 15 A.L.R. 781, 35 A.L.R. 1099; 27 C.J.S., Divorce, §§ 205, 208, 222; Keezer, Marriage & Divorce (3d Ed. 1946), secs. 590, 591, 604. Thus, the general rule is that the propriety of pendente lite allowances to a wife turns primarily upon the sufficiency of her showing of need for them.

[7] While not denying that necessity must be established to justify an award under section 137, respondent claims that section 139 authorizes temporary awards to a divorced wife without a showing of necessity. Section 139 provides, in brief, that the court may order permanent support for the wife and children "having regard to the circumstances of the parties respectively," and that the court may from

time to time modify such order. Repondent's argument in regard to section 139 is that as jurisdiction over support was expressly reserved in the final divorce decree these awards constitute a modification of that decree made pursuant to section 139. We may assume, in considering this contention, that the status of the instant litigation does not differ in principle from the more common situation in which the court by final decree makes an award of support and thereby retains jurisdiction under the statute to modify it. Respondent's position is that under the line of authority commencing with Lamborn v. Lamborn, 190 Cal. 794, 214 P. 862, these awards were made under both sections 137 and 139. The Lamborn decision held proper an award of suit money to a former wife to cover the expenses of her opposition to a reduction in her permanent support allowance upon the theory that such an award was either an additional allowance for her support as authorized by section 139, or was made during the pendency of the action as extended by section 137, or was necessary within the meaning of section 137. Like the Lamborn case, this action for permanent support and for division of the community property originates under section 139, and if permanent support is awarded ultimately to respondent, it will be granted in conformity with section 139. But we do not interpret the Lamborn decision, as respondent apparently does, as establishing an identical basis for all awards thereunder, whether they be temporary or permanent in character. The awards here, which by their own terms are expressly pendente lite, are merely temporary in character.

Pendente lite allowances and permanent allowances differ fundamentally in function. As already stated, the purposes of pendente lite allowances to a wife or former wife are to maintain her in her accustomed manner of living pending the outcome of the action and to enable her to present her side of the controversy fully. On the other hand the object of permanent allowances is to make an equitable apportionment between the parties. This is demonstrated both by the content of section 139 and the settled interpretation given that section. Our courts have construed an award of permanent support under this section to a wife to be in the nature of compensation for the wrong done her and, in this sense, a penalty imposed upon the husband. The statutory measure of the punitive damages so awarded is to be found in "the circumstances of the parties respectively." Scheibe v. Scheibe, 57 Cal. App.2d 336, 342, 134 P.2d 835, 836.

[8] To conclude with respondent that this statutory measure for permanent allowances under section 139 applies as well to pendente lite allowances thereunder is both unsound and unwarranted. The only statute which expressly relates to pendente lite allowances is section 137. It specifies necessity as the requirement for such allowances, and in so doing it is in harmony with the laws relating to temporary support and suit money prevailing generally throughout the United States. We find no statutory authority for placing temporary allowances that might be made under section 139 on the same basis as permanent allowances. It is clear to us that the legislature has been careful not to do this, and has recognized the difference in fundamental character of the two classes of allowances. To disregard what we recognize as a clearly expressed legislative policy would invade the field of legislation. We conclude that pendente lite allowances made under section 139 are granted on precisely the same basis as those made under section 137, that is to say, necessity. This conclusion is substantiated by an examination of the Lamborn line of authority. An inspection of the record in the Lamborn case discloses that the award at issue was made on an uncontradicted showing of necessity. Our Supreme Court in its most recent enunciation of the Lamborn rule has indicated a similar understanding of its effect. Leupe v. Leupe, 21 Cal.2d 145, 152, 153, 130 P.2d 697.

[9] We turn now to a consideration of the evidence relied upon by respondent as establishing the propriety of these awards. Respondent has no dependents. From her testimony and her income tax returns introduced in evidence, the following facts appear. During the six months immediate-

ly preceding the hearing, respondent's living expenses, as itemized by her, averaged $460 a month, aside from income tax payments. This included a generous allowance of $100 a month for gifts, traveling, and entertainment. Respondent's estimated federal income tax amounted to an additional $200 a month, and her state income tax on the basis of her 1944 tax did not run to more than $5 a month. This would give respondent total living expenses at the time of the hearing of $665 a month. However, beginning in 1945, her federal income taxes were paid by her property managers instead of by herself. Her income at this time amounted to about $795 a month. She earned $16 a month as a Christian Science practitioner and received, roughly, $98 a month in dividends and interest as shown by her 1944 federal income tax return. On the basis of the income shown on that return from her family holdings during the period following her mother's death in May, 1944, her income from that source alone amounted to approximately $680 a month. Thus, according to respondent's own evidence, her monthly income exceeded her maximum monthly expenses by almost $130. In view of the existence of this margin of income over outgo, respondent plainly had no need of temporary support. It is by no means clear that respondent made a disclosure of her entire income. Prior to her mother's death in May, 1944, respondent's family holdings were held in trust. Under the terms of the trust, respondent owned one-eighth of the corpus and received one-half of the net income accruing from such interest, the other half being added to that interest. According to her 1944 federal income tax return, she received in trust income in the neighborhood of $300 a month, but she understood that she could have drawn an additional $200 a month and, in fact, did draw $5,000 of this additional income for the purchase of war bonds. Upon her mother's death in May, 1944, the trust terminated and respondent's interest in the corpus increased from one-eighth to one-fourth. She also became entitled to all of the income from her interest instead of one-half thereof and thus the income available to her from her family holdings more than quadrupled. However, her withdrawals did not increase proportionately, but only from $300 to $680 per month, shown by her return as income for the two periods. Although this return should have reflected the entire amount of income which accrued to her interest in her family holdings, it appears from the facts just stated that it evidently was not made on that basis. The discrepancy between the amount reported, as increased income following her mother's death, and the greater amount respondent was entitled to receive, namely, over four times her former income, either as testified to by her or as shown on her return, would indicate that the return showed only the amount of her withdrawals of such income during 1944.

However, our decision as to respondent's right to receive temporary support and suit money is not based upon any uncertainty in her testimony but upon the amount of income admitted by her, and her large capital resources. Her holdings, which were valuable, and included more than $17,000 in liquid assets, independently of any question of adequacy of her admitted income to provide conveniently for her temporary support and suit money, required, as a matter of law, denial of awards for support or suit money.

Although respondent also did not disclose the amount or complete composition of her separate estate, she admitted that her interest in her family holdings was worth about $200,000. She failed to reveal the value of other property, consisting of her interest in her mother's estate, the appraised value of which is in excess of $115,000. Respondent did divulge that she possessed over $15,000 in liquid assets, consisting of war bonds of a maturity value of $20,000 and a savings bank account of $2,200 which had been reduced from a 1941 figure of $9,000, largely by war bond purchases.

[10, 11] As previously stated, the grant or denial of pendente lite allowances of temporary alimony and suit money rests in the sound discretion of the trial court. However, that discretion should not be exercised arbitrarily. Sweeley v. Sweeley, 28 Cal.2d 389, 394, 170 P.2d 469; Turner v.

Turner, 80 Cal. 141, 144, 22 P. 72; Smith v. Smith, 147 Cal. 143, 145, 81 P. 411. The wife seeking these awards must establish her necessity for them. Such necessity may be proved only by showing that her need for proper support and the expenses of the litigation exceed her available resources. This means that the trial judge must be informed in detail not only as to her needs, Tremper v. Tremper, 39 Cal.App. 62, 66, 177 P. 868, but also as to her resources. Cf. Kenney v. Kenney, 220 Cal. 134, 138, 30 P.2d 398; Busch v. Busch, supra, 99 Cal.App. 198, 201, 278 P. 456. Here the trial court was uninformed of respondent's total available resources. Manifestly, the court could not exercise a judicial discretion without knowledge of the essential facts.

[12, 13] The argument that these awards are required in order to avoid impairment of the capital of respondent's separate estate is unsupported by the evidence. A review of the California decisions enunciating the rule of no impairment will illustrate the inapplicability of the rule to the factual situation of the instant case. In Kowalsky v. Kowalsky, 145 Cal. 394, 396, 78 P. 877, the wife's entire separate estate consisted of only $700 in corporate stocks, and she was without other means of support. In Farrar v. Farrar, supra, 45 Cal.App. 584, 586, 188 P. 289, the wife's separate income was $2.50 a month. In Whiting v. Whiting, 62 Cal. App. 157, 160, 216 P. 92, the wife owned $4,300 in non-income-producing property and her entire other income consisted of her weekly salary of $16.50. In Busch v. Busch, supra, 99 Cal.App. 198, 200, 278 P. 456, the wife's income from her property was shown to be about $8 a year. In Westphal v. Westphal, supra, 122 Cal.App. 379, 386, 10 P.2d 119, the wife's annual income from her separate property of oil stock, worth about $15,000, did not exceed $500. The contrast between these factual situations and the one we have here is extreme. Respondent, who has no dependents, possesses a separate estate of a value considerably in excess of $200,000 and a separate income substantially in excess of $9,000 a year. Her maximum annual living expenses amount to less than $8,000 a year. In addition she possessed at the time of the hearing over $15,000 in liquid resources, which were accumulated income. Plainly, she was in no need of temporary support, and the expenses of litigation were well within her available resources. Cf. Wilder v. Wilder, 214 Cal. 783, 785, 7 P.2d 1032; Baldwin v. Baldwin, 28 Cal.2d 406, 418, 170 P.2d 670. She was in a position to hire and compensate competent legal counsel and otherwise to finance this litigation. In this connection it is interesting to note that she never asked for temporary support and that her original petition, although praying for suit money, contained no allegation of her financial necessity therefor. To borrow somewhat the thought of the court in Henderson v. Henderson, 104 Colo. 325, 90 P.2d 968, 971, the trial court apparently proceeded on the theory that since appellant was wealthier than respondent, he should support her during her suit and finance it. That is not the law.

As previously stated, the power granted the court by section 137 is in line with the prevailing authority existing in other jurisdictions, in that it is intended to be exercised only in cases of necessity. After diligent search we have found no case in the United States in which an order for temporary support or suit money has been made in favor of a wife whose financial resources even remotely approached those of the respondent. The order in question presents no appeal to our sense of equity and justice, which tempts us to place a construction upon section 137 which would minimize its strict limitations and be out of harmony with principles which are well settled throughout the states. However, the views we express upon the matters before us should not be understood as indicating what would be a proper judgment in the instant case upon the ultimate issues of permanent support and division of the community property.

[14] Appellant's third and final contention is that section 142 of the Civil Code compels the reversal of these awards. The last sentence of section 142, as added in 1943, reads as follows: "Where there are no children, and either party has a separate estate sufficient for his or her proper sup-

port, no allowance shall be made from the separate estate of the other party." Appellant contends that this mandatory provision applies, since the children of the parties are adults, respondent has a separate estate sufficient for her support, and there is no community property by reason of the insolvency of the community of appellant and respondent both on March 1, 1937, the date of the final decree of their divorce, and as of the time of the hearing. Respondent disputes the factual basis of this argument and also appellant's legal conclusions therefrom. Respondent also contends that appellant, at the hearing, waived the protection of section 142 and may not now claim it. From a study of the record we conclude that the waiver was intended to relate only to the matter of permanent support and it therefore does not enter into our decision.

Apparently, section 142 does apply to awards of temporary alimony in situations meeting the conditions of the provision, but it would not seem to apply in any event to an award of suit money. Baldwin v. Baldwin, supra, 28 Cal.2d 406, 413, 416, 170 P.2d 670. We find it unnecessary to pass upon the merit of this final contention of appellant as to the applicability of the section to the facts taken as established by appellant or to those urged by respondent. Our previously-stated conclusion that the order constituted an abuse of the discretion entrusted to the trial court requires a reversal.

The order awarding respondent pendente lite allowances of temporary alimony and suit money is reversed.

VALLEE, Justice pro tem.

I concur. I agree with all that is said by Mr. Justice Shinn. The complaint in this action alleged extreme cruelty and, by implication, the existence of community property; and prayed (1) for a divorce, and (2) "that the court reserve jurisdiction to determine the rights of the parties as to community property and her rights to support and maintenance and make such order, judgment and decree with reference thereto as may be meet and proper in the premises and for all other, further and proper relief." The answer denied the allegations of cruelty and prayed that the plaintiff take nothing. Pursuant to the prayer of the complaint and a stipulation of the parties, the court, in the interlocutory and final decrees, reserved jurisdiction to determine the issues regarding community property of the parties and the division thereof and relating to support and maintenance between them. The decrees provided that a hearing as to such matters could be brought on by motion of either party at any time upon previous notice to the other party. The issues as to which jurisdiction was reserved have never been tried or determined. The action is still pending as to such issues. Ten years after the entry of the interlocutory decree plaintiff filed her "petition for award of alimony, division of community property, allowance of expenses of litigation, attorneys' fees and other relief." I construe this petition as a notice of motion pursuant to the decrees. Upon the filing of this petition the court issued an order directing defendant to show cause why he should not be required to pay plaintiff "* * * reasonable sums for attorneys' fees and court costs, during the pendency of this action * * *" It is from the order made upon the hearing of this order to show cause that this appeal was taken. It is clear to me that the order was one pendente lite for alimony, suit money and attorneys' fees. It was made pending the continuance of the action. It was to remain in force only until the determination of the issues as to which jurisdiction was reserved. In his memorandum decision, the judge who heard the order to show cause said: "This is an application by the plaintiff for an allowance from the defendant of moneys on account of attorneys' fees, costs, and for her support *pending the action.*" (Italics added.) The statement is partly in error. Alimony pendente lite was not asked for by plaintiff. Her counsel at the hearing repeatedly stated that she was only asking for suit money and attorneys' fees. In his memorandum of points and authorities, submitted to the trial judge after the conclusion of the hearing, all counsel for plaintiff asked was that "the defendant should be ordered to pay to the plaintiff at this time the sum of $10,000 on account of fees of her attorneys, the sum

of $3,500 on account of expenses of accountants and investigators, and $300 on account of costs of depositions and other expenses in these proceedings." The judge hearing the matter, after submission, on his own motion, awarded the plaintiff "$500.00 per month toward her support *pending hearing on the matter of her support.*" (Italics added.) The award being pendente lite, section 137 of the Civil Code applies and the court may only award alimony, suit money and attorneys' fees upon a showing of necessity. The order contemplated by section 139 of the Civil Code is one for permanent support,—one made after a full and complete trial so that the court is in a position to make the award "having regard to the circumstances of the parties *respectively.*" (Italics added.)

There is nothing in either Scheibe v. Scheibe, 57 Cal.App.2d 336, 134 P.2d 835, Lamborn v. Lamborn, 190 Cal. 794, 214 P. 862, or McClure v. McClure, 4 Cal.2d 356, 49 P.2d 584, which lends support to the award made here. The Scheibe case was an appeal from an interlocutory decree granting a divorce, dividing property and awarding alimony to the innocent wife. Obviously the court had power, in the absence of a showing of necessity, to make the award of alimony under Civil Code section 139. The Lamborn case involved only a question of jurisdiction. The former wife had been awarded alimony by a final decree of divorce. The former husband sought modification, which was granted. The former wife appealed from the order of modification and moved the court for attorneys' fees and costs on the appeal thus taken. The former husband appealed from the order awarding attorneys' fees and costs on the former wife's appeal. The only contention made by the husband on his appeal was that the trial court had no jurisdiction to make an award of attorneys' fees and costs on the appeal of the former wife. The Supreme Court held that the trial court had jurisdiction either under Civil Code section 139 or under the last sentence of section 137 which authorizes the enforcement of a final judgment providing for support. The McClure case merely held that where a final decree of divorce awards a wife support, a later order releasing the husband permanently from liability for alimony may not thereafter be modified by an award of future support.

I do not think that counsel for defendant led the trial judge to believe that defendant conceded that the matter of deciding on the merits whether an award for support should be made was pending before the court. At the outset the judge expressed doubt about the validity of the reservation of jurisdiction in the decrees and about his power to proceed at all. Counsel for appellant questioned the sufficiency of the original "petition" because there was no allegation of necessity. Respondent amended her petition to allege necessity. As I read the record, it was in connection with these matters and the jurisdiction of the court on the final hearing of the reserved issues that the statements referred to in the dissenting opinion were made. Defendant had a demurrer to the "petition" pending at the time. He was pressing his demurrer, and it was ruled upon with the ruling on the order to show cause. Even if it were material here as to what the judge thought was involved, and I do not think it is, there is no room for speculation, in my opinion, on that score. The judge stated what he understood the issue to be when, long after the statements were made and at the conclusion of the hearing, he said: "* * * the only matter before the Court now is counsel fees and costs on this preliminary motion, and the main issues that you have presented here have not yet been set for hearing." After submission, the judge apparently conceived the idea of making an allowance of alimony pendente lite and he did so. In any event, the matter is not relevant as we all agree that the judge had power to make an award pendente lite. We disagree on the question of whether necessity must be shown.

I do not find anything in the stipulation or in the provisions of the decrees, with respect to the reservation of jurisdiction, which can be construed as an implied agreement on the part of the defendant for action (the making of the allowances without a showing of necessity) which is not authorized by statute. The defendant cannot be precluded from asserting the limitations on

the court's jurisdiction except on the basis of estoppel or waiver found in the stipulation. There is no basis for an estoppel in the stipulation. All that the stipulation as carried into the decrees means, is that the court may exercise its jurisdiction in the future, subject to whatever limitations the law prescribes and not in any other way. The stipulation was not one as to the manner in which the court's jurisdiction should be exercised. There was no waiver. The defendant at all times contended that proof of necessity was a prerequisite to any order. He went so far as to force an amendment of the "petition" to allege necessity.

In my opinion, the award of alimony pendente lite, suit money and attorneys' fees to a wealthy woman upon a perfunctory hearing is clearly beyond the statutory or equity powers of the court. An award not based upon a showing of necessity, without a full and complete trial so that the court may make an award "having regard to the circumstances of the parties respectively," is not only an abuse of discretion but a gross miscarriage of justice.

WOOD, Justice.

I dissent. Plaintiff and defendant stipulated in writing on June 30, 1936, that the court might retain jurisdiction to determine all matters regarding community property and the division thereof, and "*all matters* relating to support and maintenance as between them, and that the hearing of any such matters may be brought on by motion of either party at any time upon previous written notice to the other party, as provided by law"; and that such stipulation might be incorporated in the final decree of divorce. (Italics added.) The final decree, entered February 26, 1937, included that stipulation. On June 30, 1945, plaintiff filed a "Petition for Award of Alimony, Division of Community property, Allowance of Expenses of Litigation, Attorneys' fees, and Other Relief." On that same day the court made an order to show cause why the defendant should not be required to pay plaintiff "reasonable sums for attorneys' fees and court costs, during the pendency of this action." The proceeding before the trial court, which is the subject of review on this appeal, was upon that order to show cause.

I agree with the majority opinion wherein it is indicated that a trial court possesses power, under statutory provision, to make an award for temporary support without an application therefor. In my opinion, the trial court herein had power, by virtue of said stipulation and the reservation of jurisdiction in the final decree, to make an award for support of plaintiff, whether the award be regarded as temporary support or as compensation for the wrong done to plaintiff. Further, in my opinion, the statements made before the court at the time of the hearing on July 12, 1945, by Mr. Lewinson, the attorney for defendant, were such that the trial judge was led to believe that defendant conceded that the matter of deciding on the merits whether an award for support should be made was properly before the court. The attorney for defendant stated at the time of said hearing (near the beginning—within the first 65 pages of the 404-page transcript): "My client, who is a lawyer, has instructed me to concede that the reservation in the final decree, having been by stipulation, gives the Court jurisdiction to award alimony *in this proceeding*, and gives the Court the same jurisdiction that it would have in an independent proceeding for an accounting of the former community property; also that, if he is enabled to confer jurisdiction by waiving the provisions of Section 472 [142], Code of Civil Procedure [Civil Code], to which I shall refer presently, he desires to do so *as to alimony*, but not as to counsel fees or suit money; also to say that, if jurisdiction to award alimony does not exist, he will continue to pay reasonable support money as he has in the past, on being advised of plaintiff's separate income and estate." (Italics added.) He also said "* * * on the basis of Section 142 [Civil Code alone, the Court is not empowered to allow alimony or support out of the separate estate of the defendant, but as I have said, if the defendant is able to confer jurisdiction by consent *to make an award of alimony, he is willing to do so, and does do so,* but he does not make such, or give such consent as to the award of counsel fees or

expense money or suit money or accounting fees, cost of taking depositions and things usually classified under 'suit money.'" (Italics added.) He also said: "I think I made it clear that while we have conceded, if we are in position to confer jurisdiction that way, the right of the court to allow alimony and support out of the defendant's separate estate, but not attorney's fees, or suit money or expense money. That is with reference to the contention under Section 142 of the Civil Code." He also said: "That *this proceeding* is utterly unnecessary, because at all stages of the dealings between the parties prior to the bringing of *this proceeding,* the defendant conceded, in writing, his liability to pay some sum to the plaintiff * * *." (Italics added.) In my opinion, those statements were calculated to indicate to the trial judge that the defendant, in view of his stipulation as to the reservation of jurisdiction, did not intend to rely on any technical construction of the stipulation or statutory provisions, but on the contrary wanted a broad and liberal construction given thereto to the end that plaintiff should not be prejudiced by reason of the fact that she had entered into the stipulation and as a result thereof had closed the divorce part of the action before the community property and support questions were settled. As indicative of such intention, the attorney for defendant said: "I do not want to handle this in a technical manner." He also said: "I am making *the broadest concession,* a far greater concession than I think is justified by the law, but I am under the instructions of my client who is a lawyer, that *the matter of alimony is kept open indefinitely, just as though alimony had been awarded in the decree;* but as to community property it is not kept open indefinitely * * *." (Italics added.)

On this appeal the attorney for defendant (appellant) asserts that his statements before the trial court regarding alimony did not relate to temporary alimony, but related to permanent alimony. It is to be noted that in the first statement above quoted the attorney said that the reservation and the stipulation gave "jurisdiction to award alimony *in this proceeding.*" (Italics added.) It is also to be noted that in the last statement above quoted the attorney said: *"This proceeding* is utterly unnecessary, because * * * prior to the bringing of *this proceeding,* the defendant conceded, in writing, his liability to pay some sum to the plaintiff." (Italics added.) The effect of appellant's argument is that by the use of the words "this proceeding" he was not referring to the order to show cause proceeding which was then before the court, but was referring to the whole proceeding which was initiated by the petition that had been filed—the trial of the ultimate issues which, it was contemplated, would be had at a later date. Appellant asserts that the trial court did not construe his attorney's statement as a voluntary submission of the right to temporary support. He refers, in support of that assertion, to instances during the hearing when the trial judge remarked that the only issue was that of counsel fees and costs. Those remarks do not indicate necessarily that the judge believed that the matter of making an award for support pending the trial was not before him. It is to be remembered that the attorney for defendant had made assertions to the effect that the court had jurisdiction to award alimony *in this proceeding,* but did not have jurisdiction to award counsel fees and costs. In view of those assertions, the trial judge might have concluded that since it was conceded that the court had jurisdiction to award alimony in that proceeding the only issue or contest as to jurisdiction was the matter of counsel fees and costs. Even if those remarks of the judge should be interpreted to mean that at the time he made them (on and prior to page 63 of the transcript) he did not believe the matter of support was before him, it appears from another remark made by him at a later time in the proceeding (on page 77 of the transcript) that he then believed that the matter of support was before him. At such later time, he said: "Let me make this suggestion, since you concede that jurisdiction lies with reference to the alimony factor, perhaps you can stipulate: The wife undoubtedly would be entitled to something, that is assuming the necessity existed." Thereupon the attorney for defendant said: "Yes, if the necessity existed, certainly." Irrespective of what interpre-

tation should be placed upon the previous remarks of the judge, that remark of the judge and counsel's reply thereto indicate that they were then proceeding upon the theory that, since jurisdiction as to the alimony factor was conceded, the wife was undoubtedly entitled in that proceeding then before the court to an award for support if necessity existed. Since the matter of necessity is an essential inquiry in considering an award for temporary support and is not an essential inquiry in considering an award for permanent support, it would seem that the judge and the attorney were not then discussing permanent support. The attorney for defendant did not explain at the hearing of the order to show cause that his reference therein to "this proceeding" did not mean the proceeding then before the court, but that, on the contrary, it meant some other proceeding that might be had at a later date. Furthermore, it is established by the written opinion of the trial judge that he considered that, by reason of the stipulation and reservation referred to by the attorney, the question of support was before him. In that opinion, after quoting the written stipulation of the parties and the provision of the final decree regarding the reservation of jurisdiction, the judge said: "The plaintiff now comes into court and asks for a determination of the issues over which the court has retained jurisdiction, viz., *her right to support pending the action,* and an allowance for counsel fees and for costs. This is not an action subsequent to the entry of a final decree of divorce where all of the issues made by the pleadings have been determined, but *is a prosecution of undetermined issues of the original action,* jurisdiction to determine which, as made by the original complaint and answer, has been *specifically retained by the judgment entered as well as by the stipulation* of the parties. The issues thus made and undetermined are the amount of money necessary *to support the plaintiff,* according to the standard established for her by the husband during the existence of the marriage relation as the same may be modified by changed economic conditions, and what her share of the community property may be." (Italics added.) The references herein to statements of defendant's attorney before the trial judge indicate that the order which the trial judge made for the support of plaintiff was not made solely on the court's own motion without suggestion or invitation by defendant's attorney, and they indicate that the trial judge was justified by reason of those statements in assuming that the matter of support was properly before him.

In any event, regardless of whether or not the statements of the attorney for defendant led the court to believe that the defendant conceded that the matter of support was before the court for decision in the proceeding then before the court, the court had power by virtue of said stipulation and reservation of jurisdiction to make an award for support of plaintiff. In the case of Scheibe v. Scheibe, 57 Cal.App.2d 336, 134 P.2d 835, there was no allegation or evidence regarding alimony and the trial court made an order for support of the wife. On appeal therein, the court said at page 342 of 57 Cal.App.2d, page 839 of 134 P.2d: "Appellant's final contention is that in the absence of allegations or evidence relating to the matter of alimony the trial court was without legal authority to order appellant to pay to respondent any sum of money, or to subject his half of the joint tenancy account to a lien for the payment thereof. This contention is not sustainable. The award was made by the trial court in the exercise of the authority conferred by section 139 of the Civil Code * * *. As pointed out in some of the earlier decisions * * * [citations] the award made under said section 139, properly speaking, is not alimony, nor is it merely a substitute for the wife's interest in the community or separate property of the husband. It is an allowance authorized to be made by way of compensation for a wrong done to the wife, and in that sense is regarded as a penalty imposed upon the husband." Appellant argues, however, that said section 139, referred to therein, relates only to the allowance of permanent alimony, and that the trial court herein, in awarding temporary support, was not acting under the provisions of section 139 but was acting under section 137 of the Civil Code which is the authority for allowing temporary support. In my opinion, under the unusual circum-

stances of the present case, it is not important that it be determined whether the trial court herein acted under section 139 or section 137. The present case is not the usual divorce case where a wife before a divorce case is tried and before it has been decided which party is at fault, seeks support pending the trial, or where at the time of granting the divorce to the wife an order is made for her support. Before the interlocutory decree was made herein, and while the divorce issue was still pending, the court certainly could have awarded temporary support to the wife, under section 137, if the necessity existed. At the time of granting the interlocutory decree herein, when it had been determined that the defendant was at fault, the court certainly could have awarded support to the wife, under section 139, irrespective of whether necessity existed, by way of compensation for the wrong done to the wife. This is an unusual case. Here, only the divorce issue was tried at the time the interlocutory decree was granted, and the parties had stipulated prior thereto that the interlocutory decree might provide (and it did provide) that the court retain jurisdiction to determine all matters relating to community property and support, and that the hearing of any such matters might be brought on by motion of either party at any time. Further in this case, by written stipulation, filed after the interlocutory decree had been granted and after it had been decided that the defendant was as fault, the parties agreed that the court in its final decree might retain such jurisdiction to determine "all matters" relating to community property and support. The final decree provided that such jurisdiction was retained.

In the case of Lamborn v. Lamborn, 190 Cal. 794, 214 P. 862, the final decree of divorce awarded the wife $45 per month, and after that decree became final the trial court, on the motion of the husband, modified the decree by decreasing the amount of alimony to $35 per month. The wife in that case appealed from the order of modification, and asked the trial court to make an allowance for attorney's fees and costs on the appeal. The trial court therein awarded such fees and costs, and the husband appealed from that order and contended that the trial court had no jurisdiction to award such fees and costs on such an appeal. The court therein stated that section 139 of the Civil Code provided that the award to the wife for her support during her life, made in the final decree of divorce, may be modified from time to time, and the court therein stated that section 137 of the Civil Code provided that during the pendancy of the divorce action the court may require the husband to pay as alimony any money necessary for the prosecution of the action and for support. The court therein also said, at page 795 of 190 Cal., page 862 of 214 P.: "*It matters not whether we consider the allowance* of costs and attorney's fees to the wife to enable her to appeal from the order modifying the decree *as an additional allowance to her for her support as authorized by section 139, Civil Code, made after the final decree of divorce, or whether we consider that the divorce action is pending within the meaning of section 137, Civil Code, so long as the court retains power to modify the terms of the decree* * * *." The court said further therein at page 795 of 190 Cal., page 862 of 214 P.: "It is true that an ordinary action is deemed to be pending only until the appeal from the judgment is determined or until the time for an appeal has passed * * * but this general provision of the statute with reference to ordinary judgments is modified in the case of divorce actions by the provisions of the Code, authorizing the modification of an award for alimony at any time after the final decree is entered." The court said further therein at page 796 of 190 Cal., page 862 of 214 P.: "Whether we regard the allowance to the wife as money necessary for her support, the allowance of which is authorized by section 139, Civil Code, or as money paid to her as counsel fees and costs during the pendency of the divorce action, it is clear that the court is authorized to make such an allowance to the former wife." In the case of McClure v. McClure, 4 Cal.2d 356, 49 P.2d 584, 100 A.L.R. 1257, the court cited with approval the Lamborn case, supra, and stated at page 362 of 4 Cal.2d, page 588 of 49 P.2d: "Where the divorced husband has not been released permanently from the obligation to pay alimony, the

court may allow the wife costs and attorney's fees to prosecute or defend an appeal from an order of modification, *either on the theory* that such an award is an additional allowance for *support* made under section 139, Civil Code, *or on the theory that where the power to modify continues, the action is still pending* under section 137, Civil Code, which authorizes the court to require the husband to pay money to enable the wife to prosecute or defend the action." (Italics added.)

By the stipulation of the parties in the present case it was intended that the plaintiff should not suffer any prejudice in any respect regarding any matter of support, either under section 137 or section 139 or at all, if she obtained a decree of divorce before the matter of support was settled. By that stipulation it was clearly intended that the action should be regarded as still pending, even after the divorce issue was determined, as to any matter relating to community property or support, and that plaintiff should not encounter any technical objections on the part of defendant, particularly as to legal procedure under section 137 or section 139 of the Civil Code, in attempting to proceed pursuant to the stipulation. In my opinion, in view of the stipulation of the parties, the reservation of jurisdiction in the decree, the statements of defendant's attorney before the trial judge, the provisions of sections 137 and 139 of the Civil Code, the decision in Scheibe v. Scheibe, supra, 57 Cal.App.2d 336, 342, 134 P.2d 835, and the decision in Lamborn v. Lamborn, supra, 190 Cal. 794, 795, 214 P. 862, the trial court here had power to award support whether the award be regarded as temporary support until the hearing on the merits concerning the issues as to property and permanent support, or whether it be regarded as a modification of the final decree to the extent of awarding compensation to the wife for the wrong done until the hearing on the merits.

In his written opinion the trial judge said properly and accurately: "The right to share in the community property as well as to be supported out of it is of as great importance to the wife in most cases as is her right to have the marriage dissolved. They form an important part of the action, and in this case these issues are still pending. The denial [by the defendant] of the existence of a community estate does not detract from the importance of the issue, and where, as here, there appears to be some community estate, and also a commingling of community property by the husband with his separate estate an allowance should be made," and that "While a wife is entitled to support out of the community property where she is not at fault, she is not limited in such support to the community property. The award may be made by way of compensation for a wrong done. Scheibe v. Scheibe, 57 Cal.App.2d 336, 134 P.2d 835. Since the decree of divorce has been entered here, any award for support, even though temporary, must partake of the latter character." It therefore appears that the trial judge considered that, since it had been decided that defendant was at fault, the award for support herein partook of the character of compensation for a wrong done. If an award for support is made on the basis that it is compensation or damages or a penalty for a wrong done, then the question as to whether there was necessity for support is not material. The attorney for defendant evidently was of the opinion at the hearing that an order for support could be made only on the basis of necessity. He argued at length to that effect. Also, in a letter to plaintiff, during negotiations concerning payments for her support, he asserted "that not only Mr. Loeb's ability to pay, but your *needs* are involved." (Italics added.) An important point in this case is that the trial court had power to make an award for support on the basis that it was compensation or damages or a penalty for the wrong done.

It appears, however, that the trial judge also determined there was necessity for an award for support. In my opinion the evidence supported that finding. The question before the trial court, under a consideration of the matter of necessity for support, was not whether it was possible for a person to live or exist on the separate income of the plaintiff. It was a question as to plaintiff's accustomed mode of living. From the time the interlocutory decree of divorce was

granted in June, 1935, until December, 1938, the defendant voluntarily paid to plaintiff for her support $850 a month. During that period of time plaintiff received $200 per month from a trust fund created by her father, and during a part of that time (until December, 1937) she received $125 per month as rental for certain real property. In other words, at the time the interlocutory decree was granted, and thereafter for approximately two years, her income was $1,175 per month. Defendant knew at the time he voluntarily paid her $850 per month that, in addition thereto, plaintiff was receiving $325 per month. It is reasonable to conclude that during that period of time the defendant considered that the amount necessary for plaintiff's support, according to her accustomed mode of living, was $1,175 per month. During that period the cost of living was considerably less than it was at the time of the hearing on the order to show cause herein. After said period of time defendant voluntarily paid to plaintiff for her support, as follows: from December, 1938, to March, 1942, $650 per month; from March, 1942, to August, 1944, $500 per month; from August, 1944, to December, 1944, $350 per month. Although he reduced his payments, as above shown, he told plaintiff at the time the reductions were made that the reductions were temporary only. When plaintiff's mother died in May, 1944, the trust which had been created by plaintiff's father terminated, and plaintiff's income increased from $200 to $675 per month. Her income from other sources at the time of such increase was about $100 per month. In other words, after the death of plaintiff's mother, plaintiff's income, including the $350 paid by defendant, was about $1,125 per month. Defendant had been one of the trustees of that trust, and presumably he knew approximately the amount of her income therefrom after the termination of the trust. It is reasonable to conclude that during the latter part of 1944, when defendant was voluntarily paying $350 per month for the support of plaintiff, he considered that the amount necessary for plaintiff's support, according to her accustomed mode of living, was at least in excess of $1,100 per month. It seems that the defendant recognized that, according to the mode of living which he established for her during their marriage, an amount in excess of $1,100 per month was a reasonable amount for her support. It is to be noted that the award of $500 per month, made by the trial court herein, and her income of $775 per month from her separate property, make a total sum per month that is approximately the amount which defendant has regarded, over a period of several years, as a proper amount for plaintiff's support according to her accustomed mode of living.

In December, 1944 (a few months after the trust ended), defendant quit making payments to her. Her interest in the trust property after the termination of the trust was of the approximate value of $200,000. In addition thereto, she has war bonds of the maturity value of $20,000, a savings account of $2,200, and a checking account of $150. (She also has an interest in her mother's estate, but the amount of her interest is not shown—the appraised value of the estate is $116,442.81.) During the first half of 1945 (preceding the hearing herein in July, 1945) her expenses per month, including income taxes, were approximately $625, which amount was considerably less (about $500 less) than the amount which defendant had recognized as a reasonable amount to maintain her according to her accustomed mode of living. Her separate income during that time was approximately $775 per month. Although she did in fact restrict her expenses, during that time after defendant had quit making payments toward her support, to an amount which was about $150 less than her separate income, it does not necessarily follow that it should be concluded that, since she had demonstrated under the changed circumstances that it was possible for her to live on an amount less that her own separate monthly income, the amount on which she did live was the extent of her needs, and that her accustomed mode of living should not be considered. In my opinion the trial judge, in determining the matter of plaintiff's necessity for support, under the unusual circumstances of this case—particularly in view

of the stipulation (at the time of the divorce) to suspend the ordinary rules as to the time when such determination should be made, was required to consider her mode of living as of the time defendant stipulated that the court should reserve jurisdiction regarding "all matters relating to support." If the stipulation had not been made that matter would have been determined when the decree was rendered, and, of course, her standard of living at that time, as it had been established by the defendant during the marriage, would have been considered. Even if the matter of her standard of living should not be considered as of that time, but should be considered as of the date of the hearing herein, it appears, as above shown, that as late as December, 1944 (a few months before the hearing herein), when defendant quit aiding in her support, he recognized at that time that her standard of living was the same then as it had been when the decree was rendered.

In any event, irrespective of the amount necessary to support her according to the standard of living which he established for her, the amount actually expended by her under her reduced standard of living, after he quit aiding in her support, impairs and practically consumes her own separate income which she acquired by inheritance from her father, while defendant has retained the community property and commingled it with his separate estate. It is proper, in view of the stipulation, to consider the relative financial conditions of the parties in deciding whether she should be required to impair her separate income and the corpus of her separate estate in order to maintain her accustomed mode of living. During the thirteen years preceding the hearing herein defendant's income averaged about $61,000 per year. In his brief, defendant states that since the entry of the final decree (to the end of 1944, when he quit paying) he has paid her $59,450. It is to be noted also that during that time his income was in excess of $400,000, and that he had the possession and use of the community property. Although defendant asserted at the hearing that there is no community property, and that the community obligations in 1937 exceeded the value of the community property, it appears that he has admitted that since the final decree was made he sold community property for $82,764.90. The trust created by plaintiff's father for her benefit was known by the parties to be in existence at the time the stipulation was made. It was not intended by the stipulation that upon the termination of the trust the proceeds thereof should become a substitute for defendant's obligation to furnish necessary support to plaintiff. The stipulation certainly was not entered into for the purpose of suspending the decision of the court regarding support until the trust ended, so that it might then appear that no necessity existed for support by defendant. The stipulation did not become purposeless and ineffectual when the trust ended, and plaintiff should not be required, under the unusual circumstances here, to impair her separate estate.

As to counsel fees and costs, in my opinion, the evidence supported the order of the trial court. The statements made hereinabove concerning necessity for support are applicable also to the matter of necessity for counsel fees and costs. At the time the stipulation was made there was some community property, and defendant had control of it. The defendant is entitled to use community property in the litigation so far as his necessities require, and the plaintiff is entitled to an equal privilege with him in the use of such part of the community property as may be necessary to maintain her rights. It appears that plaintiff, in proceeding under the stipulation to have the matter of her rights to community property and support determined, is confronted with long and tedious litigation, involving an accounting covering several years. The parties were married in 1911, and the final decree of divorce was entered February 26, 1937. Defendant married again in June, 1937, and at the time of the hearing herein he and the second wife were separated, and there are various questions herein concerning the former community property as it may or may not be commingled with the second community property and with de-

fendant's separate estate. The hearing on this order to show cause alone extended over a period of several days, resulting in a reporter's transcript of 404 pages. The defendant has pleaded the statute of limitations, laches, and estoppel; that plaintiff had waived her interest in the community property (before the stipulation was entered into); and that there is no community property. Defendant has been practicing law in Los Angeles since 1909, maintains a large law office, and as above indicated has an extensive and lucrative practice. It is apparent that the amount of counsel fees, costs and expenses, required of plaintiff, under the issues presented by defendant, will be large. This litigation is the result of defendant's refusal to continue making payments for the support of plaintiff. If she should be required to pay counsel fees, costs and expenses, including the services of accountants for several weeks, it is apparent that all of her separate income will be consumed and her seperate estate will be greatly impaired. Under the unusual circumstances of this case—especially in view of the stipulation, the fact that he has the community property, and that she acquired her separate property by inheritance from her father—she should not be required to so impair her separate property in order to make the stipulation of the parties effective. The attorney for defendant stated during the hearing, in referring to counsel fees and suit money, that since plaintiff had brought the litigation when it was unnecessary "she must pay the freight." If she had not entered into the stipulation before the divorce decree was made, and had insisted, on the contrary, that the matters of support and community property be settled by litigation at the time, before the trust had ended, undoubtedly defendant would have been required to pay the counsel fees and suit money.

The important fact in the present case which distinguishes it from those cases cited in the majority opinion regarding impairment of separate property is the stipulation herein.

As above stated, irrespective of necessity, the order of the trial judge awarding support was correct, upon the basis that it was compensation or damages or a penalty for the wrong done. The matter of determining, in addition thereto, the fact as to whether there was necessity for support was within the sound discretion of the trial judge. Likewise, the matter of determining the fact whether there was necessity for counsel fees and costs, was within the sound discretion of the trial judge. Important questions of fact for the trial judge were: as to plaintiff's accustomed mode of living; whether there was community property; whether it was intended by the parties in entering into the stipulation that if and when the trust ended the defendant would be relieved of his obligation for support; the construction which the parties themselves placed upon the stipulation, with respect to support, as indicated by their actions and conduct under it for several years; the extent of the litigation; the relative incomes and expenses, and financial condition, of the parties; whether the amount required for support, counsel fees and costs, would impair plaintiff's separate property. An important question of fact, especially in regard to counsel fees and costs, was whether there was community property, and the trial court apparently disbelieved defendant's assertion that there was no community property. It seems unreasonable that defendant would have made the stipulation regarding a division of community property if there had been no community property or if plaintiff had waived her rights thereto. In my opinion there was no abuse of discretion by the trial judge, but on the contrary his findings of fact, under the unusual conditions here, were adequately supported by the evidence.

In my opinion, the order should be affirmed.

Rehearing denied; WOOD, J., dissenting.

84 Cal.App.2d 193

**PEOPLE v. MEACHAM et al.**

**Cr. 4155.**

District Court of Appeal, Second District, Division 3, California.

March 3, 1948.

Rehearing Denied March 16, 1948.

Hearing Denied April 1, 1948.

**1. Robbery ⇐24(1)**

Evidence sustained conviction of robbery while armed.

**2. Criminal law ⇐789(3), 829(18)**

In robbery prosecution, defendant's requested instruction that each fact essential to complete a chain of circumstances establishing defendant's guilt must be proved beyond a reasonable doubt, should have been given, but refusal was not prejudicial error in view of instructions given regarding credibility of witnesses in general and reasonable doubt, and in view of the evidence. Pen.Code, § 1096.

**3. Criminal law ⇐814(3)**

In robbery prosecution, wherein defendant testified and denied and explained testimony against him, refusal of defendant's requested instruction that a defendant may not be compelled to testify, and that a defendant's failure to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, was not error.

**4. Criminal law ⇐829(1)**

In robbery prosecution, refusal of defendant's requested instruction was not error, where matters involved in requested instruction were covered by instructions given.

**5. Criminal law ⇐775(4)**

In robbery prosecution, wherein evidence established that robbery occurred within 10 or 15 minutes after 12:10 a. m. on certain date, and wherein defendant's evidence as to alibi covered a period of several hours before and after that time, failure to give, in addition to general alibi instruction, an instruction limiting issue of alibi to a matter of minutes, was not error.

**6. Criminal law ⇐641(1)**

Robbery prosecution was not unfair to defendant because of trial judge's failure to make an inquiry and to ascertain whether a conflict of interests "might" arise between defendant and codefendants so as to render injurious to defendant the action of another judge, at time of arraignment, in appointing defendant's attorney as attorney for the codefendants.

**7. Criminal law ⇐958(3)**

On motion for new trial in robbery prosecution, weight, if any, to be given affidavit filed in support of motion, whether due diligence had been exercised by defendant to obtain alleged newly discovered evidence, and whether it was probable that a different verdict might have resulted if such different or additional evidence had been received was discretionary with trial judge.

**8. Criminal law ⇐958(6)**

Denial of defendant's motion for new trial of robbery prosecution, on ground of newly discovered evidence, was not an abuse of discretion, where affidavit of codefendant that a third person and not defendant were present with the codefendant at the robbery was contrary to his testimony at the trial, and affidavit of prosecuting witness was mainly cumulative, and he had been cross-examined extensively at the trial.

---

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Gail K. Meacham, Bert R. Hughes and another were convicted of robbery while armed with a revolver, and Bert R. Hughes appeals from the judgment and order denying his motion for new trial.

Affirmed.

James A. Starritt, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendants Hughes, Brighton and Meacham were charged jointly with robbery while armed with a revolver. Each one asserted an alibi as a defense. In a trial by jury they were found guilty as charged.

Defendant Hughes appeals from the judgment and the order denying his motion for a new trial.

He contends that there is no substantial evidence of his guilt; that the court erred in its instructions; that the trial was unfair as to him; and that the court abused its discretion in denying his motion for a new trial.

On October 23, 1946, about 12:10 a. m., Jesse R. Heagy was on duty as the operator of a Mobil gasoline service station on Sherman Way near Van Nuys. At said time three men walked from the street into the station premises, and one of them went to the operator and asked him where a certain beach was located. The operator then went to his coupe automobile to get a map, and as he reached therein the man (defendant Meacham), who had asked the question, hit him on the head, pointed a loaded revolver at him, and compelled him to sit in the automobile. Meacham then stood about five feet from the operator and continued to point the gun toward him. Defendant Brighton went inside the service station building, and the third man walked up and down in front of the station, and on several occasions went into the station and then returned to the front again. The three men were there 10 or 15 minutes, and they took about $5 from a money box in the station, about $50 from the pocket of the operator, and a carton of cigarettes from the station. Then they compelled the operator to get into the back of his coupe automobile through a space at the back of the seat. It was a very foggy night. When he was in the back of the automobile they left, and soon thereafter he heard an automobile motor start and, from the sound of the motor and from the outline of the automobile (in the fog) as he saw it go away from across the street, he thought it was a 1939 or 1940 Buick. It is 14.5 miles from the service station to the place where Hughes lived.

The operator testified that the defendants Meacham and Brighton were two of the men who committed the robbery; and that he did not recognize defendant Hughes as the third man, or as anyone, who was at the robbery.

One Barnes, called as a witness by plaintiff, testified, that he was living with Meacham at the date of the robbery; that he had known the three defendants about four months; that he saw the three defendants on October 23, 1946, between 1 and 1:30 a. m., in front of Meacham's house, in a 1940 or 1941 Buick sedan automobile; that Hughes was in the driver's seat; that one of them had a .32 automatic pistol at that time and he thought it was Brighton who had it; that they said they "had just pulled a job"; that Hughes asked him (witness) if he wanted to ride, and then Meacham and Brighton got out of the automobile, and the witness and one Bob Copeland and two girls (who were with the witness) got into the automobile; and that they drove around Hollywood until about 4 a. m.

Officer Wendt testified that he saw Hughes on October 23, 1946, about 12:15 p. m. when Hughes drove a 1941 Buick sedan automobile to the front of Meacham's house and parked it there.

Officer Gidney testified that he asked Hughes some questions on October 24th, about 9 a. m., at the police station, and that Hughes answered voluntarily, that his answers were not given under any threat or undue influence, and that no promise of reward or immunity was extended to him. When the officer was asked to state that conversation, Hughes stated that he challenged said statement of the officer regarding the circumstances under which the answers were given. Thereupon, the court permitted Hughes to testify at that time concerning those circumstances. He testified that, under threats by the officer, he confessed to many crimes during that questioning; that the officer cursed him, said he would kick him in the testicles until he told him what he wanted to hear; that the officer charged him with auto stealing, hotel robbery and filling station robbery; that when he denied those charges the officer grabbed a pistol, swung it around Hughes' face, and told him to tell what he wanted to hear; that Hughes then said he "confessed" that he stole a car, and that he "pulled a station robbery" at Mr. Heagy's station. The deputy district

attorney then said that he expected to make similar proof as to the other defendants, regarding the voluntary character of their answers to questions which the officer asked them. Thereupon, the court permitted Brighton and Meacham to testify at that time concerning the circumstances under which they answered the officer's questions. Brighton testified that the officer, in the conversation with him, used words which Brighton understood to mean that he would kick Brighton in the testicles; that the officer asked him if he had been in the gas station, and Brighton replied that he had been there; and that he had been convicted of a felony. Meacham testified that the officer, in the conversation with him, said that he would beat him up if he didn't say he was at the Van Nuys robbery; that he told the officer to beat him up because he would not say he was there; and that he had been convicted of a felony.

Officer Gidney then continued his testimony and testified that he did not say he would kick any of the defendants, that he did not wave a gun in front of any of them or at all (he did testify later that "In the course of investigation we know how to get truthful answers"); that at the time he began talking with Hughes he (the officer) did not know about this robbery on Sherman Way; that they had arrested the defendants on a previous investigation, and he told Hughes that he had a report of a robbery in the Valley, and he asked Hughes if he had been involved in a robbery there; that Hughes replied that he had been, and that he, Meacham and Brighton had been at a Mobil station in San Fernando Valley in the early morning of October 23d in Hughes' 1940 Buick sedan, that he thought it was on Sherman Way, that Meacham was armed with a revolver and Hughes had an automatic, that Hughes parked the car and went to the rear of the station, that he saw Meacham strike the attendant, that $4 was taken from the station and $20 from the attendant, that they ran back to the Buick and returned to 3721 Glen Feliz Street (where Meacham lived), and that they divided the money equally. The officer testified further that he had the three defendants together about 11 a. m. on said October 24th in the presence of three other officers and Mr. Heagy, the station operator (Mr. Heagy had been to "the line-up" of the defendants and three others); that Mr. Heagy pointed out Meacham as the one who held him up, and pointed out Brighton as the one who was in the station, but he did not point out or recognize Hughes; that the officer asked Hughes if he had seen Hr. Heagy before, and he said he had; that he (officer) asked where he had seen him, and he replied that he was the attendant at the Mobil station on Sherman Way that they had held up; that Hughes said that $24 and a carton of cigarettes had been obtained; that Hughes then said to Mr. Heagy that he wanted to make restitution. The officer testified further that he first saw the revolver and the automatic pistol (exhibits for identification) in a drawer next to Meacham's bed at 3721 Glen Feliz Street, and that the revolver was loaded with five cartridges at that time.

Hughes testified that he lived in Glendale; that at 7 p. m. on October 22, 1946, he was at a restaurant in Glendale where his roommate, one Emmert, was employed; that after eating at that place he went to his home, lay down in bed and went to sleep; that he awoke about 11:30 p. m. and left his house about 11:45 p. m. in his automobile to go to the restaurant to get his roommate; that it was very foggy at that time; that after he had gone a few blocks a tire blew out, and while he was trying to change the tire the car fell from the jack; that he knew it was 12:12 when the car fell because the falling car broke his watch; that he finally put the spare tire on, and then drove to a nearby service station and put air in the tire; that when he arrived at the restaurant it was closed, and then he went to his home and his roommate was there; that it had been his custom to "pick up" Emmert when Emmert finished work, and that he (Hughes) had never missed picking him up before; that he told Emmert about the tire trouble, and then went out again to get something to eat; that just after he had finished eating in his car at a drive-in restaurant in Glendale, Meacham and Brighton came to his car;

that he waited there while they ate, and then he took them to their home on Glen Feliz Street, Glendale; that when he arrived there Barnes (the witness hereinbefore mentioned) came to the car and asked where they were going; that Meacham and Brighton got out of the car and went into the house; that soon thereafter Copeland and two girls came to the car, and he took them and Barnes in his car and drove around all night before he could get rid of them; that he returned to his home about 4 a. m., and slept until 11 o'clock that morning; that he then intended to go to Inglewood to apply for employment as an aircraft mechanic, and since Brighton had told Emmert about the opportunity for such employment, he (Hughes) went to call on Brighton; that he went to the house where Brighton and Meacham were living, and rang the doorbell, but there was no response; that he then went to the back door and knocked, and two officers "jumped out with guns" and arrested him. He testified further that, after he was on bail, he and Emmert went to a newspaper office in Van Nuys and ascertained where the robbery had occurred, and then they went to the service station to "see why I was taken in on it"; that at first he talked with a man there who he thought was the one who had been robbed, but he said he was the owner of the place and that the man who had been robbed was not there; that the owner asked the other man to come to the station, and after he (Mr. Heagy) arrived there Hughes talked to him; that Mr. Heagy said that Hughes was not one of the three men.

The landlady at the place where Hughes lived testified that on October 22, 1946, about 6 p. m., she saw Hughes' automobile parked across the street from her house; that about 10:30 p. m. of said day she saw his automobile at the same place; that it was terribly foggy that night; and that she went to bed about 11 p. m.

The daughter of the landlady testified that "about eleven or a few minutes after that" in the evening of October 22, 1946, she saw Hughes lying on his bed at her mother's house; and that she did not see him again until several days later.

Emmert testified that he roomed with Hughes; that on October 22, 1946, he (Emmert) worked at a restaurant until midnight and left there about 12:15 a. m. on October 23d; that Hughes usually "picks me up" after work, but he did not show up that night and Emmert rode home with another boy; that he (Emmert) arrived home about 12:20 a. m.; that Hughes came in about 2 o'clock; that Hughes told him about the tire trouble, smoked a cigarette, and then went away again; that it was about "a quarter to one" when he (Hughes) left, and he did not see him until the next day; that after Hughes was on bail he went with Hughes to a newspaper office in Van Nuys and obtained the address of the station where the robbery occurred; that they went to the station and talked to Mr. Heagy and he said that he did not recognize Hughes as one of the boys who robbed him.

Brighton testified that on October 22, 1946, about 8 p. m., he was in a show at 7th and Main Streets in Los Angeles; that he left the show about 11 or 11:30 p. m., and went to Colorado and Brand Boulevards in Glendale on a street car, arriving there "about a quarter after 12 or twenty minutes to twelve"; that a clock at that corner showed it was then "a quarter of twelve"; that he met Meacham there at 12:30 a. m., and they went to a drive-in restaurant, arriving there between "a quarter to one and one"; that as they were going to the door of the place they met Hughes; that after they had eaten there, Hughes took them to their home; that he and Meacham then sat on the porch about 30 minutes and then went into the house; that the officers came into the house "the next morning" and arrested them. On cross-examination he testified that he was not working at that time; that, after he left the show, he arrived in Glendale between "a quarter after twelve and twelve o'clock"; that at 5 p. m. on October 22d he was in a jewelry store in Glendale, and that he had been convicted of assault with intent to commit robbery at that time in that store.

Meacham testified that he stayed at his home in the evening of October 22d until

approximately 12 o'clock; that he then left the house to meet Brighton at Colorado and Brand Boulevards; that he met him there about "10 or 15 minutes to twelve"; that they then went to a drive-in restaurant in Glendale, and when they arrived there it was "either a quarter to one or one o'clock" and they met Hughes who was sitting in the car; that after they ate at that place, Hughes took them to their home and they arrived there about 1:30 p. m.; that he thought he saw Barnes there at that time; that at 5:15 of October 22d he was with Brighton in a jewelry store in Glendale, and that he committed the crime of assault with intent to commit robbery therein at that time, and that he was convicted of the crime. On cross-examination he said that he owned the revolver which was an exhibit in the case.

[1] Appellant Hughes' first contention, above mentioned, that there is no substantial evidence of his guilt is not sustained. A detailed discussion of the evidence is not required to show that such contention is without merit. There was evidence as follows: that the other two defendants were identified positively as participants in the robbery; that this defendant was in a 1940 Buick automobile with those defendants in front of their house about 1:30 a. m., which was about an hour after the robbery, and at that time he was in the driver's seat, and one of them had a revolver, and one of them said that they had just "pulled a job"; that the automobile which was used in the robbery was that same kind of automobile; that that midnight (when the robbery occurred) was the first time he had failed to pick Emmert up when Emmert finished work; that this defendant was at the back door of the house of the other defendants at noon following the time of the robbery; and that he admitted that he was present at and participated in the robbery.

[2] Appellant contends that the court erred in refusing to give the following instruction: "When the case which has been made out by the People against a defendant rests entirely or chiefly on circumstantial evidence, and in any case before the jury may find a defendant guilty basing its finding solely on such evidence, each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt." That instruction should have been given, but the refusal to give it was not prejudicial, in view of the instructions given and under the evidence here. The requested instruction was to the effect that each fact which is essential to complete a chain of circumstances establishing defendant's guilt must be proved beyond a reasonable doubt. That instruction related to the matter of reasonable doubt in connection with various evidentiary facts in a chain of circumstances. The court gave the usual instruction concerning reasonable doubt as to the ultimate fact involved, that is, as to defendant's guilt of the crime charged. That instruction (Pen.Code, sec. 1096) was to the effect that in case of a reasonable doubt whether his guilt, of the crime charged, is satisfactorily shown, he is entitled to an acquittal. In other words, the law as to reasonable doubt was fully before the jury as to the ultimate fact charged, but it was not referred to specifically regarding essential evidentiary facts. The court, however, did give the following instruction: "If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt." The court also instructed the jury fully in regard to the credibility of witnesses in general. Since the jury was instructed fully that in case of reasonable doubt as to defendant's guilt it should find him not guilty, and was also instructed that it must bring in a verdict of not guilty if there was any reasonable interpretation of the evidence that pointed to innocence, and was also instructed fully in regard to the credibility of witnesses in general, it appears that the failure to give the requested instruction, regarding reasonable doubt as applied to essential evidentiary facts, did not interfere, under the evidence herein which included an admission of guilt, with the substantial rights of defendant.

[3] Appellant also contends that the court erroneously refused to give a requested instruction which stated in effect that a defendant in a criminal trial may not be compelled to testify, and that the failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt. In presenting that point he states that the defendant did testify, and denied and explained testimony against him, and that apparently the jury did not believe him. He argues that it cannot be known to what extent "they gave weight" to his testimony "merely because they disbelieved it and as a result of such disbelief." He argues further that since the jury "may have given improper and unlawful weight to the disbelief of his denials and explanations" he was entitled to the requested instruction. The argument that the jury gave weight, or might have given weight, to testimony it did not believe is not clear. The defendant was not compelled to testify, but he did testify. There was no necessity for an instruction that a defendant in such a trial may not be compelled to testify. When he did testify his testimony was to be considered by the same standard and rules as testimony of other witnesses. The members of the jury were properly instructed that they were the exclusive judges of the weight of the evidence, and they were properly instructed as to the subject of credibility of witnesses. The court did not err in refusing to give that requested instruction.

[4] Appellant contends that the court erred in refusing to give his requested instruction to the effect that it is the duty of the judge to instruct the jury; that it is the function of the jury to try the issues of fact; that the jury should perform its duty uninfluenced by pity or passion or prejudice; that it must not be biased against defendant because he had been arrested, or accused or brought to trial, and that none of "these facts" is evidence of his guilt, and the jury should not infer or speculate from any of them that he is more likely to be guilty than innocent. He asserts that the refusal to give his requested instruction, except the part as to the duty of the judge, "constitutes the principal error upon which appellant relies." Those matters involved in the requested instruction were covered by instructions which were given. The court did instruct the jury that the jury was present for the purpose of trying the issues of fact; that it should perform that duty uninfluenced by pity or passion or prejudice on account of the nature of the charge; that it should be governed solely by the evidence introduced and the law as given by the court; that the law will not permit jurors to be governed by mere sentiment, conjectures, sympathy, passion or prejudice; that it should carefully and dispassionately weigh and consider the evidence and the law and give to each its conscientious judgment. This contention is not sustained.

[5] Appellant contends further that the instruction relative to the issue of alibi was insufficient and incomplete. The court gave the following instruction: "An alibi simply means that a defendant was at another place at the time the crime charged is alleged to have been committed. All the evidence should be carefully considered by you, and, if the evidence on the subject, considered with all the other evidence, is sufficient to raise a reasonable doubt as to the guilt of a defendant, you should acquit him. It is sufficient to justify an acquittal if the evidence upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged, if you find that a crime was committed." Appellant submitted an instruction concerning the matter of alibi, and it was refused. Appellant concedes, however, that the instruction given and the one requested by him "are substantially in accord, and are correct and in the ordinary case are sufficient." He argues that since the People's proof herein narrows the issue as to the time of the robbery to a matter of minutes (approximately 25 minutes according to appellant's computation), the court, of its own motion, should have narrowed such issues to a matter of minutes. It will be noted that the instruction given states that an alibi means that a defendant was at another place "at the time the crime charged is alleged to have been committed," and that the defendant should be acquitted if the evidence raises a reasonable doubt of

"his presence at the time and place of the commission of the crime charged." The information charged that the crime was committed "on or about the 23rd day of October, 1946." Appellant asserts that, in order to meet the requirement of that instruction, the evidence as to alibi would have to cover all of the day of October 23d. In support of his contention appellant cites the cases of People v. Morris, 3 Cal.App. 1, 84 P. 463, and People v. Waits, 18 Cal. App.2d 20, 62 P.2d 1054, wherein judgments of conviction were reversed because the instructions therein did not narrow the issues as to the time of commission of the offenses. Those cases are to be distinguished from the present case. In the first case cited it was charged that defendant committed rape on a certain day, and the particular act relied on by the prosecution occurred at 4 p. m. in a certain house. The alibi evidence therein was that defendant and the prosecutrix were at another place from 2:30 p. m. to 6 p. m. of said day. In that case, concededly, during the other part of that day they had been together in the house where the act was alleged to have occurred, and no one else was present. The instruction therein, regarding the alibi, was to the effect that unless the jury believed that rape was committed on the day stated in the information the verdict should be not guilty. The jury in that case asked the trial judge whether it was limited in its consideration of the evidence to the particular hour of the day mentioned, and the judge replied that the charge was that the offense occurred on the day specified. The reviewing court therein held that the jury was told in effect that it could consider the evidence with reference to the entire day, and that in that view of the case the jury might have found the alibi evidence sufficient to overcome the evidence of the alleged act at 4 p. m., and yet found defendant guilty of an act at some other hour of the day. In the second case cited, People v. Waits, supra, the charge was violation of sections 288 and 288a of the Penal Code on a certain day between 10:30 a. m. and 1 p. m. Defendant therein produced alibi evidence, and the court instructed the jury it was immaterial on what day the offense was committed, if it was committed within three years from the filing of the information. It was held therein, citing People v. Morris, supra, that the trial court should have limited the jury in its consideration of the evidence to the time selected by the prosecution as the time the offenses were committed. In the present case only one act of robbery occurred and it was established that it occurred within 10 or 15 minutes after 12:10 a. m. on October 23d. There was no claim at all that the robbery occurred at any other time that day. The evidence as to alibi covered a period of several hours before and after that time. It is wholly unreasonable to assume that the jury, under the evidence here, might have found that the robbery did not occur at said specific time on that day, but that it occurred at some other hour of that day. This contention of appellant that the trial court should have given such an additional instruction is not sustained.

[6] Appellant also asserts that the trial was unfair as to him, in that, the attorney employed by him was appointed by another judge, at the time of the arraignment, to also represent the other two defendants, and the trial judge should have ascertained that no conflict of interests "might" arise between Hughes and the other defendants.

At the preliminary hearing an attorney, Mr. J. U. Edwards, who was then appearing as counsel for Hughes, was appointed at the request of Mr. Edwards to also represent Meacham and Brighton. When the three defendants appeared for arraignment in the Superior Court before Judge McKay on November 18, 1946, Hughes appeared with his counsel Mr. Edwards and the other defendants appeared without counsel. The appellant asserts that Judge McKay then appointed Mr. Edwards to also represent the other defendants. The minutes of the court do not show that such an appointment was made, and the reporter's transcript does not show such an appointment. Judge McKay set the trial for December 13, 1946, in another department of the court before Judge Nye. The trial was postponed to January 17, 1947. Appellant asserts that on that date, before the trial commenced, Mr. Edwards and the deputy district attorney went into the trial judge's

chambers, and Mr. Edwards stated that Meacham and Brighton would plead guilty to robbery in the second degree and that Hughes would plead not guilty, and that the deputy district attorney then said that unless all three defendants would plead guilty the People would not enter into such a proposal and would require all three defendants to proceed to trial. Neither the reporter's transcript, nor the clerk's transcript, shows anything with respect to such a meeting or any meeting in the chambers. Since the record does not show that Judge McKay or any judge appointed Mr. Edwards as counsel for Meacham and Brighton, and the record does not show that any proceeding occurred in chambers, there is no basis (except as hereinafter indicated) for the contention that the trial judge should have ascertained that no conflict of interests "might" arise. Hughes made a motion to augment the record to include a transcription of the reporter's notes of the proceedings had before Judge McKay at the arraignment, which notes, he asserted, show that Mr. Edwards was appointed to also represent the other defendants. In that motion he also sought an order directing that Judge Nye make a minute entry of the proceedings had in chambers, and that such minute entry be included in the clerk's transcript. Hughes' present attorney, Mr. Starritt, made an affidavit, in support of the motion, to the effect that the reporter's notes show such an appointment, and that the deputy district attorney who was present in the chambers at said time had informed him that such proceedings as those hereinabove mentioned were had in chambers. In opposition to said motion, an affidavit of said deputy district attorney was filed herein stating in substance that the proceedings in chambers were as hereinabove mentioned. Counsel for respondent and appellant have agreed that the matters alleged in said affidavits, as to the proceedings at the arraignment and in chambers, may be regarded as a part of the record.

In regard to this last mentioned contention of appellant, he argues that by reason of the proceedings in chambers the trial judge was then apprised that it was probable that conflicting interests might appear between Hughes and the other defendants, and that it was the responsibility of the court to make inquiry "to the point of ascertainment that no conflict of interests between Hughes on the one hand and Meacham and Brighton on the other 'might' arise." In support of his contention he cites Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680, and People v. Lanigan, 22 Cal.2d 569, 140 P.2d 24, 148 A.L.R. 176. Those cases are distinguishable from the present case. In those cases specific objections were made to the appointments of counsel, and the circumstances were such that it was apparent there were conflicting interests. In the Lanigan case the defendants objected and the attorney who was appointed also objected. In the present case, assuming that Judge McKay appointed counsel for Meacham and Brighton, no objection was made by any one at that time or at all to Judge McKay to the appointment, and there was nothing to indicate to him that there might be conflicting interests. From the time of the alleged appointment to the date of trial about 60 days elapsed and during that time no objection was made, and it does not appear at all that appellant or any one, prior to the returning of the verdict, was not satisfied with the alleged appointment. There was nothing before Judge Nye to indicate even that the court had appointed Mr. Edwards as counsel for the other defendants. As above stated, there was no minute entry of such an appointment. Insofar as Judge Nye is concerned there was nothing to indicate that the counsel appearing before him was not employed and retained by the defendants. The mere fact that such a proposal to plead guilty to a lesser offense was made did not place a responsibility upon the trial judge to inquire concerning the circumstances of the employment or selection of the attorney appearing before him, or to inquire as to whether there might be conflicting interests among the defendants. No objection was made before Judge Nye, by appellant or attorney Edwards or any one, at any time before the verdict was returned regarding any probable conflict of interests. It cannot be held that the trial judge or the judge who arraigned the de-

fendants erred, or failed in any responsibility that was upon either of them, in the matter of affording defendants or any of them an opportunity for proper representation by counsel. This contention of appellant that the trial was unfair as to him is not sustained.

[7, 8] Appellant also contends that the court abused its discretion in denying his motion for a new trial. The motion was made upon all the statutory grounds, and particularly upon the ground of newly discovered evidence. In support of the motion he filed his affidavit which stated that after the verdict Brighton had informed him that Brighton, Meacham and one Berle Franklyn had committed the robbery. That affidavit stated further that Mr. Heagy would testify that the third man at the robbery appeared to have blond hair. He also filed an affidavit made by Brighton which stated that he, Meacham and a man named Berle Franklyn had committed the robbery, and that Hughes was not present; and that he did not disclose this information to Hughes or defense counsel or any one until after the verdict because he thought it would jeopardize his chance of acquittal. He also filed an affidavit of Mr. Heagy to the effect that the third man at the robbery was about the same size as Hughes but his features appeared to be different and it was his impression that he had blond hair. The affidavit of Brighton established that he swore falsely, either at the trial or in the affidavit. The evidence in the trial showed that Brighton had been convicted about a week previously of assault with intent to commit robbery. The affidavit of Mr. Heagy was cumulative, except as to the statement about the hair. He was cross-examined extensively at the trial, and appellant of course had an opportunity at that time to ascertain his testimony about the color of the hair. It was for the trial judge, in his discretion, to determine what weight, if any, to give to Brighton's affidavit and to determine whether due diligence had been exercised in regard to the color of the third man's hair, and to determine whether it was probable that a different verdict might have resulted if such different or additional evidence had been received. The trial judge did not err or abuse his discretion in denying the motion.

The judgment, and the order denying the motion for a new trial, are affirmed.

SHINN, Acting P. J., and VALLÉE, J. pro tem., concur.




84 Cal.App.2d 123

**HAMMER v. CREHAN.**

**Civ. 15997.**

District Court of Appeal, Second District, Division 1, California.

March 2, 1948.

**1. Appeal and error ⇐933(1)**

Upon appeal, presumption is in favor of order granting new trial and against verdict.

**2. New trial ⇐71**

Trial court has duty of weighing the evidence, considering conflicts therein, and then in its discretion determining whether new trial should be granted on ground of insufficiency of the evidence.

**3. Automobiles ⇐244(13)**
**New trial ⇐71**

In action for injuries sustained by motorcycle passenger in collision between motorcycle and automobile, evidence that motorist pulled out of private driveway in front of on-coming traffic supported a verdict for passenger, and hence in view of conflict between that evidence and motorist's testimony, granting of new trial after return of verdict for motorist was not an abuse of discretion. Vehicle Code, § 553.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by William Hammer against Alice Helen Crehan, for personal injuries. From order granting plaintiff's motion for

a new trial following verdict for defendant, defendant appeals.

Affirmed.

Crider, Runkle & Tilson, of Los Angeles, for appellant.

McCarroll & McCarroll, of Los Angeles, for respondent.

BARTLETT, Justice pro tem.

This is an action for personal injuries received as a result of a collision between a motorcycle on which respondent was riding and a car driven by appellant. At the conclusion of the trial, the court granted a motion for a new trial on the ground, among others, that the verdict and judgment in favor of appellant were not supported by the evidence.

At 7:30 p.m. on December 15, 1945, respondent was a passenger on a motorcycle driven by Mr. Perkins, traveling on Vermont Avenue between Sixth and Fourth streets in the City of Los Angeles. The motorcycle was in a lane near the car tracks and was going at about 20 to 25 miles per hour. Just before the accident a car driven by Mr. Jacobson was a short distance ahead and slightly to the right. Behind the motorcycle was a car driven by Mr. Towvim. Both of these cars were traveling at about the same speed as the motorcycle. While these cars were thus proceeding north, the appellant pulled out of a private driveway connected with a service station to make a left turn on Vermont Avenue in front of these cars. Seeing her, Mr. Jacobson put on his brakes, swerved to the right 8 or 10 feet, and came to a sudden stop just missing appellant's car. The driver of the motorcycle applied his brakes but could not stop in time, and as Mr. Jacobson's car swerved to the right, struck the rear fender of the appellant's car. Mr. Towvim who was 5 or 6 car lengths behind the motorcycle, applied his brakes and pulled over to the curb. Respondent was thrown from the motorcycle against Mr. Jacobson's car and received the injuries of which he complains.

Appellant's contention, as stated in her brief, is as follows: "The court erred in granting a motion for a new trial where there was no substantial conflict in the testimony on material issues. The entire record clearly indicates that the defendant was not guilty of any negligence which in any manner contributed to the happening of the accident, resulting in injury to the plaintiff." She cites many cases, upholding the familiar rule stated in that portion of the decision in Moss v. Stubbs, 111 Cal. App. 359, 295 P. 572, 573, 296 P. 86, which she quotes as follows: "* * * it is equally well settled that, where there is no substantial conflict in the testimony on material issues, and the evidence as a whole would be insufficient as a matter of law to support a verdict in favor of the moving party, an order granting a new trial cannot be sustained."

There is ample evidence in the record in this case to support a verdict for the respondent. Vehicle Code, Section 553, reads as follows: "The driver of a vehicle about to enter or cross a highway from an alley not exceeding a width of 16 feet, or any private road or driveway shall yield the right of way to all vehicles approaching on said highway."

No clearer case that appellant violated the provisions of that section could be made than is disclosed in the testimony of the four eyewitnesses to this accident given at the trial. Consider for instance the following testimony of Victor Jacobson: "I came out of the driveway of the restaurant and there was no southbound traffic on Vermont and possibly several hundred feet south on Vermont there was some vehicles coming. I crossed Vermont so as to be able to travel north on Vermont and was proceeding on Vermont past the intersection of Fourth Street. I doubt very much if I was traveling more than 20 or at the very most 25 miles an hour and as a matter of fact I don't even know if I had as yet shifted into high gear. As I approached the driveway of the service station north of Fourth Street this automobile shot right out into traffic. I slammed on the brakes and swerved to the right. This woman—the driver of this car didn't stop as she approached the street but shot right out of the station heading west or perhaps southwest, this way, right

into the lane of traffic. I slammed on the brakes and swerved to the right. As I did that this motorcycle collided with her car and was thrown up against the left side of my car. I stopped and then pulled forward and this car with this woman driving continued on Vermont and I heard someone holler, 'Stop that car', and I learned later that she turned into the next street and then stopped. There were two men on this motorcycle and they were carried over to the curbstone and then of course the police were notified. They were both bleeding, and seemingly dazed from the shock of the contact. That is substantially I believe what happened."

In the light of such evidence we cannot follow appellant's contention that there was no evidence of appellant's negligence and that the accident was due solely to the negligence of the witness Jacobson.

Mrs. Jacobson testified that if it were not for the sudden application of the brakes on their car and the fact that her husband Mr. Jacobson swerved 8 or 10 feet to the right, he would have hit appellant's car broadside. This testimony did conflict with appellant's testimony. In fact there was conflict between her testimony and that of respondent and the three other witnesses to the accident on other material issues.

[1, 2] All of this brings the case within the rule which has been reiterated time and again, that upon appeal the presumption is in favor of the order and against the verdict that the trial court has the duty of weighing the evidence, considering the conflicts in it and then in its discretion determining whether or not a new trial should be granted on the ground of the insufficiency of the evidence. Scott v. Southern Pacific Co., 100 Cal.App., 634, 280 P. 996; Anderson v. Dahl, 121 Cal.App. 198, 8 P.2d 883; Woods v. Walker, 57 Cal.App. 2d 968, 136 P.2d 72.

[3] No abuse of discretion on the part of the trial court is shown by this record, and the order of the trial court is affirmed.

DORAN, Acting P. J., and WHITE, J., concur.

84 Cal.App.2d 236

## WAHRENBROCK et al. v. LOS ANGELES TRANSIT LINES et al.

Civ. 15966.

District Court of Appeal, Second District, Division 3, California.

March 4, 1948.

Rehearing Denied March 23, 1948.

Hearing Denied April 29, 1948.

**1. Appeal and error ⇐927(3)**

On appeal from judgment entered upon granting of defendant's motion for judgment of nonsuit, evidence would be viewed in light most favorable to plaintiffs, drawing all reasonable inferences in plaintiffs' favor, and disregarding all conflicting and contradictory evidence.

**2. Evidence ⇐10(3)**

In action for death of motorist when motorist driving on Crenshaw Boulevard in the City of Los Angeles turned left across street car private right of way at intersection with 46th Street and was struck by street car traveling on Crenshaw Boulevard, Court would take judicial notice that the street car was being operated in a thickly populated section of the City of Los Angeles and that Crenshaw Boulevard at 46th Street is a heavily traveled thoroughfare.

**3. Evidence ⇐60**

The presumption is that every person obeys the law.

**4. Negligence ⇐122(1)**

The presumption is that every person takes ordinary care of his own concerns.

**5. Evidence ⇐60**

The presumption is that a person is innocent of crime or wrong. Code Civ. Proc. § 1963, subds. 1, 4, 33.

**6. Street railroads ⇐112(3), 117(26, 29)**

In action for death of motorist when motorist driving in a thickly populated section of city turned left across street car private right of way at intersection and automobile was struck by street car, deceased motorist was presumed to have looked and listened and to have exercised requisite degree and amount of care for his own safety in the direction from which danger could be anticipated, and whether

he did so or not was for jury, where uncontradicted testimony to effect that motorist was not using due care was not wholly irreconcilable with the presumptions.

**7. Street railroads ⇐112(3)**

In action for death of motorist when motorist turned left across street car private right of way at intersection and was struck by street car, street car company had burden of proving contributory negligence of motorist.

**8. Negligence ⇐122(2)**

Contributory negligence may be found by the trier of fact from plaintiff's own evidence.

**9. Death ⇐103(3)**

In death action, contributory negligence of decedent is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists.

**10. Street railroads ⇐117(8)**

In action for death of motorist when motorist turned left across street car private right of way at intersection and automobile was struck by street car traveling in opposite direction to that from which motorist turned, negligence of motorman in failing to exercise ordinary care in operation of street car was for jury under the evidence.

---

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Dean M. Wahrenbrock, by his guardian ad litem, Amanda M. Wahrenbrock, Richard N. Wahrenbrock and Amanda Wahrenbrock, individually and as administratrix-with-the-will-annexed of the estate of Elmer N. Wahrenbrock, deceased, and A. W. Bishop against Los Angeles Transit Lines, a corporation and others, for wrongful death, for money expended by reason of wrongful death, and for damages to a truck. From an adverse judgment, plaintiffs appeal.

Judgment reversed.

A. J. O'Connor, John B. Petermann, and George J. Hider, all of Los Angeles, for appellants.

Gibson, Dunn & Crutcher, of Los Angeles, for respondents.

VALLÉE, Justice pro tem.

Appeal by plaintiffs, the widow, children and business partner of Elmer Norman Wahrenbrock, from a judgment entered upon the granting of a motion for a judgment of nonsuit in an action for damages.

The complaint is in three counts: (1) for wrongful death, (2) for money expended by reason of the alleged wrongful death, (3) for damage to a truck.

[1] Viewing the evidence in the light most favorable to plaintiffs, drawing all reasonable inferences in their favor, and disregarding all conflicting and contradictory evidence, the facts are these: On December 4, 1945, at about 6:00 o'clock p. m., defendants, by a skilled motorman with long experience on the particular run involved, were operating an electric streetcar on defendant L. A. Transit Lines' private right of way in Los Angeles. The right of way, 33 feet wide, divided Crenshaw Boulevard lengthwise, making it a divided highway. Automobiles travel south on the west side of the private right of way and north on the east side. At the time of the accident the streetcar was traveling south; the grade was uphill; it was dark and raining; the front window of the streetcar immediately before the motorman was splattered with rain drops; the vision of the motorman was obscured but he "could see quite a ways"; the lights on the streetcar were on; the streetcar was loaded; there were no empty seats.

Decedent was driving an automobile in a northerly direction on Crenshaw Boulevard, east of the right of way, near the west curb. The motorman first saw decedent's automobile when the streetcar was 100 feet north of the intersection of Crenshaw Boulevard and 46th Street. At that time decedent's automobile, with its lights on, was at the prolongation of the southerly curb line of 46th Street and its intersection with Crenshaw Boulevard; the streetcar was traveling between 20 and 25 miles an hour; the automobile was traveling about 10 miles an hour. De-

cedent made a left turn into 46th Street to cross the private right of way. He did not stop. At the moment decedent started across the tracks the intersection was clear. At the time the front end of the automobile reached the track on which the streetcar was traveling south, the streetcar was about 60 feet north of the prolongation of the north curb line of 46th Street and traveling about 20 miles an hour. The motorman did not apply his brakes when the automobile started to turn. He did not apply his brakes until he reached the intersection. Several automobiles had crossed the right of way at 46th Street before decedent's automobile turned onto the right of way from Crenshaw Boulevard. The motorman saw at least one of these automobiles crossing the tracks and decreased his speed slightly. When they cleared the tracks he increased his speed again. The streetcar struck decedent's automobile broadside and traveled about 80 feet beyond the point of impact, carrying the automobile with it on the tracks. The automobile was badly damaged. Wahrenbrock died as a result of the collision.

Appellants contend that the court erred in granting the motion for judgment of nonsuit. They argue that it is to be presumed that decedent was using due care for his safety; that even though there is evidence which conflicts with the presumption, the presumption still stands and the issue is one for the jury; that, in any event, the evidence does not show that decedent was guilty of contributory negligence as a matter of law; that the evidence shows that the motorman was guilty of negligence and, at most, there is a conflict in the evidence.

Respondents argue that since the streetcar was operated upon a private right of way, the rules applicable to a steam railroad apply, including the traversing of street intersections; that the speed limits prescribed by the Vehicle Code, § 511, do not apply to a streetcar; that the motorman could operate the car at any speed not inconsistent with the exercise of ordinary care; that the deceased had a positive duty to look and to listen for the oncoming car and stop, if necessary, to gain an unobscured view of it and to avoid a collision; that the motorman was entitled to assume that a person intending to cross the tracks would look and listen and would not cross when the streetcar was so close to the cross-over as would be a menace to the driver's safety; that the motorman is not required to decrease his speed until he is led reasonably to believe that the person so approaching the tracks does not intend to stop. Respondents also urge that the presumption that the decedent was using due care for his safety is not applicable where plaintiff produces eyewitnesses to an accident, whose uncontradicted testimony proves that the decedent was not using due care.

We assume for the purpose of this opinion that respondents' contentions with respect to the duties of a motorman operating a streetcar on a private right of way and the duties of a driver of a motor vehicle about to cross a private right of way on which streetcars are operated are correct, although there is doubt whether the application of such rules is not limited to electric cars operated in interurban service outside of a city. See, Billig v. Southern Pacific Co., 192 Cal. 357, 362, 219 P. 992; Lund v. Pacific Electric R. Co., 25 Cal.2d 287, 295, 153 P.2d 705; Lindsey v. Pacific Electric R. Co., 111 Cal.App. 482, 487, 296 P. 131.

[2] The trial court should have taken, and we take, judicial notice of the fact that the streetcar was being operated in a thickly populated section of the city of Los Angeles and that Crenshaw Boulevard at 46th Street is a heavily traveled thoroughfare. Katz v. Helbing, 205 Cal. 629, 635, 271 P.1062, 62 A.L.R. 825; Reaugh v. Cudahy Packing Co., 189 Cal. 335, 340, 208 P. 125.

[3-5] In our opinion, various presumptions of law come to the aid of appellants and compel a holding that decedent was not guilty of contributory negligence as a matter of law. The applicable principles are stated at length in Wiswell v. Shinners, 47 Cal.App.2d 156, 160, 117 P.2d 677, 680: "Where, as in the instant case, death has ensued as a result of the accident, thereby sealing the lips of the injured party, the

surviving spouse as plaintiff in the action for the alleged wrongful death, was entitled to invoke the aid of certain presumptions indulged in by law. The presumption is that every person obeys the law; that every person takes ordinary care of his own concerns, and that a person is innocent of crime or wrong. Code Civ. Proc., sec. 1963, subdivisions 1, 4, and 33. There was therefore present in this case the presumption that decedent, while crossing through the intersection, was at all times exercising the requisite degree and amount of care for his own safety by looking in the direction from which danger could be anticipated, * * *.

"True, where facts are admitted or established by proof which are irreconcilable with the presumption, the latter loses its evidentiary value. Nevertheless the presumption is a species of indirect evidence (Code Civ.Proc., sec. 1957), and will prevail in and control the deliberations of the jury unless it is overcome by satisfactory evidence. When, as in the case at bar, direct evidence of an eye-witness was introduced to establish as a fact conduct and behavior on the part of the decedent at variance with and contrary to the presumption, the disputed fact nevertheless remains to be considered and determined upon all the evidence, including the presumption. Indeed, section 2061, subdivision 2, of the Code of Civil Procedure admonishes the trial judge upon all proper occasions to instruct the jury 'that they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against * * * a presumption * * *'.

"* * * We therefore conclude that appellant was entitled to the benefit of the presumptions here claimed until dispelled by evidence opposed to them, and that it was for the jury to determine whether the presumptions had been overcome by evidence offered in contradiction thereof, and which last-named evidence the court was not permitted to consider in ruling upon the motion for a directed verdict.

"Cases cited by respondents in support of their claim that the presumption is destroyed by evidence in contradiction thereof are all cases where appeals were taken from final judgments, in the rendition of which the court or jury was entitled to pass upon the weight of all the evidence submitted and to judge of the credibility of witnesses. Such power is not within the province of a court in ruling upon motions for nonsuit or directed verdict." See, to the same effect, Ryan v. San Diego Electric R. Co., 52 Cal.App.2d 460, 466, 126 P.2d 401; Barry v. Maddalena, 63 Cal.App.2d 302, 306, 146 P.2d 974; White v. Los Angeles Ry. Corporation, 73 Cal.App.2d 720, 727, 167 P.2d 530; Vincent v. Los Angeles Transit Lines, 81 Cal.App.2d 195, 183 P.2d 713. Annotation, 144 A.L.R. 1477.

The rule stems from Mar Shee v. Maryland Assurance Corporation, 190 Cal. 1, 210 P. 269, and Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529, 532. The latter case was an appeal from a judgment on a directed verdict. The question was "directly raised and presented as to whether this presumption, that the deceased exercised due care for his safety, has been overcome and dispelled as a matter of law," by uncontradicted testimony that the decedent was not using due care. The court concluded (page 555 of 212 Cal., page 535 of 299 P.): "In this state the facts and circumstances of the killing must be in evidence. When in evidence, they are aided by the statutory presumption as a species of evidence in behalf of the party relying upon it. When the presumption is invoked by a party, and his evidence is not inconsistent therewith, it is in the case, provided, of course, the evidence sufficiently establishes a sphere or field within which the presumption can operate. Whether it does must, of course, be decided by the trial court as a question of law," and that (page 564 of 212 Cal., page 539 of 299 P.) "[t]he facts before us do not, we think, point unerringly to the negligence of the deceased. * * * Under these circumstances, we think it was for the jury to say as a matter of fact, and not for the court to hold as a matter of law, whether the deceased was guilty of contributory negligence."

It is only when the uncontradicted testimony of the party himself or his witnesses is "wholly irreconcilable" with the presumptions invoked that the latter are dispelled and disappear from the case. Westberg v. Willde, 14 Cal.2d 360, 367, 94 P.2d 590, 594, where it was said: "[W]here the acts and conduct of a deceased person are the subject of inquiry, and the testimony respecting such acts and conduct necessarily must be produced by witnesses other than the deceased, unless such testimony meets the requirement of the rule in the Mar Shee case, and other cases decided by this court following the Mar Shee case, an instruction that the deceased is presumed to have exercised ordinary care of his own concerns is not only proper but this court in an unbroken line of decisions, has sustained the giving of such an instruction"; Anthony v. Hobbie, 25 Cal.2d 814, 819, 155 P.2d 826; Douglas v. Hoff, 82 Cal.App.2d 82, 185 P.2d 607; Wright v. Sniffin, 80 Cal.App. 2d 358, 366, 181 P.2d 675; Simon v. City & County of San Francisco, 79 Cal.App. 2d 590, 180 P.2d 393; Paulsen v. Spencer, 78 Cal.App.2d 268, 271, 177 P.2d 597.

[6] The evidence introduced by the plaintiffs in the present case is not "wholly irreconcilable" with the presumption that every person obeys the law, that a person is innocent of wrong, and that the decedent exercised due care for his own safety. There is no evidence that the decedent did not look and listen. It is presumed that he did and that he, at all times, exercised the requisite degree and amount of care for his own safety by looking in the direction from which danger could be anticipated. Whether he did or not, was a question for the jury. The situation is the same as if he were alive and had testified that he did and did not do all things which a reasonably prudent person would have done or would not have done under like circumstances. The deceased was upon a public highway, a place where he was lawfully entitled to be, and he was about to cross defendants' right of way upon a public highway traversing the right of way. As was said in White v. Los Angeles Railway Corporation, 73 Cal.App.2d 720, 728, 167 P.2d 530, 534: "[T]he question of whether he should have observed the immediate proximity of the streetcar, or whether, in making an error in judgment as to the speed or danger of the approaching streetcar, he was guilty of contributory negligence, was also for the consideration of the jury, the test, under these circumstances, being whether deceased's action was compatible with the conduct of a person of ordinary prudence."

[7-9] The following statement of the Supreme Court in Anthony v. Hobbie, 25 Cal.2d 814, 818, 155 P.2d 826, 829, is appropriate: "Turning to the question of contributory negligence on the part of the decedent, certain rules must be remembered. The burden of proving contributory negligence is upon the defendant. 19 Cal. Jur. 697—699. True, contributory negligence may be found by the trier of fact from the plaintiffs' own evidence. But cases in which it can be said that the negligence of plaintiff contributes proximately to the accident as a matter of law are rare. The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion." See, Wright v. Los Angeles Ry. Corporation, 14 Cal.2d 168, 93 P.2d 135.

[10] The trial court granted the motion for a judgment of nonsuit upon the ground that decedent was guilty of contributory negligence as a matter of law. He did not pass upon the question of whether there was evidence of negligence on the part of the motorman which proximately caused the death of decedent. Under the facts, it is obvious that there was sufficient evidence to require the submission of the cause to the jury on that question. The jury could reasonably have concluded

from the evidence that the motorman saw decedent's automobile when the streetcar was at least 100 feet from the intersection; that when he, the motorman, was from 60 to 100 feet from the intersection he saw, or could have seen, decedent turn onto the right of way and start across; that he should have applied his brakes when he saw decedent start across the right of way instead of waiting until he reached the intersection to do so; and that if he had done so the automobile would have cleared the track without being struck; in fine, that he did not exercise ordinary care in the operation of the streetcar.

We are of the opinion that the court erred in granting defendants' motion for a judgment of nonsuit.

Judgment reversed.

SHINN, Acting P. J., and WOOD, J., concur.

Hearing denied; EDMONDS and TRAYNOR, JJ., dissenting.




84 Cal.App.2d 46

**In re SELB'S ESTATE.**

**Civ. 7423; Sac. 5861.**

District Court of Appeal, Third District, California.

Feb. 28, 1948.

**1. Wills ⇐47**

Old age, feebleness, forgetfulness, filthy personal habits, personal eccentricities, failure to recognize old friends or relatives, physical disability, absent-mindedness and mental confusion do not show lack of testamentary capacity.

**2. Evidence ⇐568(2), 571(2)**

The opinions of witnesses regarding mental soundness or testamentary capacity of a testator are of no greater value than the reasons given in support of such opinions.

**3. Wills ⇐50**

A testator has sufficient mental capacity to make a will if he understands the nature of his act in making will, extent and character of his property, and his relationship to persons who are the natural objects of his bounty.

**4. Wills ⇐52(5)**

To invalidate a will on ground that testator was induced by insane delusion to dispose of his property otherwise than he would have done but for such delusion, it must be shown that testator was actually possessed of a delusion and that such delusion was an insane delusion.

**5. Wills ⇐38(1)**

Prejudices, dislikes, and antipathies, however ill-founded or strongly entertained, do not constitute an "insane delusion" which will invalidate a will.

See Words and Phrases, Permanent Edition, for all other definitions of "Insane Delusion".

**6. Wills ⇐38(1)**

When one's mind is tricked into a false opinion or belief, it is "deluded", but an "insane delusion" such as will invalidate a will, must be the spontaneous production of a diseased mind, leading to belief in existence of something which either does not exist or does not exist in the manner believed, which belief is so firmly fixed that neither argument nor evidence can convince to the contrary, and such insane delusion must have operated to produce the will under attack.

See Words and Phrases, Permanent Edition, for all other definitions of "Delude".

**7. Wills ⇐38(3)**

Alleged delusion of testatrix that daughter and grandson had hounded her about her property and tried to induce her to give it to them, even though testatrix was thereby induced to make a will giving son slightly larger share of her property than daughter, was not such an "insane delusion" as would invalidate will, in view of evidence that daughter and grandson had made some efforts to induce testatrix to sell her home and go elsewhere to live.

**8. Wills ⇐330(2)**

Instruction in will contest as to insane delusion was erroneous in that it permitted jury to consider as such delusion a

persistent belief manifested by acts and conduct of testatrix and omitted essential qualification that such delusion had influenced the making of will.

**9. Wills ⇐384**

Giving erroneous instruction in will contest as to insane delusion was not harmless error, where jury returned into court asking further instructions on what constituted unsoundness of mind, whereupon instructions previously given, including the one on insane delusion, were re-read to them, and possession of insane delusion was substantially the only ground upon which verdict of lack of testamentary capacity could be supported. Const. art. 6, § 4½.

---

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Will contest in the matter of the estate of Mary Elizabeth Selb, also known as Mary Selb, deceased, between Bertha Elizabeth Morris, contestant, and Theodore Selb, proponent. From a judgment denying probate, proponent appeals.

Judgment reversed with directions to admit the will to probate.

C. Ray Robinson, of Merced, for appellant.

V. F. Gant, of Modesto, for respondent.

ADAMS, Presiding Justice.

Mary Elizabeth Selb died September 12, 1945, at the age of 93 years, leaving a will dated March 18, 1944, in which she named her son, Theodore Selb, executor. Probate of said will was contested by decedent's daughter, Bertha Elizabeth Morris, on the ground that decedent was not of sound mind when she executed same and that she was under the undue influence of her said son. The cause was tried before a jury which returned a verdict that decedent was not induced to sign the alleged will by means of undue influence, but that at the time of its execution she was not of sound and disposing mind. From the judgment thereafter entered denying probate this appeal was taken, it being contended by appellant that no evidence of lack of testamentary capacity was adduced and therefore a motion made by him for a directed verdict should have been granted, and that the evidence does not support the verdict. Reversible error is also predicated upon the giving of an instruction as to insane delusions which it is contended was erroneous.

The evidence shows that appellant and respondent were the only children of decedent, and her only heirs at law, her husband having pre-deceased her in 1929. Decedent was at the time of her death the owner of a farm in Missouri, and property in California consisting of a home located on a five acre tract about five miles from Modesto, a small amount of cash, and personal belongings located in the home. For about 13 years prior to her death her son had resided with her on the home place, he having in 1921 suffered a permanent totally disabling industrial accident for which he was drawing compensation in the amount of $7.89 weekly. Contestant lived in Modesto.

Decedent's will, which was drafted by Attorney Hoover in his office in Modesto, recited that testatrix was the owner of the property above mentioned and that her son and daughter were her only children. By the terms of the will the farm in Missouri was devised to the son and daughter in equal shares. Mrs. Morris was given $500 in cash "to be raised from, or upon the security of," the property in California, and the residue was left to Theodore Selb; but it was provided that decedent's funeral expenses and expenses of last illness should be paid from funds to be raised or deducted in equal shares from property given by the will to the son and daughter, respectively. The testimony of the attorney who drafted the will was to the effect that decedent had come to his office, had told him what she wanted put into the will, and that he had drawn it up according to her instructions; that though thte testatrix was not hale or strong physically, she was "quite perky and snappy in a conversation," did not have any difficulty in telling him what she desired to have contained in the will, and was "very definite and certain as to just how she wanted her will prepared"; and that he saw nothing to make him question

her clearmindedness. The subscribing witnesses to the will were a Mr. and Mrs. Harris. Mrs. Harris had died before the contest was instituted but Mr. Harris testified that on the day before the will was executed Mrs. Selb, with her son, had walked over to his home which was situated about a mile from the Selb place, and had asked him to take her into Modesto to witness her will; that the following day he did so; and that when Mrs. Selb signed the will "her mind was keen, she was right up to date," "she was a bright woman," she was "allright." There was other testimony tending to show mental capacity of decedent.

Testimony relied upon by contestant as showing general testamentary incapacity on the part of the testatrix need not be recited in detail. That set forth and relied upon in respondent's brief amounts to no more than that the testatrix was very old and had deteriorated mentally and physically; that at one time she had asked her grandson to write a letter for her to her son who was away from home because ill of a heart attack, she had not given the grandson any specific directions as to what he should write, and that, though the letter was not written, decedent had later stated that it had been written and mailed; that she kept repeating how awful the war was; that she was forgetful; that she was entirely different from what she was sixty years before, and appeared to have failed mentally and physically; that she and her house were untidy, and dirty; that during the last two years of her life she failed greatly in appearance and memory; that at times she would not recognize her friends; that she seemed "rattled" and when staying with her daughter in January, 1944, just wanted to go home and would not talk of anything else; that she did not seem to remember one of her grandson's children; that she was frail and feeble; that during the year 1943 she failed physically, and once "weaved" as she walked; that her house was filthy and musty.

[1] It has been held over and over in this state that old age, feebleness, forgetfulness, filthy personal habits, personal eccentricities, failure to recognize old friends or relatives, physical disability, absentmindedness and mental confusion do not furnish grounds for holding that a testator lacked testamentary capacity. In Re Estate of Vellado, 31 Cal.App.2d 355, 357, 88 P.2d 187, the decedent made a will when he was 85 years old, less than three months prior to his death and at a time when he was very weak, had been suffering for many years from heart trouble, diabetes, kidney and bladder trouble and other ailments from which he was then "gone away to almost nothing," could hardly speak and had a glassy stare in his eye, and was too sick to be shaved. Nevertheless, a judgment for a nonsuit was affirmed. In Re Estate of Garvey, 38 Cal.App.2d 449, 101 P.2d 551, 554, the court said that repulsive or filthy personal habits, ill temper and a disagreeable disposition did not constitute insanity or unsoundness of mind; and there was evidence in that case that following an operation decedent drank to excess, was easily upset emotionally, was slovenly in his appearance and habits, and was not "as smart a man as he had been before". In Re Estate of Collins, 174 Cal. 663, 164 P. 1110, stinginess, repulsive or filthy personal habits, ill temper, jealousy, a dictatorial and disagreeable disposition were said not to constitute insanity or unsoundness of mind. In Re Estate of Agnew, 65 Cal. App.2d 553, 151 P.2d 126, a judgment in favor of contestant was reversed although the evidence showed that the testatrix was eccentric, slept on a cot without a mattress, used candles, wanted to go to bed with her clothes on, wore clothing that was soiled and so worn that when laundered it fell to pieces, was forgetful, was like a child in a way, and had a mind that seemed that it would drift off onto other subjects altogether. In Re Estate of Wright, 7 Cal.2d 348, 60 P.2d 434, also a judgment in favor of contestant was reversed, although the evidence showed that the testator lived alone in his little shack with dirt and junk, that he was "not right," that he gave one of the witnesses a fish which he said he had caught but which she found had been soaked in kerosene, that on occasions he would run out of the

house partially dressed, that he picked up articles from garbage cans and hid them around his house, picked up paper flowers and pinned them on his rose bushes, and went away with a blanket wrapped around him. In Re Estate of Campbell, 46 Cal. App. 612, 189 P. 812, a judgment granting a nonsuit was affirmed. The court said that one with a defective memory who failed to recognize old friends or recall happenings was not bereft of testamentary capacity, as one of the characteristics of old age is forgetfulness or lapses of memory; and that an aged person may be afflicted with these shortcomings without being incapable of disposing by testament of his estate according to the course he wishes to take.

In Rollins v. Smith, 72 Cal.App. 773, 238 P. 171, in reversing a judgment setting aside the assignments of certificates of stock executed by decedent, the court said that proof that a person old and infirm was at times unable to recognize his friends, unable to transact his regular business, had filthy habits and was irritable and ill tempered, and that his mind was weak and failing, did not establish as a fact that his mental incompetency was such that he could not make a will or otherwise dispose of his property.

In Re Estate of Packer, 164 Cal. 525, 529, 129 P. 778, in affirming a judgment of nonsuit, the court said that the only circumstance having any bearing on the matter of mental soundness was a repetition of questions that had already been asked and answered; that this had a tendency to show that the testator's memory was somewhat weakened but did not show an impairment of his ability to grasp the salient facts in relation to his property, its situation, and the objects of his bounty; and would not suffice as proof of want of testamentary capacity. A like holding was made in Re Estate of Dole, 147 Cal. 188, 81 P. 534, where, though the evidence showed that deceased at the time he made his will was old and feeble and fast approaching the end, the court said this was not sufficient to justify the setting aside of his will if the testator knew his property, the manner in which it was invested, and his relatives who were the object of his bounty; and it added that old age alone, no matter how great, never did and cannot invalidate a will, if from all the evidence it appeared that the testator had sufficient capacity.

In Re Estate of MacCrellish, 167 Cal. 711, 141 P. 257, L.R.A. 1915a, 443, the court reversed a judgment revoking probate of the will, though the evidence showed that testatrix would forget what had been told her; claimed there was a man in the room when there was no one there, that a man was watching her and had tried to get into her room at night, and that she had got messages slipped under her door; and expressed fears of being watched and of being robbed. In Re Estate of Phillips, 202 Cal. 490, 261 P. 709, the court affirmed a judgment admitting a will to probate though same had been executed by the testator when he was 93 years old and there was evidence that he was absent-minded, repeated questions already asked and answered a short time previously, and at times seemed confused and unable to recognize those about him.

In Re Estate of Finkler, 3 Cal.2d 584, 46 P.2d 149, a judgment for proponents notwithstanding a verdict in favor of contestants was affirmed, though the evidence showed that decedent was building an airplane in the attic of his home, spoke of a tunnel which ran from the hill on his property to Lake Merced, failed to recognize and speak to acquaintances at various times, was cruel to dumb animals, was eccentric and had various delusions. The court cited In Re Estate of Bemmerly, 110 Cal.App. 550, 294 P. 33, to the effect that a testator is of sound and disposing mind and memory, if, at the time of making his will, he has sufficient mental capacity to be able to understand the nature of the act he is doing, and to understand and recall the nature and situation of his property, and remember and understand his relations to the persons who have claims upon his bounty and whose interests are affected by the will.

[2] In Re Estate of Stump, 202 Cal. 308, 260 P. 543, in affirming a judgment based upon a directed verdict for proponent, the court said that the wills of aged and infirm people, or people sick in mind as well as in body, must be upheld as in other cases

if, notwithstanding their enfeeblement, testamentary capacity is shown. Citing Matter of Estate of Chevallier, 159 Cal. 161, 168, 113 P. 130. It is well established that opinions of witnesses regarding the mental soundness or testamentary capacity of a testator are of no greater value than the reasons given in support of the opinions. In re Estate of Flint, 179 Cal. 552, 177 P. 451; In re Estate of Collins, supra; In re Estate of Smethurst, 15 Cal.App.2d 322, 335, 59 P.2d 830.

[3] In Re Estate of Arnold, 16 Cal.2d 573, page 585, 107 P.2d 25, page 31, the court said that mere proof of mental derangement or even insanity in a medical sense is not sufficient to invalidate a will; and (page 588 of 16 Cal.2d, page 33 of 107 P.2d) that if a person is in the possession of sufficient mental capacity to understand the nature of his act in making the will, the extent and character of his property, and his relationship to persons who are the natural objects of his bounty, he is possessed of sufficient mental capacity to make a will disposing of his estate. Citing In re Estate of Perkins, 195 Cal. 699, 703, 235 P. 45; In re Estate of Shay, 196 Cal. 355, 361, 237 P. 1079; In re Estate of Sexton, 199 Cal. 759, 764, 251 P. 778.

Also see In re Estate of Russel, 80 Cal. App.2d 711, 719, 182 P.2d 318, hearing by Supreme Court denied.

In the case before us those conditions were fully met, as appears from the will itself and the testimony of attorney Hoover, which is uncontradicted in the record. Furthermore, the will cannot be said to be an unnatural one though it may give the son something more than it gives the daughter. The son had lived with his mother for many years, had no other home, was no longer young, had been permanently and totally disabled by his previous accident, and also suffered from heart disease. The daughter, on the contrary, had a husband and two grown sons who were apparently prosperous, and was, herself, able to and did work in the canneries during the summer months. The record also shows that the relationship between the contestant and Theodore Selb was not friendly, and it would have been only natural for decedent to assume that if the home were left to the son and daughter in equal shares, such divided ownership would result in further disharmony and probably eviction of the son from his home.

Respondent in effect concedes that the evidence adduced by her does not show general incompetency, and that none of it goes to the mental capacity of testatrix on the day the will was executed; but she urges that decedent was possessed of an insane delusion that her daughter and grandson had mistreated her; and, though an insane delusion was not alleged as a ground of contest, that there is sufficient proof thereof to sustain the allegation of the contest and the finding of the jury that testatrix was not of sound and disposing mind. She relies upon the testimony of attorney Hoover that his recollection was that when Mrs. Selb gave him instructions regarding her will she stated that she had been ill recently and had been taken to stay with her daughter, and that the daughter and the daughter's son had continually hounded her about her property and tried to induce her to give it to them until she had got disgusted with it and just decided to cut down the gift to her daughter on that account.

Decedent had previously executed two wills, one in May, 1929, in which after making certain small bequests of specific personal property she had devised her estate to her two children in equal shares, and nominated her son as executor; and the other in March, 1939, in which she omitted the specific bequests in the former will, but left her estate to her son and daughter in equal shares, naming the daughter as executrix. It therefore appears that in the will of March, 1944, she did cut down the share of the daughter to some extent, though she did not by any means totally disinherit her.

[4-6] That the possession of an "insane delusion" which leads a testator to dispose of his property otherwise than he would have done had he not possessed such insane delusion is sufficient to invalidate a will may be conceded. But to have such effect testator must have been actually possessed of a delusion, and it must have been an in-

sane one. In Re Estate of Kendrick, 130 Cal. 360, 62 P. 605, the testatrix destroyed a will she had previously made in favor of a sister, and executed one leaving her estate to a neice. Prior to the time this later will was made decedent had suffered a paralytic stroke from the effects of which she died about fourteen months after the execution of the will. Probate of such will was denied and it was contended that it was the result of an insane delusion, contestant relying on testimony that after her stroke decedent gave evidence of hostility to her sister which was violent and groundless; that she had delusions that her sister had stolen all her wearing apparel, was trying to put her out of the house which she occupied, and had tried to kill her. On reversing the judgment in favor of contestant the court said, pages 364, 365 of 130 Cal., page 607 of 62 P.:

"Prejudices, dislikes, and antipathies, however ill founded, or however strongly entertained, cannot be classed as insane delusions; nor is every delusion an insane delusion. Whenever one's mind is tricked or deceived into a false opinion or belief, it has been played upon; it is deluded. But an insane delusion is the spontaneous production of a diseased mind, leading to the belief in the existence of something which either does not exist or does not exist in the manner believed,—a belief which a rational mind would not entertain, yet which is so firmly fixed that neither argument nor evidence can convince to the contrary. Moreover such an insane delusion must have operated to cause the production of the will which is under attack. Estate of Carpenter, 94 Cal. 406, 29 P. 1101; In re McDevitt's Estate, 95 Cal. [17], 33, 30 P. 101; Cole's Will, 49 Wis. [179], 181, 5 N.W. 346; Middleditch v. Williams, 45 N.J. Eq. [726], 734, 17 A. 826 [4 L.R.A. 738]; Stackhouse v. Horton, 15 N.J.Eq. [202], 228; 1 Redf. Wills, p. 89; In re Estate of Scott, [128 Cal. 57], 60 P. 527."

It then considered the evidence, and regarding the asserted delusion of decedent that her sister had stolen her clothing stated that there was testimony both that decedent did and that she did not entertain such a delusion; that it did not appear that decedent had ever been reasoned with upon the matter, or any effort made to convince her of the falsity of her belief; and that "If she believed it upon the evidence of her senses, or upon the statements of some one in whom she had confidence, no matter how ill-founded her conviction might have been, it could not be placed in the category of insane delusions." As to the delusion that the sister was trying to put her out of her house, the court pointed out that decedent had executed a deed of her home to her sister with the express understanding that it should not be recorded until after the grantor's death, but that soon after Mrs. Kendrick suffered her stroke her sister recorded the deed; and when Mrs. Kendrick sent for the keys she found that her sister had taken them. And though the sister told decedent that she had no thought of ejecting her, and offered to return the keys, decedent was not mollified. The court said, page 366 of 130 Cal., page 608 of 62 P.:

"The violated agreement, the recording of the deed, the detention of the keys, the locking of the chicken house, the sale and removal of Mrs. Kendrick's lard, while not sufficient to justify the conclusion that Mrs. Masterson did intend to eject her invalid sister from the house, afforded some ground of belief, at least to the sick and irascible woman, that her sister designed to take advantage of her helplessness. And when it is further considered that Mrs. Kendrick, when aroused, seems to have been both violant and extravagant of speech, the matter of the accusation does not appear extraordinary. At least the belief did not originate in a diseased mind, but found color for its support in the matters that have been recited. It cannot, then, be considered an insane delusion."

Regarding the delusion that the sister was trying to kill decedent, some basis therefor was found in the fact that the sister had administered to the sick woman a dose of morphine in excess of that prescribed, and this was said to furnish some foundation for the accusation of decedent, and that such belief was not, therefore, "the groundless and self-originating belief of a diseased mind."

In Re Estate of Allen, 177 Cal. 668, page 671, 171 P. 686, page 687, where a daughter

contested the will of her father who had entirely disinherited her and her sister in favor of two nephews, contestant relied upon alleged delusions on the part of testator that he had provided for his daughters by gifts, that his daughters were conspiring against him, that they were guilty of immoral acts, etc. The court said:

"The burden was on contestant to prove the existence of the alleged delusions, and to do this it not only devolved upon her to show that they had no foundation in fact, but also that there was no evidence, *however slight or inconclusive,* of any fact upon which the belief could be founded." (Italics added.)

The court there cited In re Estate of Scott, 128 Cal. 57, at page 62, 60 P. 527 at page 528, where it is said:

"In ordinary language, a person is said to be under a delusion who entertains a false belief or opinion which he has been led to form by reason of some deception or fraud; but it is not every false or unfounded opinion which is in legal phraseology a delusion, nor is every delusion an insane delusion. If the belief or opinion has no basis in reason or probability, and is without any evidence in its support, but exists without any process of reasoning, or is the spontaneous offspring of a perverted imagination, and is adhered to against all evidence and argument, the delusion may be truly called insane; but if there is any evidence, however slight or inconclusive, which might have a tendency to create the belief, it cannot said to be a delusion. One cannot be said to act under an insane delusion if his condition of mind results from a belief or inference, however irrational or unfounded, drawn from facts which are shown to exist. 'An insane delusion is not only one which is error, but one in favor of the truth of which there is no evidence, but the clearest evidence often to the contrary. It must be a delusion of such character that no evidence or argument will have the slightest effect to remove.' Merrill v. Rolston, 5 Redf. Sur. [N.Y., 220] 252."

In Re Estate of Shay, 196 Cal. 355, 237 P. 1079, a judgment in favor of contestants of a will, based upon a verdict of a jury, was reversed. The court said that the evidence of general testamentary incapacity was insufficient to overcome the presumption of sanity. And as for an "insane delusion" on the part of testator that one of his daughters was addicted to the use of liquor and drugs, and the contention of contestant that in dictating the terms of his will decedent had stated that for that reason he was making a trust provision for her instead of an outright legacy, the court said, page 361 of 196 Cal., page 1081 of 237 P.:

"The evidence shows that this daughter was neither a drunkard, a drug addict, nor a spendthrift, and it is argued that the will is therefore the product of a delusion which affected the testamentary purpose of the testator. But the existence of a mere delusion; that is to say, a false or mistaken belief concerning the existence of a fact, does not affect testamentary capacity. A delusion to invalidate a will must be an insane delusion, that is to say, a belief which is the spontaneous product of a diseased mind, which comes into existence without reason or evidence to support it, and which is adhered to against reason and against the evidence. Estate of Scott, 128 Cal. 57, 60 P. 527; Estate of Kendrick, 130 Cal. 360, 62 P. 605; Estate of Perkins, [195 Cal. 699] 235 P. 45; Estate of Allen, 177 Cal. 668, 171 P. 686; Estate of Hess, 183 Cal. 589, 192 P. 35; Estate of Calef, 139 Cal. 673, 73 P. 539. There is nothing in the record to indicate that this belief of the testator mistaken though it may have been, was without reason or evidence, or that it was adhered to against reason or against evidence. The finding of testamentary incapacity is not sustained by the evidence."

In Re Estate of Putnam, 1 Cal.2d 162, 34 P.2d 148, where both general insanity and the possession of insane delusions were alleged as grounds of contest and the contestants prevailed in the trial court, the case was reversed on appeal, the court holding that the evidence was insufficient to show general insanity, and that as there was some foundation in fact for the testator's beliefs which influenced his disposition of his estate they could not be said to constitute insane delusions or any de-

lusions at all. It said also, pages 171, 172 of 1 Cal.2d, page 152 of 34 P.2d:

"The only reasonable conclusion from the record before us is that the testator was possessed of a parental belief, not abnormal or unfounded under the facts, relating to his son's ability to handle money, and that he took steps to protect him with an income adequate to his needs in addition to his own earnings for the balance of his life. Even though there may have been discord in the family during the decedent's lifetime or even injustice in the division of income between the children, that alone would not be sufficient to set aside a will executed by one in full possession of his mental faculties and otherwise competent to make a will. An insane delusion has been defined to be the conception of a disordered mind which imagines facts to exist of which there is no evidence and the belief in which is adhered to against all evidence and argument to the contrary, and which cannot be accounted for on any reasonable hypothesis. 'One cannot be said to act under an insane delusion if his condition of mind results from a belief or inference, however irrational or unfounded, drawn from facts which are shown to exist.' Estate of Scott, 128 Cal. 57, 62, 60 P. 527, 529, Estate of Shay, 196 Cal. 355, 237 P. 1079; Estate of Perkins, 195 Cal. 699, 235 P. 45; Estate of Powell, 113 Cal.App. 670, 299 P. 108. The facts in this case do not meet the tests prescribed by our law and are inadequate as a foundation for setting aside the testamentary acts in question."

The same rule prevails elsewhere. See 28 Am.Jur., p. 657; Vol. 21 Words and Phrases, Perm.Ed. pages 573-583.

Assuming, then, that Mrs. Selb at the time she executed her will believed that her daughter and her daughter's son had "hounded her about her property" and had tried to induce her to give it to them, and that this belief induced her to change the terms of her will, the question arises whether the evidence shows that there was any evidence, however slight, to supply a basis for such a belief. The testimony of contestant's son, Pierce Morris, is to the effect that in January, 1944, after a discussion with his family, he took it upon himself to talk to his grandmother with the idea in mind that they would sell the ranch and put the money into funds so that it would take care of her, but that he couldn't get anything from her; that her son was hostile to the idea, had it in his mind that the grandson was there to get some money out of the estate, and said so in no uncertain terms; that shortly after that Theodore Selb became ill and was not able to take care of his mother, whereupon Mrs. Selb was brought to her daughter's home; and that while she was there he again tried to talk to her—"to sell the same idea"—but she was still in the same frame of mind, and all she could say was that she just had to get back to the ranch—to live there.

Mrs. Morris, the contestant, testified that while her mother was with her in her home from January 8 to 25, 1944, her mother "acted more like a maniac * * *"; that she wanted to go somewhere else and stay; that she wanted to go home; that she would run out of the house, scream, throw up her hands, and the witness would have to go out of the house, get her by the arm and tell her to come in. She also stated, in response to a question as to whether she ever attempted to talk to her mother about the latter's business affairs, that she couldn't "because every time I tried to say a thing there would be something brought up about being none of my business * * * so I got so I didn't try to mention business or anything." She also said that before her mother was brought to her home in January, 1944, she had said that "if mother comes in and stays with me there will have to be some provision made"; and she admitted that after her mother left on January 25th she did not see her again until her mother broke her hip about a year later, at which time she was taken to the hospital where she died on September 12, 1945.

Other witnesses testified that while decedent was in her daughter's home in January, 1944, all she could talk about was that she wanted to go home. Mrs. Rife said that when Mrs. Selb was brought to her home in January, 1944, she was upset because the Morrises had wanted her to sign some paper.

[7] While the witness Harris testified that Mrs. Selb had complained of treatment that she had received in her daughter's home, where they had tried to get her to sign some paper. and that the daughter and her son had used violence upon her to accomplish this purpose, it is not reasonable to believe that such violence was resorted to. Such an extravagant claim may have originated in the mind of the overzealous witness rather than in that of the decedent. But discounting the matter of violence, the fact remains that some efforts had been made by contestant and the members of her family to induce Mrs. Selb to sell her home and go elsewhere to live; and for this reason it cannot be said that the so-called delusion of testatrix that her daughter and grandson had hounded her about her property and tried to get her to give it to them was "the groundless and self-originating belief of a diseased mind" (In re Estate of Kendrick, supra), or that it was without "any evidence, however slight or inconclusive, which might have a tendency to create the belief" (In re Estate of Allen, supra; In re Estate of Scott, supra), or that the belief of the testatrix, "mistaken though it may have been, was without reason or evidence, or that it was adhered to against reason or against evidence" (In re Estate of Shay, supra), or that it was not "based upon evidence, however slight." In re Estate of Hill, 1 Coffey's Probate Decisions (Ann.) 380, 402.

It was said in Taylor v. McClintock, 87 Ark. 243, 112 S.W. 405, 414, that a belief grounded on evidence, however slight, necessarily involves the exercise of the mental faculties of perception and reason; and in such cases, no matter how imperfect the reasoning process may be, or however erroneous the conclusion reached, it is not an "insane delusion." Citing In re Estate of Scott, supra.

Appellants finally complain that an instruction given to the jury, and which was the only one bearing upon the subject of insane delusions, was erroneous, and the giving of same so prejudicial as to justify a reversal of the judgment. It reads:

"If you find that the testatrix at the time of making her alleged will in March, 1944, *acted and conducted herself as if she had a persistent belief* that her daugher, Bertha Morris, had not treated her fairly or justly or affectionately, but had treated her wrongly and injuriously, and further find that there was no evidence or probability for such belief, and further find that such belief was without any foundation or reason, then in such case, such belief may be considered as an insane delusion. And, if you find in accordance with the foregoing, that the testatrix was suffering from such insane delusion at the time of the making of her alleged will of March 18, 1944, then I instruct you that you must find that such will is invalid." (Italics added.)

[8] Without going farther said instruction may be said to be erroneous because of the language underlined above and because it omits the essential qualification that the "persistent belief" had influenced the making of the will. See In re Estate of Kendrick, supra, 130 Cal. at pages 370, 371, 62 P. at pages 609, 610.

[9] Respondent replies that even though the instruction was defective it should be disregarded because of the provisions of Art. VI, sec. 4½, of the Constitution. We cannot agree with this contention in this particular case, for two reasons, one that the record shows that the jury before reaching a verdict returned into court and asked for further instruction on what constituted unsoundness of mind, whereupon the court reread to them its instructions previously given, including the one above set forth; and for the second reason that reliance upon the possession of an insane delusion is substantially the only ground upon which the verdict could find possible support.

The judgment is reversed with directions to admit the will to probate.

PEEK and THOMPSON, JJ., concur.

84 Cal.App.2d 64

## PEOPLE v. BYRNES.

Cr. 4010.

District Court of Appeal, Second District, Division 3, California.

March 1, 1948.

Hearing Denied March 30, 1948.

1. Assault and battery ⇐91
Kidnapping ⇐5
Rape ⇐51(4)
Sodomy ⇐6

Evidence sustained convictions of kidnapping, forcible rape, sexual perversion, and simple assault. Pen Code, § 288a.

2. Criminal law ⇐1171(1)

Contemptuous attitude of prosecutor toward attorney for defense throughout trial, which was manifested by many allegedly sarcastic and insulting remarks, was not ground for reversal of convictions, where prosecutor's ill temper was not displayed toward defendant, and it was not probable that improper statements could have influenced jury's verdict.

3. Criminal law ⇐1173(2)

In prosecutions for kidnapping, forcible rape, sexual perversion, and simple assault, court should have given a more comprehensive instruction than that testimony of prosecutrix should have been carefully scanned, but failure to give a more comprehensive instruction was not reversible error, where in view of the evidence it was highly improbable that different verdicts could have been returned if a more complete instruction had been given. Pen. Code, § 288a.

4. Criminal law ⇐785(7)

In prosecutions for kidnapping, forcible rape, sexual preversion, and simple assault, failure to give instruction on expert testimony was not error, where the only testimony of any consequence given by physician who examined prosecutrix consisted of descriptions of prosecutrix' physical condition. Pen. Code, § 288a.

5. Criminal law ⇐678(1)

Where count 2 of indictment charged rape by means of force and violence and count 3 charged rape by means of threats, and jury was instructed that defendant could be convicted on only one charge of rape, and he was convicted on count 2, and acquitted on count 3, failure to require prosecution to elect as to which act was relied on was not error, though prosecutrix testified to more than one act of rape, in absence of any demand by defendant for an election, since it was presumed that prosecution relied on the charge as to which it first submitted evidence.

---

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Frederick J. Byrnes was convicted of kidnapping, forcible rape, sexual perversion, and simple assault, and he appeals.

Judgments affirmed.

See also 190 P.2d 290.

Frederick J. Byrnes, in pro. per., for appellant.

Robert W. Kenny, and Fred N. Howser, Attys. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

SHINN, Acting Presiding Justice.

In 1932, Frederick J. Byrnes was accused by indictment of six felony offenses against a young woman. Two prior convictions of felonies were charged, namely, forgery and grand theft, which defendant admitted. In a jury trial he was convicted of kidnapping, forcible rape, violation of section 288a of the Penal Code, and simple assault. He was acquitted of a separate charge of rape, of violation of section 286 Penal Code, and of assault with intent to kill and murder his victim. By separate indictment defendant was accused of aiding and abetting one Jack Clay in the commission of two acts of forcible rape, of violation of section 286 Penal Code, and of two violations of section 288a, by the said Jack Clay. The same prior convictions were charged and admitted. Clay also was indicted. The victim was the same as in the first indictment. The defendants were tried jointly. Clay was acquitted and Byrnes was convicted of two offenses of forcible rape and two violations of section 288a Penal Code. The eight offenses of which he was convicted were committed during the course of a single night.

After judgment was pronounced in each case, defendant made a motion for new trial, which was denied. He gave notices of appeal but no records on appeal were prepared. He entered State Prison in 1932, where he still remains. In 1945 he was before the Supreme Court on habeas corpus, seeking his release. The writ was discharged, defendant was remanded, but the superior court was directed to hear any motion or motions he might make to be relieved from default in perfecting his appeal in either or both of said actions. In re Byrnes, 26 Cal.2d 824, 161 P.2d 376. The main circumstances which led to the long delay in the proceedings on appeal are stated in the opinion. Upon applications of defendant the superior court ordered the preparation of clerk's and reporter's transcripts on appeal in each case, and the same have been filed. The two appeals are before us on a single set of briefs.

The several sentences under the first indictment were ordered to run consecutively, and those under the second indictment were ordered to run consecutively, and consecutively with the sentences under the first indictment. Defendant had served out the terms fixed as punishment under the judgments in the first prosecution before the decision of the Supreme Court in the habeas corpus proceeding, and is now serving the sentences imposed under the judgments in the second case.

We are considering now only the appeal from the judgments in the first case.

In the habeas corpus matter the Supreme Court took note of the fact that the first judgments had been fully satisfied, but extended to defendant an opportunity to perfect his appeals, saying, 26 Cal.2d at page 828, 161 P.2d at page 378: "For although Byrnes served the full terms of imprisonment imposed under the judgments of conviction in the first action, that fact does not bar his right to an appeal from such judgments for the purpose of clearing his name (see, People v. Chamness, 109 Cal. App.Supp. 778, 288 P. 20; In re Lincoln, 102 Cal.App. 733, 283 P. 965) * * * in the event that the trial court relieves him from default in the presentation of the record."

Appellant's principal contention is that the evidence was insufficient to justify the verdicts and we shall proceed to a consideration of that question. A condensed statement of the substance of the evidence will provide the answer. In our statement we shall omit all but a few of the details of appellant's conduct with which the record abounds. It will be sufficient to state the facts testified to by the witnesses, without embellishment. There will be found in what we have to say no satisfaction or solace for appellant. In its mildest form it will be a nauseating recital of depravity, brutality and hideous torture on the part of Byrnes, compared with which the mere slaying of his victim might well have been an act of mercy.

There was proof of the following facts: The prosecutrix, a young unmarried white woman, who lived with her mother and sister, went late one evening with an escort, Mr. Sullivan, to a negro resort on Central Avenue, in Los Angeles. Many of those present were colored; the defendant has a white skin. Drinks were consumed by prosecutrix and her escort; the latter, becoming ill, retired and was grabbed by several negroes, beaten, robbed and rousted out of the place with violence. He was later arrested for a traffic violation and did not reappear. Defendant, who was in the uniform of an officer of the Air Forces, though not a member thereof, offered to help prosecutrix find her escort. He took her to another night club, nearby, where he checked her coat. When she sought to leave he twisted her arm and threatened her; when she had recovered her coat she ran out, across the street and entered a cab; defendant followed, dragged her from the cab, and threatened to shoot the cab driver; prosecutrix, shortly thereafter, ran to the cab again, asked to be taken home and defendant grabbed her, forced her away and into his car. She jumped out of the car and onto the running board of a car of a man named Mitchell. Byrnes again grabbed her, forced her into his car and drove to the stockyards area where he committed an act of rape and other offenses. Defendant stated that he had a gun, threatened to kill the prosecutrix, tore her clothes from her, threw her to the floor

of the car, beat her with his fists and broke her nose in two places. He drove back to the front of the last mentioned night club; prosecutrix was on the floor of the car, without clothing. A negro, Jack Clay, a stranger, came to the car with a bottle of liquor, defendant ordered him into the car and drove to a grain field near an airport. Here Clay, threatened with death and believing Byrnes had a gun, committed an act of rape, a violation of section 288a, and prosecutrix, under like threats, committed the latter act upon the person of Clay and the person of Byrnes. Byrnes kicked prosecutrix, struck her in the face, slammed her head against the car, seized her by the hair and threw her about, pulling out quantities of her hair and causing her nose to again bleed profusely. As they left the field the car stalled in a ditch. Ignacio Tabar, a farmer who lived nearby, helped them extricate it. He testified to seeing Byrnes in an act of intercourse with prosecutrix; that the latter was naked, badly beaten up and bleeding and that Byrnes compelled her to walk around in this condition. Upon returning to the neighborhood from which they had started, Byrnes caused Clay to leave the car, drove to a house in the vicinity, placed his overcoat around prosecutrix, carried her up to a room, brought in three negroes and caused them to commit sexual crimes upon prosecutrix. He then drove her to an abandoned shack toward the beach, committed an act of rape and other sexual offenses and caused prosecutrix to commit an act of violation of section 288a. During this time he threw her against a wall, struck her in the face and threatened to kill her. He then drove her to her home; she had an intense desire to cause his arrest and persuaded him to take her to her apartment, clothed in his overcoat. As they entered the apartment, prosecutrix hysterically told her mother and sister something of what had happened to her, called to them to hold Byrnes, which they attempted to do. Byrnes struck the mother, knocking her down and breaking a rib, also struck the sister, and fled. Prosecutrix was hospitalized for six days on account of her injuries. Other evidence will be mentioned later. After his arrest Byrnes admitted to the police that he assaulted prosecutrix near the airport, forced her to have intercourse with Clay and to commit a violation of section 288a with Clay. At the trial he testified that he used no violence, that he engaged in an act of intercourse with prosecutrix near the airport and that it was with her consent and upon her insistence. He also testified to witnessing acts of misconduct between prosecutrix and Clay.

Briefs have been filed on behalf of appellant by an attorney substituted for one appointed by the Supreme Court. They contain a conscientious, labored effort to discredit the testimony of the prosecutrix to the end that the judgments in each case be reversed for insufficiency of evidence. After discharging his attorney, who had shown extreme diligence and effort in his behalf, appellant filed a supplemental brief in propria persona. In this brief he makes use of scurrilous and abusive language in his attack upon the credibility of the prosecutrix. It is sufficient to say that we are not impressed in the slightest by any of the arguments questioning the credibility of the prosecutrix or the sufficiency of the evidence. The testimony of prosecutrix before the grand jury and at the trial as to her mistreatment at the hands of defendant was fully as coherent and consistent as could have been expected of any woman who had been through a night of the cruel and terrifying abuse which she related. If there was any inherently improbable and worthless testimony in the case it consisted of the feeble and obviously false testimony of Byrnes that he committed no act of violence, and that the acts which he admitted were committed with the consent and upon the insistence of prosecutrix. There was no lack of evidence corroborating the testimony of the prosecutrix. The taxicab driver testified to the attempts made by prosecutrix to escape in his cab when she was dragged out of it by Byrnes under threats that he would shoot the driver if he interfered. Mitchell testified to her attempt to escape in his car which was forcibly prevented by Byrnes. A physician testified that prosecutrix was bruised, cut and scratched, and that her nose was

broken in two places. The police found blood, a handful of hair, and part of an undergarment, in the car that Byrnes had used, and there was other corroborative evidence, including that of the mother and sister, which need not be related.

[1] The evidence was not only legally sufficient to establish guilt, but the proof in support of the charges was so strong that verdicts other than those rendered would not have been within the bounds of reason.

[2] Another contention is that the prosecutor was guilty of prejudicial misconduct. He is accused of maintaining a contemptuous attitude toward the attorney for the defense throughout the trial, which was manifested by many sarcastic and even insulting remarks. The attorney general very properly concedes that this conduct was obnoxious and not to be condoned, but he maintains that it furnishes no sufficient ground for a reversal of the judgments. With this position we agree. The ill temper of the prosecutor was not displayed toward the defendant, there was no attempt to influence the jury by the statement of any matter outside the record, and the remarks complained of were not such as have heretofore been deemed prejudicial to a defendant on trial. It is unnecessary to consider them specifically. We do not believe it at all probable that the improper statements could have influenced the verdict in the slightest. We might repeat an observation which we made recently that the improper statements of the prosecutor could have had no appreciable effect on the minds of the jurors as compared with the impact of the evidence of the defendant's guilt.

[3] There was no prejudicial error in the matter of instructions. While the court instructed that the testimony of the prosecutrix should be carefully scanned, a more comprehensive instruction which it is well established should be given in such cases was not given. In view of the evidence it is highly improbable that different verdicts would have been returned if a more complete instruction had been given. People v. Lucas, 16 Cal.2d 178, 105 P.2d 102, 130 A.L.R. 1485; People v. Mummert, 57 Cal. App.2d 849, 135 P.2d 665; People v. Stangler, 18 Cal.2d 688, 693, 117 P.2d 321.

[4] There was no error in failing to give an instruction on expert testimony. The only testimony of any consequence given by the physician consisted of descriptions of the physical condition of prosecutrix.

[5] Count two of the indictment charged rape by means of force and violence and count three, rape by means of threats, etc. The jury were instructed that defendant could be convicted of only one charge of rape. He was convicted on count two and acquitted on count three. It is contended that inasmuch as prosecutrix testified to more than one act of rape the People should have made an election as to which act was relied on. No demand for an election was made by defendant and it was to be presumed that the prosecution relied upon the charge as to which it first submitted evidence. People v. Chiappelone, 90 Cal.App. 472, 265 P. 976; People v. Bodey, 94 Cal.App. 420, 271 P. 203; People v. Meraviglia, 73 Cal.App. 402, 238 P. 794.

It is unnecessary in our decision to indicate what our judgment might have been if we had found that the evidence was insufficient to justify the verdicts, that is to say, whether it would have been proper to direct a new trial or to order a dismissal of the action. We have considered also the charge of misconduct of the prosecutor and the several claims of error as we would in a case where the judgment had not been fully satisfied by the completion of a sentence of imprisonment. It should not be inferred from our consideration of these points that if we had found the charge of prejudicial misconduct or any claim of prejudicial error sustained, we would have directed a reversal of the judgments and ordered a new trial. A reversal for mere error or irregularity in the proceedings would not tend in any way to clear the name of the defendant, but would necessarily place it in his power to plead former jeopardy, and thus force a dismissal of the charge. The attorney general has not made objection to the consideration of these questions on the ground that they

are moot, and we deem it unnecessary to decide the point.

The judgments and the order denying motion for new trial are affirmed.

WOOD, J., and VALLÉE, Justice pro tem., concur.




84 Cal.App.2d 72

**PEOPLE v. BYRNES.**

**Cr. 4011.**

District Court of Appeal, Second District, Division 3, California.

March 1, 1948.

Hearing Denied March 30, 1948.

**1. Criminal law ⇐635**

A "public trial", guaranteed by the Constitution and code section, is one open to the general public at all times, but such right of attendance may be curtailed under certain circumstances without infringement of the right, but it cannot be denied altogether, nor can it be restricted except in cases of necessity. Pen.Code, § 686; Const. art. 1, § 13.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Trial".

**2. Criminal law ⇐635**

Defendant in prosecution for rape and sexual perversion, was denied a "public trial" guaranteed by the Constitution and code section, where court ordered sheriff to admit to the court room only defendants, counsel, officers of the court, jurors, and those having business with and in the court, and excluded others and all witnesses except while on the witness stand. Pen.Code, § 686; Const. art. 1, § 13.

**3. Criminal law ⇐1186(4)**

Constitutional provision that a judgment shall not be set aside or a new trial granted unless there has been a miscarriage of justice does not abridge a defendant's constitutional right to a public trial. Pen. Code, § 686; Const. art. 1, § 13; art. 6, § 4½.

**4. Criminal law ⇐635**

A defendant's right to a public trial, as guaranteed by the Constitution and code section, is comparable to and on the same footing as rights of trial by jury and to the assistance of counsel. Pen.Code, § 686; Const. art. 1, § 13.

**5. Criminal law ⇐1166½(1)**

A judgment of conviction of a defendant who has demanded and been refused a public trial cannot be allowed to stand on appeal, even though the defendant is obviously guilty. Pen.Code, § 686; Const. art. 1, § 13.

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Frederick J. Byrnes was convicted of two offenses of forcible rape and two offenses of sexual perversion, and he appeals.

Judgments reversed and new trial ordered.

Frederick J. Byrnes, in pro. per., for appellant.

Robert W. Kenny and Fred N. Howser, Attys. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

SHINN, Acting Presiding Justice.

This is a companion appeal to No. 4010, Cal.App., 190 P.2d 286. Reference is made to the opinion in that appeal for a statement of the offenses of which defendant stands convicted. He is now in prison under sentences upon judgments of conviction of four charges of felonies. He appeals from those judgments and from an order denying his motion for a new trial. The reasons for the delay of fifteen years are referred to in our opinion in case No. 4010.

Numerous assignments of error are presented by defendant and discussed in the briefs. Only one of them requires decision and this is the contention that defendant was not accorded a public trial as guaranteed by Article I, section 13, of the

Constitution, and section 686 of the Penal Code.

Defendant, on trial to a jury, with one Clay, jointly accused, was acting as his own attorney. The deputies of the district attorney, acting as prosecutors, moved at the commencement of the trial that the case be heard behind closed doors. Defendant Byrnes objected to any order of that nature and demanded that the trial be public. The court overruled the objection and made an order as follows: "* * * all persons, except the defendants, counsel, officers of the Court, jurors and those having business with and in the court will be excluded, and the Court will direct that the Sheriff shall keep the doors of the court room open and unlocked to admit into the court room only those who have business with the court or in the court. All witnesses on both sides will be excluded from the court room except the witness upon the stand, and the defendants." Presumably this order was carried out by the bailiff and the case was tried under the conditions stated in the order.

Appellant has not attempted to prove any actual prejudice resulting from the exclusion of the public. The record shows no reason for the order, other than the one stated by the court.

[1, 2] The first question is whether in the circumstances appellant was given a public trial. Under normal conditions a public trial is one which is open to the general public at all times. This right of attendance may be curtailed under special circumstances without infringement of the constitutional right, but it cannot be denied altogether, nor can it be restricted except in cases of necessity. The most common of these is the necessity of preserving order and preventing interference with the proceedings. Here there was no actual or threatened disturbance of the proceedings in the trial of defendant and there was no necessity for the order of exclusion. Such being the case, the order was a clear deprivation of the right to a public trial. The law was clearly stated in People v. Hartman, 103 Cal. 242, at pages 243, 245, 37 P. 153, 154, 42 Am.St.Rep. 108, as follows: "the court made an order excluding from the courtroom, during the trial of the case, all persons except the officers of the court and the defendant. This was a novel procedure, and has no justification in the law of modern times. We know of no case, decided in this country, supporting the course of procedure here pursued. It is in direct violation of that provision of the constitution which says that a party accused of crime has a right to a public trial. The fact that the officers of the court were allowed to be present in no way made the trial public. For the purposes contemplated by the provision of the constitution, the presence of the officers of the court,—men whom, it is safe to say, were under the influence of the court,—made the trial no more public than if they too had been excluded. * * * The trial should be 'public,' in the ordinary common-sense acceptation of the term. The doors of the courtroom are expected to be kept open, the public are entitled to be admitted, and the trial is to be public in all respects, as we have before suggested, with due regard to the size of the courtroom, the conveniences of the court, the right to exclude objectionable characters and youth of tender years, and to do other things which may facilitate the proper conduct of the trial."

We are in full accord with these views. They are supported by the decided weight of authority. People v. Letoile, 31 Cal.App. 166, 159 P. 1057, where the court, quoting from People v. Hartman, stated that the public cannot be wholly excluded; Tilton v. State, 5 Ga.App. 59, 62 S.E. 651, where the order excluded "every one not connected with the case"; Wade v. State, 207 Ala. 1, 92 So. 101 (overruling Clemons v. State, 17 Ala.App. 533, 86 So. 177), where admittance was denied to all except those who were related to defendant and officers of the court, including attorneys whose duty it may have been to enter during the course of the trial; Stewart v. State, 18 Ala.App. 622, 93 So. 274, where all were excluded except those whose presence was "necessary"; People v. Yeager, 113 Mich. 228, 71 N.W. 491, where all spectators were excluded except relatives of defendant, representatives of the press, friends of the defendant, or the prosecuting witness; State v. Beckstead, 96 Utah 528, 88 P.2d 461,

where witnesses were allowed to remain and all spectators were excluded; Tanksley v. United States, 9 Cir., 145 F.2d 58, 156 A.L.R. 257 (Annotation), where the order excluded all persons except the parties and their counsel, officers of the law, representatives of the press, and the brother and father of the defendant; State v. Osborne, 54 Or. 289, 103 P. 62, 20 Ann.Cas. 627, where only the defendant, the attorneys engaged in the trial, officers of the court and witnesses while on the stand were allowed in the courtroom; Rhoades v. State, 102 Neb. 750, 169 N.W. 433, where all those present merely as listeners were excluded while the prosecutrix was testifying; State v. Jordan, 57 Utah 612, 196 P. 565, where the order excluded all persons except those connected with the case, exclusive of witnesses, but permitted the father of defendant to remain; State v. Bonza, 72 Utah 177, 269 P. 480, where the order excluded all spectators except the sister of the prosecuting witness; State v. Hensley, 75 Ohio St. 255, 79 N.E. 462, 9 L.R.A.,N.S., 277, 116 Am.St.Rep. 734, 9 Ann.Cas. 108, where testimony of the prosecution, except that of one witness, was taken in a small room to which the court was adjourned, the public being excluded; State v. Keeler, 52 Mont. 205, 156 P. 1080, L.R.A.1916E, 472, Ann.Cas.1917E, 619, where all those present were allowed to remain but no one was to be admitted. All the foregoing were prosecutions for sex offenses and the orders were made upon the ground that the testimony would be of an indecent nature. Other cases are: People v. Murray, 89 Mich. 276, 50 N.W. 995, 14 L.R.A. 809, 28 Am.St.Rep. 294, a murder case where spectators were excluded under an order to the sheriff to admit only respectable people, and he excluded all who sought admittance, indiscriminately; People v. Micalizzi, 223 Mich. 580, 194 N.W. 540, a murder case where the courtroom doors were locked and persons were denied admittance during the charge to the jury; People v. Callazo, 119 P.R.R. (Puerto Rico), where the public was excluded during examination of one of the witnesses in a prosecution for disturbing the peace; Davis v. United States, 8 Cir., 247 F. 394, 159 C.C.A. 448, L.R.A.1918C, 1164, a conspiracy to delay the mails, where the order excluded all spectators, during one night session near the end of the trial, except relatives of defendant and members of the bar and press, and the sheriff was instructed to admit no one but those of the excepted classes.

While the several orders considered in the foregoing cases differed as to terms, all of the cases fall into a single category, in which also the case at bar belongs. This line of authority is clear cut and direct. It leads to no uncertainty or confusion. The same is not true of the cases in which the right to a public trial has been denied or restricted for various reasons.

Some courts have held that the trial court has the discretionary power to limit the number of spectators, even though there is no real or apparent necessity for it. The reason usually assigned is that the testimony is expected to be indecent and that the spectators, generally, are not otherwise interested in the case. Trials have been held public, within the meaning of the constitutional provision, if friends and relatives of the defendant, or persons interested in the case, were allowed to attend, and it has been deemed important that representatives of the press and members of the bar were not excluded. The theory of these cases is that a trial is public if it is not private, and that the accused is deprived of no substantial right if those who would be of assistance to him in the trial are allowed to remain, or enough spectators are present to insure the performance of their duties by court officials. As we shall point out later, in discussing the cases relied on by the People, the constitutional right has been construed erroneously as a protection against only the detriment which the accused can show as the result of a nonpublic trial. In other words, prejudice is not presumed, and in the absence of proof of actual prejudice the trials have been held of a sufficiently public nature to meet the requirement of the constitution.

The attorney general concedes that appellant's trial did not meet the requirements of a public trial as stated in the Hartman case. He adopts the reasoning of the minority cases, placing much reliance upon People v. Stanley, 33 Cal.App. 624, 166 P.

596, 598, a prosecution upon a charge of omitting to provide for an illegitimate child. Two orders were made. The first was at the request of the defendant and directed that all persons not in some way related to the case should retire. Several days later, the defendant requested that the courtroom be cleared "under the former rule." The court stated that while those who came to gratify some sort of prurient curiosity should be excluded, those who had some legitimate interest should be allowed to remain, including personal friends and relatives of the defendant and those of the complaining witness, if any. The defendant objected to the presence of friends of the complaining witness and demanded that the trial be public. The court was of the opinion that the right had been waived and directed the trial to proceed as already ordered, that is, under the direction that those who had no interest in the case should retire. From the opinion on the appeal it appears that it was not disclosed by the record to what extent, if at all either order was obeyed or enforced but it was presumed that the orders were obeyed. The court said, 33 Cal.App. at page 629, 166 P. at page 598: "When the order of the court is sufficiently broad and flexible as to admit the officers of the court, the witnesses for the respective parties, the members of the bar, and also, as in this case, all others who have a legitimate interest of any sort or kind in the case, including the personal relatives or friends of the defendant and of the complaining witness, and only expressly excluding those 'who have no interest in the case,' it cannot be said that the trial has not been a public trial, or that the order was not one which it was clearly within the sound discretion of the trial court to make. Reagan v. United States, 9 Cir., 202 F. 488, 120 C.C.A [44 L.R.A., N.S., 583, 627], and cases cited." We are obliged to disagree with this statement of the law, but if it were deemed correct, as applied to the order there under review, it would not be authority for sustaining the order here in question, which excluded all spectators. However, as we read the Reagan case, it was not authority for the proposition that the order in question in People v. Stanley did not deprive the trial of a public character. The Reagan case, decided by the Ninth Circuit, was considered by that court in Tanksley v. United States, supra, 9 Cir., 145 F.2d 58, 59, 156 A.L.R. 257 (Annotation page 260), where it was said: "In the Reagan case this court did not hold that the exclusion of the public was not a violation of the defendant's right to a public trial. What was held was that, on the facts existing in that case, no possible prejudice could have been suffered by the defendant from the exclusion of the public." This analysis of the decision was correct, for it was said in the Reagan case, 202 F. at page 490, 44 L.R.A.,N.S., page 585: "We think the better doctrine is that it is not reversible error to exclude the spectators as was done by the order of the court in the case at bar, *when there is no showing whatever that the defendant was prejudiced thereby, or deprived of the presence, aid, or counsel of any person whose presence might have been of advantage to him.* * * * [emphasis added.] The mere denial of the literal right should not be held ground for reversing a judgment, unless it can be perceived that the defendant has been deprived of some benefit or advantage thereby. * * In a sense it was still a public trial. In addition to the court and jury, there were present in the court room the officers of the court, the witnesses for the government and for the defendant, and the counsel for the respective parties, and no members of the bar were excluded. These constituted a sufficient number of the public to see that the plaintiff in error was fairly dealt with and not unjustly condemned." We are not in agreement with the quoted statements or the holding in the case, and shall refer to it later.

There is not much to be said with reference to the claimed discretion of the court to exclude the public solely upon the ground of the salacious nature of the testimony. The transcript shows that the learned and altruistic judge was of the opinion that the trial had attracted persons whose only motive in attending was to satisfy their morbid tastes by listening to narratives of indecencies and obscenities. Although well known from his decisions as a staunch defender of constitutional rights he felt that such individuals had no place in a temple of jus-

tice, and in the interest of decency and public morals should be excluded. Many other judges have been actuated by the same high motive. The purpose, however, was one which could not be accomplished legally. The public includes persons of all classes. If there were any process by which any group or groups could be screened out for exclusion solely on the basis of their ulterior motives in attending the trial, this purpose could not have been accomplished without depriving the trial of a public character. The exclusion of the general public upon this ground alone was a violation of the defendant's constitutional right. What we have said is not intended to apply to a situation in which it would appear to the court that a material witness, because of emotional disturbance, would be substantially prevented from giving testimony in the presence of a crowd of spectators.

In considering further the matter of the presumption of prejudice we shall extend some of the views previously expressed. In the decisions which follow the minority rule a good deal of confusion will be noticed. The question whether the trial was public and the question whether actual prejudice was shown have occasionally been considered together as if the latter were controlling as to the former, and some courts have reached the conclusion that if the presence of a few spectators is permitted this gives the trial a public character, if no actual prejudice be shown. This, as we have pointed out, is merely to hold that the accused is not entitled to a public trial in the true sense.

On this point the attorney general relies on the Reagan case, supra, as the court did in People v. Stanley, supra. It was said there that the only conceivable benefit the defendant might have been deprived of was the advantage that he might have gained by reason of the embarrassment the prosecutrix might suffer because of the presence of spectators, and the court said that he had no right to complain of the loss of this benefit. This statement, which is the gist of the decision, was expressly disapproved in the Tanksley case, where the court quoted with approval from Davis v. United States, supra, 8 Cir., 247 F. 394, 398, L.R.A. 1918C, 1164, that "a violation of the constitutional right necessarily implies prejudice and more than that need not appear. Furthermore, it would be difficult, if not impossible, in such cases for a defendant to point to any definite, personal injury. To require him to do so would impair or destroy the safeguard." The Reagan case does not state the prevailing rule of the federal courts as to the right to a public trial under the guaranty of the Constitution of the United States. The statement found occasionally in decisions of state courts that the accused has no reason to complain of a nonpublic trial unless he can show how he was disadvantaged, has been disapproved generally for the reasons stated in the Tanksley and Davis cases.

We have not found any case in which the court has pointed out how a defendant would go about proving actual prejudice. The attorney general has furnished no answer to the many statements in the cases as to the practical impossibility of it and we can furnish none. Neither have we found a case in which a judgment has been reversed on a showing of actual prejudice, as distinguished from presumed prejudice, for deprivation of the right to a public trial.

The attorney general also relies on section 4½ of Article VI of the Constitution, which provides that a judgment shall not be set aside or a new trial granted unless, after an examination of the entire case, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. The argument is that even if prior to the adoption of section 4½ a presumption of prejudice arose from deprivation of the right to a public trial, this rule was abolished by the adoption of section 4½, under which prejudice is no longer presumed from errors of procedure.

[3] We think section 4½ may not be given effect as an abridgment of the right to a public trial. At the time the section was adopted the right to a public trial was well established as inviolate. Our courts and the courts generally refused to inquire into the matter of actual prejudice.

[4] The right to a public trial, in this respect, is comparable to the rights of trial by jury and to the assistance of counsel.

They stand on the same footing. All questions as to whether these rights are essential for the protection of the substantial rights of the accused were settled affirmatively by the adoption of section 13 of Article I. There can be no inquiry into the matter, so far as the right to a public trial is concerned, other than in the exceptional cases of necessity heretofore mentioned.

[5] A judgment of conviction, where the defendant has demanded and been refused a public trial, cannot be allowed to stand, even against the meanest criminal in the land, however guilty he may be of the offenses charged.

The judgments and order denying motion for new trial are reversed and a new trial is ordered as to the charges in the several counts of the indictment under which judgments of conviction were heretofore rendered.

VALLÉE, Justice pro tem., concurs.

WOOD, J., dissents.

Hearing denied; EDMONDS and SPENCE, JJ., dissenting.




84 Cal.App.2d 214

## RIO DEL MAR COUNTRY CLUB, Inc. v. SUPERIOR COURT IN AND FOR SANTA CRUZ COUNTY et al.

Civ. 13631.

District Court of Appeal, First District, Division 1, California.

March 4, 1948.

**1. Prohibition ⇐3(2)**

When a meritorious motion to dismiss for failure of plaintiff to prosecute action within statutory time is made and motion is denied, prohibition is proper remedy, since court has jurisdiction only to dismiss, any attempt to try action is beyond court's jurisdiction, there is no right of appeal from an order denying a motion to dismiss, and appeal from judgment entered after trial would not be a speedy or adequate remedy. Code Civ.Proc. §§ 581a, 963, 1102–1104.

**2. Dismissal and nonsuit ⇐60(1)**

The code section providing for dismissal for failure to prosecute an action within three years from the service of summons and complaint is mandatory, and is jurisdictional in that when a meritorious motion is made court has jurisdiction only to dismiss. Code Civ.Proc. § 581a.

**3. Prohibition ⇐10(2)**

Where mandamus will lie to compel trial court to enter a meritorious dismissal for plaintiff's failure to prosecute, prohibition will lie to prevent court from trying action after denying, in excess of jurisdiction, the motion to dismiss. Code Civ. Proc. §§ 581a, 1102–1104.

**4. Mandamus ⇐5**

Where mandamus is proper remedy, petitioner will not be denied relief because he erroneously chose prohibition as a remedy.

**5. Statutes ⇐233**

The code section providing for dismissal for failure to prosecute action within specified time is applicable to actions by state agency. Code Civ.Proc. § 581a.

**6. Dismissal and nonsuit ⇐60(2)**

Where, after service of summons, no answer was ever filed and a demurrer was filed more than three years after service of summons and more than three years elapsed between service of summons and motion to dismiss, defendant was entitled to a dismissal under statute requiring dismissal of action for want of prosecution thereof. Code Civ.Proc. § 581a.

**7. Dismissal and nonsuit ⇐70, 73**

Under code section providing for dismissal of an action for want of prosecution, once factors necessitating dismissal are brought to attention of court, court must dismiss regardless of participation in dismissal procedure by either of the parties, hence defendant's failure to serve plaintiff with a notice of motion to dismiss under the statute was not fatal. Code Civ.Proc. § 581a.

**8. Appeal and error ⇐1043(1)**

Where trial court denied defendant's motion and plaintiff appeared and successfully argued motion, plaintiff was not

prejudiced by failure to receive formal notice of motion.

**9. Master and servant ⇐78**

The provisions of the Unemployment Insurance Act must be liberally construed so as to effecuate the beneficial purpose of the act. Gen.Laws, Act 8780d.

**10. Dismissal and nonsuit ⇐60(1)**

Liberal construction in favor of state of Unemployment Insurance Act does not permit a disregard of statute requiring dismissal of action in which no answer has been filed within three years after service of summons and complaint and plaintiff has neglected to have judgment entered. Gen. Laws, Act 8780d; Code Civ.Proc. § 581a.

**11. Dismissal and nonsuit ⇐45**

Employment Stabilization Commission could not rely on provision of Unemployment Insurance Act that no statute shall limit time within which commission may enforce payment of contributions if no return has been filed or by reason of intent to evade act no contribution report, or an erroneous return, has been filed, as superseding the statute providing for dismissal of action for want of prosecution in the absence of affirmative allegations showing that provision of Unemployment Insurance Act applied. Gen.Laws, Act 8780d, § 45.2; Code Civ. Proc § 581a.

**12. Statutes ⇐233**

The provisions of the Unemployment Insurance Act excluding limitation statutes from running against state does not exclude application to an action to collect contributions to the Unemployment Insurance Fund of statute requiring dismissal for want of prosecution, since latter statute is not one of limitations. Gen.Laws, Act 8780d, § 45.2; Code Civ.Proc. § 581a.

**13. Pleading ⇐76**

While every "answer" constitutes an "appearance", the converse is not true.

See Words and Phrases, Permanent Edition, for all other definitions of "Answer" and "Appearance".

**14. Dismissal and nonsuit ⇐60(2)**

The code section, providing for dismissal of action three years after service of summons and complaint if an answer has not been filed and plaintiff has not secured entry of judgment, contemplates the filing of an answer in the ordinary understanding of the term and not a mere entry of appearance. Code Civ.Proc. § 581a.

**15. Dismissal and nonsuit ⇐60(2)**

The execution of a stipulation between plaintiff and defendant, although it may constitute an "appearance" of defendant, does not constitute the filing of an "answer", so as to remove action from application of code section providing for dismissal if an answer has not been filed within three years of service of summons and complaint and no judgment has been entered. Code Civ.Proc. § 581a.

**16. Dismissal and nonsuit ⇐50**

The parties to an action are without power to waive the provisions of code section requiring a dismissal of action three years after service of summons and complaint if no answer has been filed and no judgment entered. Code Civ.Proc. § 581a.

**17. Dismissal and nonsuit ⇐60(2)**

A demurrer constitutes an "answer" within meaning of code section requiring a dismissal of action three years after service of summons and complaint if no answer has been filed and no judgment entered. Code Civ. Proc. § 581a.

**18. Dismissal and nonsuit ⇐60(2)**

Where defendant filed a demurrer more than three years after service of summons and complaint, such filing did not preclude dismissal as action under code section requiring a dismissal three years after service of summons and complaint if no answer has been filed and no judgment entered. Code Civ.Proc. § 581a.

---

Original proceeding on the petition of Rio Del Mar Country Club, Inc., against the Superior Court of the State of California in and for the County of Santa Cruz, Honorable A. M. Runnells, Judge, respondents, James G. Bryant, Director of Employment, successor to California Employment Stabilization Commission, real

party in interest, to prevent respondent court from further proceeding, except to dismiss, in an action commenced by the California Employment Stabilization Commission against petitioner for collection of contributions under the Unemployment Insurance Act, on the ground that petitioner's motion to dismiss action for failure to prosecute should have been granted.

Peremptory writ issued.

See also 190 P.2d 306.

Carlyle Miller, of Aptos, for petitioner.

Fred N. Howser, Atty. Gen., and Chas. W. Johnson, and William L. Shaw, Deputy Attys. Gen., for respondents.

PETERS, Presiding Justice.

Petition for a writ of prohibition.

Petitioner seeks by this application to prevent the respondent Superior Court from further proceeding, except to dismiss, an action commenced by the California Stabilization Commission against petitioner for the collection of contributions under the Unemployment Insurance Act, Gen.Laws, Act 8780d, § 1 et seq. This is one of a series of five cases in which the respective petitioners all moved, under § 581a of the Code of Civil Procedure, to dismiss the actions pending against them in the respondent court on the ground that there had been a failure to prosecute the actions within the time prescribed in that section. The trial court denied the motions in all five cases. The cases involve substantially similar, but not identical, questions of law. All questions of law involved in the present proceeding, and all questions of law common to all five cases, will be discussed in this opinion. The facts of the other four cases will be set forth in separate opinions, and questions of law, if any, peculiar to each case will be discussed in such separate opinions. Aptos Building Co. v. Superior Court, Cal.App., 190 P.2d 303; Monroe v. Superior Court, Cal.App., 190 P.2d 304; Aptos Land & Water Co. v. Superior Court, Cal.App., 190 P.2d 305; Rio Del Mar Country Club v. Superior Court, Cal.App., 190 P.2d 306.

[1, 2] If petitioner is entitled to a dismissal under § 581a of the Code of Civil Procedure, prohibition is the proper remedy to secure that relief. There is, of course, no right of appeal from an order denying a motion to dismiss. § 963, Code Civ. Proc.; see cases collected 2 Cal.Jur. p. 158, § 27. While the respondent commission argues that petitioner has a remedy by an appeal from the judgment that might be rendered against it after trial, it is quite obvious that such remedy is neither speedy nor adequate. The Supreme Court has recently determined that where § 581a is applicable the court has "jurisdiction" to proceed only in one way—to dismiss. In Gonsalves v. Bank of America, 16 Cal.2d 169, 172, 105 P.2d 118, 120, that court discussed the scope and effect of § 581a as follows: "The dismissal statute [§ 581a] gives a remedy for delay in prosecution of an action, and makes it *mandatory* upon the court to dismiss it after three years, unless the defendant is absent or has concealed himself. The statute is 'jurisdictional' in the sense that the court has no power to excuse the delay, nor can it refuse to act merely because the party fails to make a motion for dismissal. It has power to act only in a certain way, that is, by ordering a dismissal." It thus appears that when a meritorious motion is made under § 581a the trial court has "jurisdiction" only to dismiss, and that any attempt to try the case is beyond its "jurisdiction." It seems quite clear, therefore, that prohibition is the proper remedy to prevent any further proceedings in contravention of the law. That is the historical function of the writ of prohibition. §§ 1102, 1103 and 1104 Code Civ. Proc.; Lord v. Superior Court, 27 Cal.2d 855, 168 P.2d 14; Jardine v. Superior Court, 213 Cal. 301, 2 P.2d 756, 79 A.L.R. 291; Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715.

[3, 4] While no case seems to have been cited where prohibition has been used to secure a meritorious dismissal denied by the trial court the extraordinary writ of *mandamus*, which normally will not be granted where the legal remedy is available and adequate, has been held to be the proper remedy to compel a trial court to enter a meritorious dismissal. Superior Oil Co. v. Superior Court, 6 Cal.2d 113, 56 P.2d 950.

If *mandamus* will lie to compel a dismissal where the court has refused to act, it would seem that prohibition should also lie where the court, in excess of jurisdiction, has denied the motion to dismiss, and is threatening to try the action. Morover, if mandate is the proper remedy the petitioner will not be denied relief because of the erroneous choice of remedies.

[5] There is another preliminary matter common to all five petitions to which reference should be made. The plaintiff in each case is a state agency. The law is now well settled that the provisions of § 581a are as much applicable to actions instituted by a state officer or agency as they are to actions instituted by private persons. People v. Kings County Dev. Co., 48 Cal. App. 72, 191 P. 1004; see, also, Superior Oil Co. v. Superior Court, 6 Cal.2d 113, 56 P.2d 950.

Before discussing any further contentions of the parties the chronology of this particular case should be set forth. The record discloses the following:

September 7, 1943—complaint filed naming petitioner as a defendant. On the same date summons was issued.

September 17, 1943—the defendant, the petitioner herein, was properly served.

September 27, 1943— a stipulation was entered into giving the defendant thirty days' additional time within which to plead. This was not filed until August 18, 1947.

August 26, 1946—counsel for the defendant in that action, petitioner herein, executed and delivered to the Attorney-General, counsel for the plaintiff state agency, a stipulation purporting to waive the provisions of §§ 581a and 583 of the Code of Civil Procedure. The return to the alternative writ discloses that this stipulation was filed in the Superior Court on December 10, 1946.

August 27, 1946—return of service filed. It is to be noted that the summons was thus served and returned to the court within three years of the filing of the complaint.

January 22, 1947—defendant in that action, petitioner herein, filed a demurrer to the complaint. Plaintiff in that action, one of the respondents herein, filed an amended complaint and a demurrer was thereupon filed to the amended complaint. This last demurrer was filed on July 3, 1947.

July 11, 1947—upon the hearing of this demurrer the defendant in that action, petitioner herein, without prior notice, made an oral motion to dismiss on the ground that the plaintiff had failed to have judgment entered within three years from the filing of the complaint as required by § 581a, that the demurrer filed after the three-year period had elapsed did not constitute a waiver of the section, and that the stipulation purporting to waive the provisions of § 581a was ineffectual for that purpose.

August 18, 1947—plaintiff's motion to dismiss was denied. This order was filed August 20, 1947.

October 14, 1947—this proceeding in prohibition was instituted.

This, and the other four cases, infra, as already pointed out, involve the proper interpretation and application of § 581a of the Code of Civil Procedure to the facts of this and the other cases. It should be noted that that section consists of two paragraphs substantially different in their wording. The first paragraph reads as follows: "No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced must be dismissed by the court in which the same shall have been commenced, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have issued within one year, and all such actions must be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action. But all such actions may be prosecuted, if appearance has been made by the defendant or defendants, within said three years in the same manner as if summons had been issued and served * * *."

It will be noted that this paragraph refers to the issuance, service and return of the summons within designated periods, and

that a mere "appearance" within the designated periods, regardless of whether the summons has been issued, served or returned, renders the paragraph inapplicable. Inasmuch as, in the present case, the summons was issued, served and returned within the designated periods, it is quite clear that petitioner is not entitled to a dismissal under this paragraph, and petitioner does not so contend. The importance of this first paragraph, in this present proceeding, is to compare its language with the second paragraph in order to interpret properly the second paragraph.

The second paragraph, and the one under which petitioner claims the right to dismissal in the present case, reads as follows: "All actions, heretofore or hereafter commenced, must be dismissed by the court in which the same may be pending, on its own motion, or on the motion of any party interested therein, if summons has been served, and no answer has been filed, if plaintiff fails, or has failed, to have judgment entered within three years after service of summons."

[6] The summons here involved was served on September 17, 1943. No answer was ever filed although a demurrer was filed more than three years *after* service of summons. More than three years elapsed between the service and the motion to dismiss. It is clear, therefore, that petitioner is entitled to a dismissal under this paragraph unless any one of the several arguments made by the Attorney-General as to why this paragraph is not applicable is sound.

There are several general arguments made by the Attorney-General that may be disposed of without extended discussion.

[7, 8] It is pointed out that petitioner admits that it failed to serve the respondent commission with notice of its motion to dismiss, and it is argued that this in some way affected the validity of the motion. The argument lacks merit. Under § 581a it is the duty of the trial court, in a proper case, to dismiss of its own motion. Once the factors necessitating dismissal are brought to the attention of the trial court, it is the duty of that court to dismiss regardless of any participation in the dismissal procedure by either of the parties to the action. Moreover, in view of the fact that the trial court denied the motion, and, in view of the fact that the respondent commission appeared and successfully argued the motion, it is apparent that the commission was in no way prejudiced by failing to receive a formal notice of the motion.

[9, 10] The respondent commission also makes a somewhat vague argument to the effect that the provisions of the Unemployment Insurance Act must be liberally construed in favor of the state agency. That is undoubtedly true. But, admitting the premise that the provisions of the statute must and should be liberally construed in favor of the state so as to effectuate the beneficial purpose of the act, it is a non sequitur to argue that such "liberal" construction permits the complete disregarding of the provisions of § 581a. It is settled law, and respondent commission does not contend to the contrary, that § 581a applies to the state and to state agencies. No matter how liberally the Unemployment Insurance Act is construed, the fact still exists that the last paragraph of § 581a is applicable to this agency, and if the commission has failed, in violation of that paragraph, to secure a judgment against petitioner within the time limited, the action must be dismissed.

The respondent commission places some reliance on § 45.2 of the Unemployment Insurance Act, contending that that section supersedes § 581a. That section became effective on September 19, 1939, and then provided that "no statute of this State shall limit the time within which the commission may enforce the payment of contributions by civil action or any other remedy provided by this act if with respect to such contributions no return has been filed." Effective August 4, 1943, this section was amended to provide that no statute should limit the time within which contributions could be collected by legal action "if by reason of any intent to evade the provisions of this act no contribution report or an erroneous return has been filed." The section was repealed on September 15,

1945. It is the thought of the respondent commission that this section, until its repeal, excluded any possible application of § 581a, and that the three-year period provided in § 581a must date from the date of the repeal of that section in September, 1945.

[11] To this contention there are two complete answers. In the first place the commission has not brought itself within § 45.2 as it read either in 1939 or 1943. The section in 1939 only applied "if with respect to such contributions no return has been filed" and in 1943 it only applied if "by reason of any intent to evade the provisions of this act no contribution report or an erroneous return has been filed." In none of their pleadings herein filed does the commission aver that no return has been filed, or that by reason of an intent to evade the statute no return or an erroneous return was filed. If § 45.2 were to be interpreted so that, where applicable, it would supersede § 581a, it is quite clear that such would be a matter of affirmative defense which must be pleaded. No such pleading has been filed by the commission.

[12] In the second place, in our opinion, § 45.2, at no time, operated to exclude § 581a. Section 45.2 was obviously framed to afford the state protection against statutes of limitations which would otherwise operate to bar the remedies of the state after the lapse of the statutory time. It has been expressly held that § 581a is not a statute of limitations. Gonsalves v. Bank of America, 16 Cal.2d 169, 105 P.2d 118; People v. Kings County Dev.Co., 48 Cal. App. 72, 191 P. 1004. It has also been expressly held that a judgment of dismissal under § 581a is not a judgment on the merits, is not res judicata, and that, unless barred by some statute of limitations, the plaintiff's cause of action still persists in spite of such judgment. Gonsalves v. Bank of America, supra. In other words, if, as the commission contends, § 45.2, when applicable, operated to nullify all statutes of limitation (a point we do not decide) a judgment of dismissal of the instant action would not bar the filing of a subsequent action to recover the same contributions. The point is that § 581a, which is not a statute of limitations at all, gives to defendants a statutory right to a dismissal unless the instituted action results in a judgment within the time fixed in the last paragraph of the section.

We now turn to the more important contentions of the respondents relating to the legal effect of the filing of the demurrer and the execution of the various stipulations. It is the thought of respondents that the stipulations and waiver bar the application of § 581a, and that, in any event, the filing of the demurrer constituted the filing of an "answer" within the meaning of the last paragraph of the section. It will be remembered that the last paragraph of the section requires the dismissal, where summons has been served but no answer has been filed, if the plaintiff fails to have judgment entered within three years of the service of summons. It is important to keep in mind that this last paragraph was not added to the section until 1933. Stats. of 1933, Chap. 744, p. 1869. The provisions of the first paragraph were added to the Code of Civil Procedure as § 581a in 1907. Prior to that time most of the provisions of the first paragraph were in § 581, subd. 7.

[13] It will be noted that the first paragraph of § 581a as it now reads relates to the failure to have issued, served and returned the summons, but no dismissal can be had "if *appearance* has been made" within three years. The second paragraph, and the one here involved, applies where summons has been served and where judgment is not entered within three years of service, but no such dismissal shall be had if an "answer" has been filed. There is a great difference between an "appearance" and an "answer." Every "answer" constitutes an "appearance," but every "appearance" does not constitute the filing of an "answer." This is quite important because, while the stipulations here involved might constitute an appearance within the first paragraph, they do not constitute the filing of an "answer" within the meaning of the last paragraph.

The differences between the two paragraphs were pointedly referred to as follows in Schultz v. Schultz, 70 Cal.App.2d 293, 298, 161 P.2d 36, 39:

"Appellant next contends that the court, in this case, should construe the word 'answer' used in the second paragraph of section 581a to mean 'appear in the action'; and that the stipulation hereinbefore discussed constituted an appearance by defendant in the case at bar. Appellant relies upon the following language in Lynch v. Bencini, supra, 17 Cal.2d [521] at page 533, 110 P.2d [662] at page 669: 'This statutory provision was plainly intended to apply in just such a case as this where the defendant did not appear'; and the case of Jacks v. Lewis, 61 Cal.App.2d 148, 151, 142 P.2d 358, 360, wherein the court used the phrase 'failure of the defendant to appear and plead', is also cited by appellant. In view of the reasoning contained in the foregoing opinions taken as a whole, as well as the conclusions reached therein, we are unable to ascribe to these isolated expressions the meaning imputed to them by appellant. The history of section 581a of the Code of Civil Procedure, as set forth in People v. Southern Pacific R. R. Co., 17 Cal.App.2d 257, 260, 61 P.2d 1184, coupled with the holding of the Supreme Court in Lynch v. Bencini, supra, militates strongly against appellant's contention. The words 'answer' and 'appear' are not synonymous. To construe the word 'answer' as used in section 581a as including every 'appearance' would amount to judicial legislation, which is beyond the authority of the court. Sec. 437, C.C.P., provides that 'The answer of the defendant shall contain: 1. A general or specific denial of the material allegations of the complaint controverted by the defendant. 2. A statement of any new matter constituting a defense or counterclaim.' The stipulation filed in the instant action contains neither. Sec. 1014 of the same code provides that 'A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of an appearance for him.' This section makes it plain that, although an answer is an appearance an appearance is not necessarily an answer.

"In the light of the final paragraph of section 581a, C.C.P., the only portion of the section with which we are here concerned, we must assume from the plain and unequivocal language used that when the legislature enacted the same, the legislative intent was that the actions mentioned in said paragraph must be dismissed by the court whenever no answer has been filed, regardless of what 'appearance' may have been made other than by answer, when plaintiff fails to have judgment entered within three years after service of summons."

It will be noted that in the quotation above reference is made to a stipulation between the parties. The stipulation there involved was executed about two weeks after service of summons. The stipulation was to the effect that "the plaintiff herein will not enter default against the defendant, Henry C. Schultz, except upon and after serving the Attorney of Record for said defendant with written notice of her intention to enter the same, unless the defendant plead within 10 days after service of said written notice." There service of the summons was on December 27, 1939, the stipulation was dated January 10, 1940, and the trial court, on August 30, 1944, on its own motion dismissed the action under the last paragraph of § 581a. No answer had ever been filed. It was contended that the stipulation above mentioned amounted to a valid waiver of § 581a. At page 296 of 70 Cal.App.2d, at page 38 of 161 P.2d, the court answered this contention as follows:

"Appellant earnestly contends that, because of the above-quoted stipulation, the court was without power to enter the defendant's default and therefore the provisions of section 581a were inapplicable. This argument is not impressive. In Lynch v. Bencini, 17 Cal.2d 521, 531, 110 P.2d 662, it was held that the last paragraph of the code section imposes a duty upon the plaintiff to have judgment entered within three years after service of summons, with a resulting benefit to the defendant, and casts a specific penalty upon a plaintiff when he fails to perform the duty imposed upon him. The case just cited further holds, at page 532 of 17 Cal. 2d, 110 P.2d [662] at page 668, that whenever there is a failure on the part of the plaintiff to perform the aforesaid duty, the court 'must dismiss the action', and must do so 'on its own motion'; and further-

more, that 'it is error for the court to fail to perform this duty directly imposed upon it.' '[That] the statute is "jurisdictional" in the sense that the court has no power to excuse the delay' and is empowered 'to act only in a certain way, that is, by ordering a dismissal' was the holding in Gonsalves v. Bank of America, 16 Cal.2d 169, 172, 105 P.2d 118, 120.

"* * * We are further persuaded that the terms of the last paragraph of section 581a with which we are here alone concerned, providing that the action must be dismissed by the court 'on its own motion', would be rendered practically nugatory if by stipulation the parties to an action might take from the court not only its power but its duty to dismiss the action on its own motion. The courts are without power by judicial decision to render practically meaningless the direct and positive requirement of the portion of the statute which is applicable to a case such as this where the defendant did not file an answer.

"We are further impressed that the portion of the statute here under consideration was adopted to secure expeditious and prompt disposition of litigation, and not for the benefit and repose of individuals. When a law is established for a public reason, and not intended for the benefit of an individual, such law cannot be contravened by a private agreement or stipulation. Sec. 3513, Civ.Code. While courts are loath to deny a trial on the merits, nevertheless the portion of the code provision with which we are here concerned directs in plain and explicit terms what shall be done in cases like the one at bar and the court has no discretion. To relax the rule in some cases would be to set at naught the will of the legislature."

[14-16] From these various quotations from the Schultz case the following conclusions are inescapable: First, the last paragraph of § 581a requires the filing of an "answer." Second, the execution of a stipulation may constitute an "appearance," but it does not constitute the filing of an "answer" within the meaning of the last paragraph of § 581a, and third, the parties are without power to waive the provisions of § 581a.

Respondents cite cases which apparently hold that a stipulation satisfies the "appearance" requirement of the first paragraph of § 581a. In view of the holding in the Schultz case it must be held that such a stipulation does not satisfy the "answer" requirement of the last paragraph of the section. In their briefs and on the oral argument respondents placed considerable reliance on Cooper v. Gordon, 125 Cal. 296, 57 P. 1006, where it was held that a stipulation was a sufficient "appearance" to render a dismissal unauthorized, but that case was interpreting § 581, subd. 7, as it read in 1899 which then referred only to an "appearance" and had no provision relating to the filing of an answer. The same applies to Roth v. Superior Court, 147 Cal. 604, 82 P. 246, decided in 1905, and also interpreting the "appearance" provision of subd. 7 of § 581 as it then read.

The rule announced in the Schultz case that the provisions of § 581a cannot be waived may seem harsh, but it is based upon sound public policy and upon proper rules of construction. The Legislature has stated that where summons has been served but no judgment has been entered within three years the action "must" be dismissed unless an answer has been filed. That is the only exception to the mandatory provisions of the section. If the Legislature had wanted to provide that the parties by stipulation could extend the three-year limit, or waive it, they would have so stated. It is quite significant that in drafting § 583 of the Code of Civil Procedure, the section that provides for dismissals for failure to bring actions to *trial* within designated periods, the Legislature expressly provided that the parties could file a stipulation extending the time limits fixed in that section. The failure of the Legislature in § 581a to refer to stipulations, under such circumstances, is most significant. If we were to hold that a stipulation could extend or waive the time limits fixed in § 581a we would be amending the section, not interpreting it.

The last point necessary to discuss is the legal effect of the filing of the demurrer. If reference be made to the chronology set forth in the first part of this opinion, it

will be noted that summons was served on September 17, 1943, and that the demurrer was filed January 22, 1947. Thus the demurrer was filed more than three years after the service of summons.

[17, 18] There can be no doubt at all that, if the demurrer had been filed within the three-year period, no dismissal could be granted, such pleading constituting an "answer" within the meaning of § 581a. That was the exact holding in Evans v. Superior Court, 14 Cal.App.2d 743, 59 P.2d 159, in which a hearing was denied by the Supreme Court. But, in order to have the effect of cutting off the right to a dismissal the "answer" or "demurrer" must be filed within three years from the date of service of summons. That is what the section says. See, also, Grant v. McArthur, 137 Cal. 270, 70 P. 88. An answer filed after the three-year period has elapsed does not cut off the right to a dismissal.

Let the peremptory writ of prohibition issue as prayed.

WARD and BRAY, JJ., concur.




84 Cal.App.2d 840

**APTOS BUILDING COMPANY, a Corporation, L. J. Miller, and Aptos Building Company, a Copartnership, Petitioners, v. SUPERIOR COURT in and for COUNTY of SANTA CRUZ, Honorable A. M. Runnells, Judge, Respondents, James G. Bryant, Director of Employment, Successor to California Employment Stabilization Commission, Real Party in Interest.**

Civ. 13632.

District Court of Appeal, First District, Division 1, California.

March 4, 1948.

Carlyle Miller, of Aptos, for petitioner.

Fred N. Howser, Atty. Gen., and Chas. W. Johnson and Wm. L. Shaw, Deputy Attys. Gen., for respondents.

PETERS, Presiding Justice.

Petition for a writ of prohibition.

Petitioners seek in this proceeding to prevent the respondent Superior Court from further proceeding, except to dismiss, an action commenced by the respondent commission against petitioners. The record discloses the following chronology:

November 2, 1943—complaint filed and summons issued, but it was never served.

April 14, 1944—the original summons was returned unserved, an amended complaint was filed, and summons issued on the amended complaint.

April 18 or 20, 1944—summons on the amended complaint was served on petitioners.

April 27, 1944—stipulation extending time to defendants to plead to June 1, 1944, executed. This was not filed with the trial court until August 14, 1947.

May 18, 1944—stipulation extending time to defendants to plead until July 1, 1944, executed. This was not filed with the trial court until August 14, 1947.

June 23, 1944—stipulation extending time to defendants to plead until 10 days after receipt of written notice from plaintiff executed. This was not filed with the trial court until August 14, 1947.

December 23, 1946—summons on first amended complaint returned.

July 1, 1947—notice to plead given defendants.

July 7, 1947—motion to dismiss filed by defendants upon the ground, among others, that more than three years had elapsed from the date of service of summons on the amended complaint, that no answer or appearance had been filed or made within that time, and that no judgment had been entered.

July 11, 1947—motion to dismiss argued.

August 14, 1947—the three stipulations above mentioned were filed with the trial court.

August 18, 1947—motion to dismiss denied—entered August 20, 1947.

October 14, 1947—this proceeding in prohibition instituted.

It is quite apparent that, so far as the legal effect of the stipulations is concerned, the case is governed by the rules of law set forth in Rio Del Mar Country Club v. Superior Court, Cal.App., 190 P.2d 295, this day filed.

On the authority and for the reasons there set forth in the opinion it is ordered that the peremptory writ of prohibition issue as prayed.

WARD and BRAY, JJ., concur.




84 Cal.App.2d 841

**James MONROE, a Copartnership, and L. J. Miller, Petitioners, v. SUPERIOR COURT in and for COUNTY OF SANTA CRUZ, Honorable A. M. Runnells, Judge, Respondents; James G. BRYANT, Director of Employment, Successor to California Employment Stabilization Commission, Real Party in Interest.**

**Civ. 13634.**

District Court of Appeal, First District, Division 1, California.

March 4, 1948.

Carlyle Miller, of Aptos, for petitioners.

Fred N. Howser, Atty. Gen., and Chas. W. Johnson and William L. Shaw, Deputy Attys. Gen., for respondents.

PETERS, Presiding Justice.

Petition for a writ of prohibition.

Petitioners seek in this proceeding to prevent respondent Superior Court from further proceeding, except to dismiss, an action commenced by the respondent commission against petitioners. The record discloses the following chronology:

October 29, 1943—complaint filed and summons issued.

April 13, 1944—amended complaint filed and summons issued.

April 18, 1944—amended complaint and summons served on petitioners.

April 27, 1944—stipulation extending time to defendants to plead to June 1, 1944, executed—not filed with the trial court until August 14, 1947.

May 18, 1944—stipulation extending time to defendants to plead to July 1, 1944, executed—not filed with the trial court until August 14, 1947.

June 23, 1944—stipulation extending time to defendants to plead until ten days after receipt of written notice from plaintiff—not filed with the trial court until August 14, 1937.

December 23, 1946—summons on first amended complaint returned.

July 1, 1947—notice to plead given defendants.

July 7, 1947—motion to dismiss filed by defendants upon the ground, among others, that more than three years had elapsed from the date of service of summons on the amended complaint, that no answer or appearance had been filed or made within that time, and that no judgment had been entered.

July 11, 1947—motion to dismiss argued.

August 14, 1947—the three stipulations above mentioned were filed with the trial court.

August 18, 1947—motion to dismiss denied—entered August 20, 1947.

October 14, 1947—this proceeding in prohibition instituted.

The facts of this case are substantially similar to those in Aptos Building Company v. Superior Court, Cal.App., 190 P.2d 303, this day filed. So far as the legal effect of the stipulations is concerned, the case is governed by the rules of law set forth in Rio Del Mar Country Club v. Superior Court, Cal.App., 190 P.2d 295, this day filed.

On the authority and for the reasons set forth in the opinions in those cases it is ordered that the peremptory writ of prohibition issue as prayed.

WARD and BRAY, JJ., concur.

84 Cal.App.2d 843

**APTOS LAND & WATER COMPANY, a Corporation, Aptos Land & Water Company, a Copartnership, and L. J. Miller, Petitioners, v. SUPERIOR COURT in and for COUNTY OF SANTA CRUZ, Honorable A. M. Runnells, Judge, Respondents; James G. Bryant, Director of Employment, Successor to California Employment Stabilization Commission, Real Party in Interest.**

Civ. 13635.

District Court of Appeal, First District, Division 2, California.

March 4, 1948.

Carlyle Miller, of Aptos, for petitioners.

Fred N. Howser, Atty. Gen., and Chas. W. Johnson and William L. Shaw, Deputy Attys. Gen., for respondents.

PETERS, Presiding Justice.

Petition for a writ of prohibition.

Petitioners seek in this proceeding to prevent respondent Superior Court from further proceeding, except to dismiss, an action commenced by respondent commission against petitioners. The record discloses the following chronology:

April 7, 1944—complaint filed and summons issued.

April 18, 1944—complaint and summons served.

April 27, 1944—stipulation extending time to defendants to plead to June 1, 1944, executed—not filed with the trial court until August 14, 1947.

May 18, 1944—stipulation extending time to defendants to plead to July 1, 1944, executed—not filed with the trial court until August 14, 1947.

June 23, 1944—stipulation extending time to defendants to plead until ten days after receipt of written notice from plaintiff—not filed with the trial court until August 14, 1947.

December 23, 1946—summons returned.

July 1, 1947—notice to plead given defendants.

July 7, 1947—motion to dismiss filed by defendants upon the ground, among others, that more than three years had elapsed from the date of service of summons, that no answer or appearance had been filed or made within that time, and that no judgment had been entered.

July 11, 1947—motion to dismiss argued.

August 14, 1947—the three stipulations above mentioned were filed with the trial court.

August 18, 1947—motion to dismiss denied—entered August 20, 1947.

August 30, 1947—petitioners filed a demurrer.

October 14, 1947—this proceeding in prohibition instituted.

The facts of this case are substantially similar to those in Aptos Building Company v. Superior Court, Cal.App., 190 P.2d 303, and to James Monroe, etc., v. Superior Court, Cal.App., 190 P.2d 304. So far as the legal effect of the stipulations is concerned, the case is governed by the rules of law set forth in Rio Del Mar Country Club v. Superior Court, Cal.App., 190 P.2d 295, this day filed.

On the authority and for the reasons set forth in the opinions in those cases it is ordered that the peremptory writ of prohibition issue as prayed.

WARD and BRAY, JJ., concur.

84 Cal.App.2d 227

## RIO DEL MAR COUNTRY CLUB, Inc. v. SUPERIOR COURT IN AND FOR SANTA CRUZ COUNTY et al.

Civ. 13633.

District Court of Appeal, First District, Division 1, California.

March 4, 1948.

**1. Dismissal and nonsuit ⇐60(2)**

Where, within three years after service of summons and complaint, defendant demurred, such demurrer constituted an "answer" within meaning of that part of code section requiring a dismissal of action three years after service of summons and complaint if no "answer" has been filed and no judgment entered, and constituted an "appearance" within that part of code section providing for dismissal where there is a failue to serve and return summons within three years if no "appearance" is made within three-year period, so that defendant was not entitled to a dismissal under either provision of such code section. Code Civ. Proc. §§ 581a, 1014.

See Words and Phrases, Permanent Edition, for all other definitions of "Answer" and "Appearance".

**2. Appearance ⇐20**

The voluntary appearance of defendant by demurrer within three years of commencement of action renders unnecessary either service or return of service of summons. Code Civ.Proc. §§ 581a, 1014.

Original proceeding on the petition of Rio Del Mar Country Club, Inc., against Superior Court of the State of California in and for the County of Santa Cruz, Honorable A. M. Runnells, Judge, respondents, James G. Bryant, Director of Employment, successor to California Employment Stabilization Commission, real party in interest, to prevent respondent court from further proceeding except to dismiss an action commenced by the California Employment Stabilization Commission against petitioner for collection of contributions under the Unemployment Insurance Act on the ground that petitioner's motion to dismiss action for failure to prosecute should have been granted.

Alternative writ discharged and petition for peremptory writ denied.

Carlyle Miller, of Aptos, for petitioner.

Fred N. Howser, Atty. Gen., and Chas. W. Johnson and William L. Shaw, Deputy Attys. Gen., for respondents.

PETERS, Presiding Justice.

Petition for a writ of prohibition.

Petitioner seeks in this proceeding to prevent respondent Superior Court from further proceeding, except to dismiss, an action commenced by respondent commission against petitioner. The record discloses the following chronology:

August 26, 1941 — complaint filed and summons issued.

September 5, 1941 — complaint and summons served.

October 15, 1941 — defendant filed a demurrer to the complaint. On the same day defendant executed a stipulation waiving the provisions of § 583 of the Code of Civil Procedure.

December 4, 1946 — summons returned.

December 12, 1946 — stipulation above mentioned filed with court.

June 12, 1947 — plaintiff filed an amended complaint.

July 3, 1947 — defendant filed a demurrer to the amended complaint.

July 11, 1947 — on hearing of demurrer defendant orally moved to dismiss for failure to prosecute.

August 20, 1947 — motion to dismiss denied.

October 14, 1947 — this proceeding in prohibition instituted.

[1] This case differs fundamentally on its facts from the four cases heretofore decided, Rio Del Mar Country Club v. Superior Court, Cal.App., 190 P.2d 295; Aptos Building Co. v. Superior Ct., Cal.App., 190 P.2d 303; Monroe v. Superior Ct., Cal. App., 190 P.2d 304, and Aptos Land & Water Co. v. Superior Court, Cal.App., 190 P. 2d 305 and in which the peremptory writs were granted. The pertinent dates here in-

volved are August 26, 1941, when the complaint was filed and summons issued, September 5, 1941, when they were served on defendant, and October 15, 1941, when defendant filed its demurrer. Thus, unlike the facts in Rio Del Mar Country Club v. Superior Court, supra, the demurrer in the instant case was filed within the three years subsequent to service of summons. In the case to which reference has been made the demurrer had been filed after the lapse of three years from date of service. This is a fundamental distinction. In Evans v. Superior Court, 14 Cal.App.2d 743, 59 P.2d 159, it was held that a "demurrer" was the equivalent of an "answer" within the meaning of the last paragraph of § 581a of the Code of Civil Procedure. The last paragraph of that section, it will be remembered, applies where, as here, summons has been served and where judgment has not been entered within three years of service, but it is expressly provided that no dismissal shall be had under that paragraph if an "answer" has been filed. In the instant case an "answer" in the form of a demurrer has been filed. It seems quite clear, therefore, that the trial court properly refused to dismiss.

[2] The argument of petitioner to the contrary is not convincing. It points out that, although it demurred on October 15, 1941, no return was made of the summons until December 4, 1946. It, therefore, contends that there was a failure to serve and return the summons within three years, and that it is entitled to a dismissal under the first paragraph of § 581a providing for service and return within a period of three years. But, it will be remembered that the first paragraph of § 581a provides that no dismissal shall be had if an "appearance" is made within the three-year period, even though the summons is not returned. The filing of a demurrer within that three-year period, as already pointed out, constituted the filing of an "answer" under the Evans case, supra. Every "answer" is, of course, an appearance. § 1014, Code Civ. Proc.; Schultz v. Schultz, 70 Cal.App.2d 293, 161 P.2d 36. Once an appearance has been made by defendant, non-service or non-return of the summons become immaterial factors. The voluntary appearance of the defendant within the three years renders unnecessary either service or return of service of the summons.

The alternative writ of prohibition is discharged, and the petition for a peremptory writ is denied.

WARD and BRAY, JJ., concur.




84 Cal.App.2d 107

## BONNEAR v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 13552.

District Court of Appeal, First District, Division 2, California.

March 2, 1948.

**1. Frauds, statute of ⇐54½**

An agreement which by its terms is not to be performed during lifetime of promisor is invalid. Code Civ.Proc. § 1973, subd. 6; Civ.Code, § 1624, subd. 6.

**2. Frauds, statute of ⇐50(2)**

An agreement to bequeath property or to make provision by will is invalid unless there is some note or memorandum in writing and subscribed by the party charged or his agent. Code Civ.Proc. § 1973, subd. 6; Civ.Code, § 1624, subd. 6.

**3. Frauds, statute of ⇐156**

In action against executor of divorced wife's estate to establish a constructive trust, the form of complaint which alleged oral promise by wife to devise property to husband in consideration of his monthly payments of certain sum to her during her lifetime was not of great consequence but real question was whether alleged contract was void under statute of frauds as an agreement to bequeath property. Code Civ.Proc. § 1973, subd. 6; Civ.Code, § 1624, subd. 6.

**4. Frauds, statute of ⇐142**
**Trusts ⇐92**

Equity will intervene in a proper case to cure ills resulting from a breach of an

oral contract based upon a consideration of a promise to devise or bequeath, where there is no adequate remedy in law, and although the remedy is frequently referred to as specific performance, the contract is enforced, not by ordering will to be executed, but by impressing a trust upon property in hands of promisor's representatives or transferees. Code Civ.Proc. § 1973, subd. 6.; Civ.Code, § 1624, subd. 6.

**5. Trusts ⇐371(2)**

In action against executor of divorced wife's estate to establish a constructive trust, complaint which alleged written property settlement agreement under which plaintiff conveyed property to wife, and subsequent oral agreement under which wife agreed to devise property to plaintiff in consideration of monthly payments to her for life did not allege cause for equitable relief though plaintiff invoked rules applicable to specific performance. Code Civ.Proc. § 1973, subd. 6; Civ.Code, § 1624, subd. 6.

**6. Frauds, statute of ⇐144**

Where complaint alleged execution of a property settlement agreement under which plaintiff conveyed property to wife and agreed to make monthly payments aggregating $3,300, and alleged also a subsequent parol agreement by wife to devise the property back to plaintiff in consideration of monthly payments to her for life, wife's executor was not estopped to set up statute of frauds, in view of fact that payments made by plaintiff did not aggregate $3,300, at time of wife's death, since plaintiff's position had not been altered to his injury. Code Civ.Proc. § 1973, subd. 6; Civ.Code, § 1624, subd. 6.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Jess H. Bonnear against the Bank of America National Trust & Savings Association, as executor of the last will and testament of Eva Bonnear, also known as Eva O. Bonnear, deceased, to establish a constructive trust. Judgment for defendant and plaintiff appeals.

Affirmed.

Krinsky & Abraham, of Oakland, for appellant.

H. Raymond Hall, of Oakland, for respondent.

WARD, Justice.

Jess Bonnear brought this action to establish a constructive trust based upon certain facts alleged in the complaint, namely, that defendant Bank of America National Trust & Savings Association was appointed and qualified as executor of the last will and testament of Eva Bonnear; that plaintiff and the deceased were at one time man and wife; that "certain unhappy differences" arose between them which terminated in a decree of divorce. About the time of the dissolution of the marriage, September 30, 1942, the parties entered into a property settlement. The complaint alleges "That it was provided in said property settlement agreement that plaintiff herein would convey to said deceased all his right, title and interest in and to that certain real property and the improvements thereon, commonly known as 2550 Castello Street, Oakland, California, which premises are more particularly described as follows:" The complaint sets forth a specific description of the property and further alleges that the settlement provided "that he would pay to the said deceased the sum of Thirty-three Hundred Dollars ($3,300.00) payable $75.00 per month for twelve (12) consecutive months, beginning October 15th, 1942, the sum of Fifty Dollars ($50.00) per month, beginning October 15th, 1943, and continuing for twenty-four (24) consecutive months, and the sum of Twenty-five dollars ($25.00) per month, beginning the 15th day of October, 1945, and continuing until the total sum of Thirty-three Hundred Dollars ($3,300) should have been paid."

The complaint further alleges that in the month of September or October, 1943, Eva Bonnear was in poor health and was a patient at a sanitarium where she had incurred a bill of $139.00 and did not have available funds to meet the obligation; that thereupon Jess and Eva Bonnear entered into a parol agreement whereby Jess obligated himself to pay the sanitarium the amount of $139.00, and in addition agreed to pay $50.00 per month to Eva for her

support and maintenance until she should die. In return Eva, according to the complaint "promised and agreed to devise and bequeath the real property heretofore described herein and the improvements thereon to the plaintiff." Jess paid the obligation to the sanitarium and the sum of $50.00 each month to Eva, who, however, did not bequeath the property and improvements to him. The bank, as executor, sold the property in the due course of the administration of the estate for an alleged reasonable consideration of $18,000. The prayer of the complaint is that the court direct the defendant bank to pay to plaintiff, Jess Bonnear, the amount of money received from the sale of property which is alleged to be the reasonable value of the property and improvements. If the property had not been sold the action probably would have been one for the title, possession and ownership of the property.

A general and special demurrer to an amended complaint was filed, the second ground of which is "That the said action is barred under and by virtue of the provisions of Section 1973 of the Code of Civil Procedure, and Section 1624, subd. 6, of the Civil Code of the State of California."

[1, 2] An agreement is invalid which by its terms is not to be performed during the lifetime of the promisor, likewise an agreement to bequeath any property, or to make any provision by will unless there is some note or memorandum in writing and subscribed by the party charged, or his agent. Code Civ.Proc. sec. 1973, subd. 6; Civil Code, sec. 1624, subd. 6 is to the same effect. The demurrer to the amended complaint was sustained without leave to amend.

Judgment was subsequently entered.

[3] Plaintiff contends that the action is one to impress a trust upon the property and that the rules generally applicable to specific performance control. The form of the pleading is not of great consequence in view of the recent trend of California decisions: Wennerholm v. Stanford Univ. Sch. of Med., 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358; Jaffe v. Stone, 18 Cal.2d 146, 114 P.2d 335, 135, A.L.R. 775; Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 172 P.2d 867; MacIssac v. Pozzo, 26 Cal.2d 809, 161 P.2d 449; Maguire v. Hibernia S. & L. Soc., 23 Cal.2d 719, 146 P. 2d 673, 151 A.L.R. 1062. The real question presented is whether the alleged contract, which is the basis of plaintiff's complaint, is void under the statute of frauds as an agreement to bequeath property. Plaintiff states certain questions as the issues involved but they only lead to the determination of the main question.

It may be well to note that the property settlement agreement is made a part of the present complaint. Therein by mutual consent the community property of the respective parties, consisting of an automobile, furniture and furnishings, a residence, a drug store and the good will thereof and a life insurance policy, was disposed of in accordance with the desires of the parties. The agreement provides for the payment of monthly installments in specified amounts. The subsequent alleged oral agreement covered only the residence and the payment of the monthly sums for maintenance. As a mathematical matter it may be ascertained that at the time of Eva Bonnear's death her former husband had not paid all that would have been required under the property settlement of September 30, 1942.

[4] There is some authority that equity will intervene in a proper case to cure the ills resulting from the breach of an oral contract based upon a consideration of a promise to devise or bequeath where there is no adequate remedy in law. As said in 26 Cal.Jur., p. 836, sec. 164 and pp. 837, 838, sec. 166; "While the promisee's remedy in equity is frequently referred to as 'specific performance,' the contract is enforced, not by ordering a will to be executed, but by impressing a trust upon the property in the hands of the promisor's representatives or transferees." "The cases for the most part constitute two groups: (1) those involving a promise to devise property which was conveyed to the promisor by the promisee; and (2) those wherein the promise is shown to have been made in consideration of acts done by the promisee, such as the performance of services, furnishing of care and support, and the like."

In Wolf v. Donahue, 206 Cal. 213, 273 P. 547, plaintiff came to California upon a written statement made by defendant that he was very ill and unable to care for his business and home and a promise that if plaintiff would look after the home she and her children would never be in want and that at his death the plaintiff and her children would be well cared for. Plaintiff hesitated but defendant persuaded her to come to California where she conducted defendant's home and assisted in his business. The court said that where the contract is not contrary to good morals, and where innocent third parties are not affected, a court (page 220 of 206 Cal., page 550 of 273 P.) may "decree specific performance of such an agreement upon the recognized principles by which it is governed in the exercise of this branch of its jurisdiction." This case must be listed in the second classification noted in 26 Cal.Jur., supra, covering "the performance of services." The facts are entirely foreign to the present case.

The cases cited in support of the first group deserve attention in determining the similarity of principle and the dissimilarity of facts to the present case. The facts in Trower v. Young, 40 Cal.App.2d 539, on page 546, 105 P.2d 160, on page 164, are briefly set forth: "In the case at bar interests in real property were conveyed to the decedent upon her undertaking that the parties so conveying the property would be made beneficiaries under her will to the extent of one-half of her property. It is true that there was no express agreement to leave a specific interest in any specified real property, but it is also true that by the terms of the agreement the heirs were to receive a one-half interest in any real property which the deceased might own at the time of her death." The form of the action was one to impress a trust upon property. The real question raised was whether it was necessary that plaintiffs proceed by presenting a creditors' claim. It was held that plaintiffs were not creditors and that the form of the action was sufficient. In the Trower case the agreement was in writing and the consideration was not the exchange of money for property but the mutual exchange of property.

Stewart v. Smith, 6 Cal.App. 152, 91 P. 667, was an action in equity to compel specific performance of an oral contract to make a certain testamentary disposition of property in consideration of a conveyance of real estate to the promisor. The court recognized the validity of such a contract and stated the rule as follows (page 156 of 6 Cal.App., page 669 of 91 P.): "There must be an adequate consideration; the contract must be just and reasonable as to the party against whom it is sought to be enforced; the other party must not have practiced fraud nor undue influence in securing the contract; it must be certain and definite, not within the statute of frauds; and its enforcement must not involve an invasion of the legal or equitable rights of an innocent third party." After considering a number of cases the court said (page 162 of 6 Cal.App., page 671 of 91 P.): "Again, the mother received *real* property as a part of the consideration, and the *peculiar* value of such property is a decisive element in actions for specific performance. If the children had parted simply with personal property, under the decisions it might be that application would have to be made to the law side of the court; but here no such contention can be maintained." "Although such statute [sec. 1624, subd. 6] is a bar at law, a court of equity may 'enforce a parol agreement to make a devise or a bequest of property if there has been sufficient part performance.' Rundell v. McDonald, 62 Cal.App. 721, 724, 217 P. 1082, 1084 * * *." Van Fossen v. Yager, 65 Cal.App.2d 591, 596, 151 P. 2d 14, 17. The Van Fossen case involved only real property and, as stated on pages 596–597 of 65 Cal.App.2d, page 17 of 151 P.2d: "Here, the undisputed testimony shows conclusively that the plaintiff completely performed his obligation under the agreement."

In Dean v. Davis, 73 Cal.App.2d 166, page 168, 166 P.2d 15, page 16, a case involving Dean's promise to obtain employment for Davis, in connection with which Dean was to receive a percentage of the former's compensation, there appears a quotation worthy of note: "In 49 American Jurisprudence 860, it is said: 'To state the rule another way, where the employee has fully

performed the contract on his part and there is nothing left for the other party to do but to pay the agreed compensation, the statute does not apply, and the contract may be enforced against the employer according to its terms. Such is the view of the American Law Institute.' See Restatement, Contracts, vol. 1, § 178."

[5] In the present case if plaintiff had paid the full amount provided by the written contract upon an alleged promise that the deceased would leave a will under the terms of which she would devise the designated property to him as an inducement to live up to the terms of the written contract, his remedy would be in law and not in equity. The present alleged promise cannot change that rule. It is doubtful whether any court of equity would give a money judgment, upon the consideration alleged in the complaint, in favor of plaintiff unless he had paid an amount in excess of the sum he originally contracted to pay under the terms of the written agreement. In the present case plaintiff's performance could be measured in money.

[6] Plaintiff's next contention is that having accepted the consideration under the terms of the alleged oral agreement, her representative should not be permitted to set up the statute of frauds. In brief, the doctrine of estoppel is invoked. In support of this plaintiff cites Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am. St.Rep. 154, and Notten v. Mensing, 3 Cal. 2d 469, 45 P.2d 198. Plaintiff in the Seymour case gave up a life position in reliance upon a promise, and the case involved an oral contract covering a period of more than one year. Seymour, in pursuance of the contract, altered his position to his own injury and loss. These facts do not appear in the present case. In Notten v. Mensing the facts show an oral contract to execute reciprocal wills and that upon the death of the survivor the property should go to designated relatives. The husband died and the wife became the beneficiary. Later she revoked her reciprocal will and executed a new one. These facts held sufficient to estop her representatives from setting up the statute of frauds. The facts in the Notten case indicate a changed position, namely, the wife made a will and and then made one with inconsistent provisions. In this case it is not alleged that Eva Bonnear ever made the will which her husband alleges she agreed to make.

In Barr v. Ferris, 41 Cal.App.2d 527, 107 P.2d 269, consideration is given to the contention that a property settlement between C. M. Barr and his wife had been altered. No such issue is raised in this case. The Barr agreement provided (page 529 of 41 Cal.App.2d, page 270 of 107 P.2d) that "Should I die before C. M. Barr all property in my possession, real, personal and mixed, shall be returned to C. M. Barr." It was there decided that the agreement was one to make a will giving to Mr. Barr all the property possessed by Mrs. Barr at her death. All the property received by Mrs. Barr under the terms of the agreement was personal property. It was held that, having accepted the consideration (personal property), Mrs. Barr's representatives should be estopped to deny the binding effect of the part of the agreement to be performed by her. The legal effect of the complaint in Barr v. Ferris, supra, was to impress a trust. The propriety of the form of the action was not determined because the question had not been definitely raised. Neither Code of Civil Procedure section 1973 nor Civil Code section 1624 is mentioned in the opinion. In the Barr case there was a written agreement which (page 534 of 41 Cal.App.2d, page 273 of 107 P.2d) might have "been held sufficient to constitute a deed, and given that effect." In the present case, at the time of the execution of the written agreement Mrs. Bonnear received real estate. It is not the written agreement that interests plaintiff but an alleged oral agreement which, according to him, abrogated the written agreement so far as real estate was concerned and the amount of monthly payments to Mrs. Bonnear.

Plaintiff appeals to a court of equity. He claims fraud in the failure of Mrs. Bonnear to mention him in her will. He alleges that she violated the promise and agreement. The alleged oral contract was executed in October of 1943 when Mrs. Bonnear in poor health was in a sanitarium

and owed $139.00. At that time, under the terms of the written contract, plaintiff owed his wife 50.00 for twenty-four months and $25.00 thereafter each month until with prior payments $3,300 should be paid. The original monthly amounts were payable at $75.00 a month. The complaint does not allege any effort to have the new agreement to devise and bequeath property to plaintiff, put into writing and subscribed by Mrs. Bonnear who died in August of 1946.

If plaintiff's position had been altered to his injury, equity may have disregarded the statute of frauds and rendered assistance, but plaintiff had an adequate remedy at law. He needed no equitable protection. Under the pleadings the trial court was correct.

The judgment is affirmed.

PETERS, P. J., and JACOBY, J. pro tem, concur.




84 Cal.App.2d 229

## MILSTEIN v. OGDEN et al.

Civ. 15948.

District Court of Appeal, Second District, Division 3, California.

March 4, 1948.

**1. Appearance ⇐9(5)**

The nature of appearance made by motion is not determined by intentions of moving party, but whether appearance is general or special depends on relief sought.

**2. Appearance ⇐9(2)**

A defendant appearing and objecting only to consideration of case or to any procedure therein because court has acquired no jurisdiction of defendant's person, makes "special appearance", and no statement to that effect in his notice or motion is required.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Appearance".

**3. Appearance ⇐9(1)**

A defendant, appearing and asking for relief which could be given only to a party in case or would be itself regular proceeding therein, makes "general appearance," no matter how expressly he states that appearance is special.

See Words and Phrases, Permanent Edition, for all other definitions of "General Appearance".

**4. Dismissal and nonsuit ⇐60(1)**

A motion, made within three years after commencement of action, to dismiss it on ground of unreasonable delay in service of summons, is within trial court's sound discretion. Code Civ.Proc. § 581a.

**5. Appeal and error ⇐78(4)**

The trial court's order on defendants' motion, made within three years after commencement of action, to dismiss it for unreasonable delay in service of summons, is final. Code Civ.Proc. § 581a.

**6. Appearance ⇐9(5)**

Defendants, moving to dismiss action for unreasonable delay in service of summons, without moving to quash service or raising any question as to sufficiency thereof, made "general appearance".

**7. Appearance ⇐9(2)**

A defendant, desiring to stand on ground that court is without jurisdiction over his person, must specially appear for such purpose only and ask nothing further.

**8. Appeal and error ⇐95**

An order denying defendants' motion to quash service of summons is not appealable.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action on a judgment by M. M. Milstein against Laura E. Ogden, Fred R. Ogden, and Laura R. Hiatt. From an order denying defendants' motion to quash service of summons, set aside a default judgment against defendants Fred R. Ogden and Laura R. Hiatt, and dismiss the action, defendants appeal.

Appeal from order denying motion to quash service of summons dismissed, and

order denying motion to set aside default judgment and dismiss action affirmed.

Bush & Hoffman, of Los Angeles, and McAllister & Johnson and A. B. Reynolds, all of Sacramento, for appellants.

Joe Wapner, of Los Angeles, for respondent.

WOOD, Justice.

This is an action on a judgment. The superintendent of banks of California obtained a judgment in Yolo County against defendants Laura E. Ogden and her son and daughter, Fred R. Ogden and Laura R. Hiatt. Plaintiff purchased the judgment and commenced this action as assignee. Defendants made a motion to dismiss the action, as hereinafter stated, which motion was denied. A judgment by default was entered herein against Fred Ogden and Laura Hiatt, but not against Laura Ogden. Thereafter, the defendants filed a notice of motion to quash service of summons, set aside the default judgment, and dismiss the action. This appeal is from an order denying said second motion.

This action was filed in Los Angeles County on November 24, 1943, at which time the summons was issued. On April 15, 1946, Laura Hiatt was served with a copy of the summons and a document which was a copy of the original complaint, except that a copy of the verification which was on the original complaint was not included in that document. In lieu of a copy of the verification, the words "original verified" appeared on the document which was served. On April 27, 1946, Fred Ogden was served with a copy of the summons and a purported copy of the complaint, which copy was identical with the one served on Laura Hiatt. On May 3, 1946, the three defendants filed a notice of motion to dismiss the action on the ground that there had been an unreasonable delay in serving the summons. In support of the motion, affidavits were made by Fred Ogden and Laura Hiatt to the effect that defendants were well-known in Yolo County, and that plaintiff knew, or could easily have ascertained, the whereabouts of defendants, but made no effort to serve them until March 28, 1946. Said motion came on for hearing on May 8, 1946, at which time it was submitted, and the defendants, by stipulation, were given 15 days after notice of ruling on the motion, if it should be adverse to them, to appear in the case and plead. On May 9, 1946, the motion was denied. Defendants thereafter filed no pleading. On June 6, 1946, the defaults of defendants Fred Ogden and Laura Hiatt were entered, and on June 13, 1946, a judgment by default was entered against them. On Decembr 9, 1946, the three defendants filed their notice of motion to quash service of summons, set aside the default judgment, and dismiss the action. Notice of motion, which was supported by affidavits of all three defendants, was made upon the grounds that more than three years had elapsed since the filing of the complaint, and that the court had never obtained jurisdiction over any of the defendants, in that, Laura Ogden had not been served with a copy of the complaint and summons, and that the purported copies of the complaint which were served upon Fred Ogden and Laura Hiatt were not copies of the complaint filed in the action because they did not include a copy of the verification which appeared on the original complaint, but in lieu thereof the words "original verified" appeared thereon. The motion came on for hearing on December 18, 1946, at which time it was denied. On December 26, 1946, the default of Laura Ogden was entered. On January 18, 1947, defendants filed their notice of appeal from the order denying their motion to quash service of summons, set aside the default judgment, and dismiss the action.

[1-3] Appellants contend that true copies of the complaint were not served upon them, and therefore the trial court acquired no jurisdiction over them. Respondent contends that, irrespective of the sufficiency of the service, appellants, by their first motion to dismiss the action, made a general appearance and that they thereby submitted to the jurisdiction of the court. Appellants stated in their first motion to dismiss that their appearance was made "solely and specifically for the purpose of the motion and for no other purpose," and asked the

"Court for an order" dismissing the action. The nature of the appearance made, however, is not determined by the intentions of the party making the motion. Whether an appearance is general or special depends upon the relief sought. It was stated in In re Clarke, 125 Cal. 388, at page 392, 58 P. 22 at page 23: "On general principles, a statement that a defendant or party makes a special appearance is of no consequence whatever. If he appears and objects only to the consideration of the case, or to any procedure in it, because the court has not acquired jurisdiction of the person of the defendant, the appearance is special, and no statement to that effect in the notice or motion is required, or could have any effect if made. On the other hand, if he appears and asks for any relief which could only be given to a party in a pending case, or which itself would be a regular proceeding in the case, it is a general appearance, no matter how carefully or expressly it may be stated that the appearance is special. It is the character of the relief asked, and not the intention of the party that it shall or shall not constitute a general appearance, which is material." See also Raps v. Raps, 20 Cal.2d 382, 385, 125 P.2d 826.

[4, 5] The first motion to dismiss herein was made upon the sole ground, as above stated, that there had been an unreasonable delay in serving the summons. Section 581a of the Code of Civil Procedure, provides "* * * all actions * * * must be dismissed by the court * * * on its own motion, or on motion of any party interested therein * * * unless the summons shall be served and return thereon made within three years after the commencement of said action." Appellants made their motion about 2½ years after the action had been commenced, and about 6 months before the court would have been required, under section 581a, to dismiss the action if the summons had not then been served and return thereon made. A motion to dismiss on the ground that there has been an unreasonable delay in service of summons, which motion is made before the expiration of 3 years after the commencement of the action, is within the sound discretion of the trial court. Witter v. Phelps, 163 Cal. 655, 656, 657, 126 P. 593; Forneris v. Krell, 69 Cal.App. 2d 280, 284, 158 P.2d 937. The order of the court on appellants' said motion is final, and there is no issue on this appeal concerning the correctness of the ruling. As to that motion, the only issue on this appeal is as to the nature of the appearance.

[6, 7] At the time the first motion to dismiss was made the appellants made no motion to quash service of summons. Prior to the time that motion was filed each appellant, Fred Ogden and Laura Hiatt, had been served with a copy of summons and a document which they refer to as a "purported copy" of the complaint. At the hearing on that motion appellants raised no question as to the sufficiency of service but sought to invoke the discretionary power of the trial court to terminate the action for an alleged unreasonable delay in service of summons. Appellants thereby made a general appearance. A defendant who desires to stand upon the ground that the court is without jurisdiction over his person must specially appear for that purpose only and ask nothing further. Leaper v. Gandy, 22 Cal.App. 2d 475, 478, 71 P.2d 303; Olcese v. Justice's Court, 156 Cal. 82, 87, 103 P. 317.

In the case of Judson v. Superior Court, 21 Cal.2d 11, 129 P.2d 361, the defendant made a motion to dismiss the action for want of prosecution under section 583 of the Code of Civil Procedure, which section provides that upon motion of the defendant the court "shall" dismiss an action which has not been brought to trial within 5 years after the plaintiff filed the action. The court therein stated that the provisions of said section were not so rigid as to be without exception and concluded that the action should not be dismissed. In holding that the motion to dismiss therein constituted a general appearance, the court stated, at page 13 of 21 Cal.2d, page 363 of 129 P.2d: "'In the instant case we are impressed that petitioners in seeking a dismissal of the case, pursuant to the provisions of section 583 of the Code

of Civil Procedure, were invoking the affirmative action of the court in their behalf to terminate the litigation. How they could apply for the relief asked on any other theory than that they were submitting themselves to the general jurisdiction of the court in the action is not apparent to us, because the relief they sought was such as could be given only to a party in a pending case.'"

Appellants contend that there is a distinction between the Judson case and the present case, in that, the motion to dismiss in the Judson case was made under section 583 of the Code of Civil Procedure, which section they assert presupposes an appearance on the part of plaintiffs. There is no merit in that contention. Section 583 formerly provided that an action should be dismissed if not brought to trial within 5 years "after the defendant has filed his answer," but in 1933 that portion of the section was amended to read that the action should be dismissed if not brought to trial within 5 years "after the plaintiff has filed his action." The Legislature thereby removed the limitation which made the relief available only to defendants who had filed answers.

One of the cases relied upon by appellants is Anderson v. Nawa, 25 Cal.App. 151, 143 P. 555, wherein the court held that an appearance to make a motion to dismiss under section 581a of the Code of Civil Procedure was a special appearance. That case, however, was expressly disapproved by the Supreme Court in Judson v. Superior Court, supra. Appellants also cite the case of Linden Gravel Mining Co. v. Sheplar, 53 Cal. 245, wherein the defendant made a motion to dismiss on the ground the summons had not been issued within the prescribed statutory period, and the court held that such appearance was not a general appearance. That case was overruled by the Supreme Court in Judson v. Superior Court, supra.

It was held in the case of Brock v. Fouchy, 76 Cal.App.2d 363, 172 P.2d 945, 950, that the appearance of one of the defendants therein for the purpose of making a motion to quash service of summons and to dismiss the action was a special appearance. The motion was made on the grounds that summons had not been issued within one year from the commencement of the action, and that the defendant had not appeared in said action. Said motion was made three years and one day after the action had been commenced. Section 581a of the Code of Civil Procedure provides that a court must dismiss an action, on its own motion, or on the motion of any party interested therein, "unless summons shall have issued within one year" after the commencement of the action; except when an appearance has been made by the defendant within three years after the commencement of said action. In that case, not only had the statutory period of one year expired in which the summons could have been issued, but defendant had not appeared either generally or specially until after the statutory period of three years had expired in which service could have been made. The statutory requirements having been met, the court was required to dismiss the action. In determining that said appearance was special, the court therein applied the rule stated in In re Clarke, supra, which was followed in the case of Judson v. Superior Court, supra, and apparently concluded that the defendant had appeared and objected "only to the consideration of the case or any procedure in it because the court had not acquired jurisdiction of the person of the defendant." In the present case the defendants did not, at the time of making the first motion, base their objection to consideration of the case or any proceeding in it on the ground that the court had not acquired jurisdiction of the persons, but made the motion solely on the ground that there had been an unreasonable delay in service of summons.

In view of the above conclusions, it is not necessary to discuss appellants' contention that the service of copies of the summons and the complaint made upon Fred Ogden and Laura Hiatt was not sufficient.

[8] That portion of the appeal relating to the motion to quash service of summons need not be discussed since no appeal lies from an order denying such a motion.

Saroff v. Saroff, 66 Cal.App.2d 330, 152 P.2d 333; Mertens v. Keene, 77 Cal.App. 786, 789, 247 P. 543.

The appeal from the order denying the motion to quash service of summons is dismissed. The order denying the motion to set aside the default judgment and dismiss the action is affirmed.

SHINN, Acting P. J., and VALLEE, Justice pro tem., concur.




84 Cal.App.2d 306

**NULSEN v. NULSEN et al.**

**Civ. 16038.**

District Court of Appeal, Second District, Division 1, California.

March 10, 1948.

Hearing Denied May 6, 1948.

**1. Appeal and error ⇐544(3)**

When record on appeal consists of the judgment roll alone, only the alleged errors appearing therein may be considered.

**2. Appeal and error ⇐554(3)**

An order denying a motion to vacate a judgment for plaintiffs in action to quiet title would be affirmed where record on appeal consisted of clerk's transcript only in which no errors appeared.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Quiet title action by Jack C. Nulsen, as administrator with will annexed of the estate of Maude K. Nulsen, deceased, against Joseph K. Nulsen, Hazel R. Nulsen and others. From an order denying a motion to vacate judgment for plaintiffs Joseph K. Nulsen appealed.

Order affirmed.

Joseph K. Nulsen, in pro. per.

Elza C. Mowry, of Los Angeles, for respondent.

PER CURIAM.

This is an appeal from an order denying a motion to vacate the judgment. Appellant appears in propria persona.

The action is to quiet title to property in Manhattan Beach alleged to be owned by the Estate of Maude K. Nulsen. Appellant also appeared in propria persona as a defendant in the court below. Appellant's wife, also a defendant, was not represented by counsel at the trial.

Appellant's brief on appeal is a general argument and reference to details relating to litigation covering a period of ten years. In substance appellant contends that, "in ten years of litigation, to recover the confiscated residential premises involved, appellant's cause has not been heard by any court, in any place, at any time." According to appellant the estate has also been litigated in Texas. Appellant's affidavit in support of the motion to set aside the judgment in the lower court alleges that, "Judge Vickers, in denying defendant the right to speak for himself and his wife in presenting the case, and in denying defendant's wife the right to appoint defendant to represent her, violated the interference boundaries established by the premise grant of 'equality and liberty' in our Declaration of Independence, to uphold and support which, our Federal Constitution was drafted."

In appellant's affidavit, as defendant in the lower court, objecting to the trial the following appears:

"At this time, the court should be briefly informed as to the nature of these legal actions. They present a case in which a father, brothers and a sister, confiscate the wedding present home given to defendant and his wife by defendant's mother, the late Maude Nulsen. The property is taken, not because of any need for the home itself nor of the values it represents, but because of an athiestic hatred of the divine motive prompting the gift, and the divine use to which the premises were put as a truth center. The property has been seized, withheld from defendant and his wife over a period of years, gutted of their personal belongings, neglected, and allowed to deteriorate, for the same reason that Jesus

Christ was persecuted and crucified by the people of his time, hatred of God.

"Litigation over this property commenced in the city of San Antonio, Texas, in the year 1936, when the death of the late Maude Nulsen afforded plaintiffs in this action an opportunity to seize the residence."

It appears from the record when the cause came on for trial the trial judge endeavored to persuade the defendants to obtain counsel and continued the matter until the afternoon for this purpose. The defendants did not return. The trial proceeded and plaintiffs were awarded judgment.

[1] The record on appeal consists of the clerk's transcript only. And it well settled that when the record on appeal consists of the judgment roll alone, only the alleged errors appearing therein may be considered. No such errors appear.

As to appellant's other contentions and arguments on appeal, the record is incomplete, hence they are beside the issue.

[2] Assuming, but not deciding, that an appeal lies in the circumstances, the record being free from errors, the order is affirmed.




84 Cal.App.2d 263

**FELICE v. CITY OF INGLEWOOD et al.**

Civ. 16147.

District Court of Appeal, Second District, Division 2, California.

March 8, 1948.

**1. Mandamus ⇐187(4)**

Plaintiff could not complain that no verified answer was filed after overruling of defendants' demurrer to mandamus petition and that no trial of issues was had, where defendants' offer and submission of affidavits and certified copies of documents, instruments and proceedings, filed contemporaneously with demurrer as "answer and response", though not conforming to standard practice, would be construed as answer to petition and as evidentiary matter relating to issues raised by petition, in view of plaintiff's failure to object to filing of affidavits and documents or to their consideration on the hearing, and plaintiff's failure to file answering affidavits. Code Civ.Proc. § 1094.5.

**2. Mandamus ⇐187(4)**

In mandamus proceeding, plaintiff who was dissatisfied with action of court in deciding case and rendering judgment on record before court at the hearing should have presented his objections to trial court by motion for new trial supported by affidavits stating the facts as to whether he consented or objected to procedure adopted by the court. Code Civ.Proc. § 1094.5.

**3. Administrative law and procedure ⇐745**
**Mandamus ⇐164(2)**

In mandamus proceeding to review action of administrative board, unorthodox method of presenting defense by filing, as part of board's response, affidavits, documents, instruments and proceedings was not approved, but board should file answer denying allegations and setting up any matters of defense relied upon.

**4. Administrative law and procedure ⇐746**
**Mandamus ⇐164(2, 4)**

In mandamus proceeding to review action of administrative board, board can file affidavits and copies of records in response to alternative writ or order to show cause as evidence in refutation of allegations of petition or as proof of defensive matters pleaded in board's answer, and unless objection is made such affidavits and records can be considered as evidence and if not controverted by counter affidavits or by oral evidence offered at the hearing their contents will be deemed to be true. Code Civ.Proc. § 1094.5.

**5. Municipal corporations ⇐621**

City council's denial of application for permit to conduct used automobile business was not arbitary, unreasonable or capricious, notwithstanding that council found nothing against applicant's character or reputation and that proposed location of business was in zone in which such

business could be conducted, where council had theretofore denied application for permit to conduct similar business at same location due to opposition of nearby residents.

**6. Municipal corporations ⇐621**

The granting of petition for permit to conduct used automobile business is not a matter of right, but city council can determine suitableness of place for business even though proposed location is in a zone in which such business may be conducted, and refusal of permit does not take away a property right of applicant, and city council is not required to grant permit if the proposed location is not a proper place for such business.

**7. Municipal corporations ⇐600**

A zoning ordinance adopted after an application for permit is filed which prevents operation of proposed business is effectual bar to granting of privilege.

---

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Mandamus proceeding by Arthur L. Felice against the City of Inglewood, a municipal corporation, and others, to compel the granting of a permit to engage in business as a used automobile dealer. From the judgment, the plaintiff appeals.

Affirmed.

Lyons & Lyons, of Los Angeles, for appellant.

Clyde Woodworth, of Inglewood, for all respondents.

WILSON, Justice.

Appellant filed a petition with the City Council of respondent City of Inglewood for a permit to engage in business as a used automobile dealer. After public hearings by the council, at which evidence was offered and received, the permit was denied. Appellant applied to the court for a writ of mandate to compel the granting of his petition. An alternative writ was issued in response to which respondent, by way of return thereto filed a demurrer to appellant's amended petition, accompanied by an "offer and submission by defendants of all documents and instruments on file in response to order to show cause." The "offer and submission" was filed "as a part of their response, answer and showing of cause" and recited that defendants thereby offered and submitted "each, all and every one of the various documents, affidavits, instruments and proceedings heretofore presented and filed in the within action on behalf of the defendants in making their answer, response and showing of cause to the Court.* * *" The affidavits were sworn to before a notary public and the documents, instruments and proceedings were certified by the city clerk, under the seal of the city, to be true and correct copies of the originals on file.

A hearing was had on plaintiff's amended petition, on the demurrer thereto, and on the alternative writ of mandate. Following the hearing the court entered a minute order overruling the demurrer, denying a peremptory writ, discharging the alternative writ, and ordering judgment in favor of defendants. The court made and filed findings of fact and conclusions of law which recite that the cause came on for hearing on the demurrer to the first amended complaint and on the alternative writ of mandate, and that in conducting the hearing the court "considered the plaintiff's First Amended Complaint or Petition and all supporting documents and evidence presented and submitted by the plaintiff, and * * * the response of the defendants and all documents and evidence presented and submitted by defendants in making their response, answer and defense in said matter."

Judgment was entered discharging the alternative writ of mandate, denying a peremptory writ, and adjudging that plaintiff take nothing and have no relief in the proceeding. The appeal is from the judgment.

[1] 1. The first ground presented for reversal is that the judgment is erroneous for the reason that no verified answer was filed after the demurrer was overruled, and no trial of the issues was had. The "offer and submission" of affidavits of respondents and certified copies of documents, instruments and proceedings filed

contemporaneously with the demurrer was an "answer and response," although not conforming to standard practice, must, in the absence of objection made by appellant at the time of the hearing, be construed both as an answer to the petition for a writ of mandate and as evidentiary matter relating to the issues raised by the petition. Since they were filed for the purpose of controverting the allegations of the petition and of stating matters in defense thereof, and the record does not disclose that appellant (1) objected to the filing of the various affidavits and documents, or (2) objected to their consideration by the court upon the hearing, either as denials of the allegations in the petition or as defenses thereto, or as evidence controverting the same, or (3) requested leave to file affidavits answering or denying any of the affidavits and documents presented by respondent, or to offer evidence in denial thereof, it must be assumed that he was satisfied with the record and was willing to submit the case to the court without further pleadings or evidence. In overruling the demurrer the court held that the amended petition stated a cause of action, but the findings and judgment were based on the evidence contained in the several affidavits and documents and were against the contentions of appellant. In other words, appellant's pleading was good but the evidence was against him. This case is not different from any action at law in which a complaint states a good cause of action but the evidence fails to sustain the allegations.

Appellant's assertion in his brief that he did not stipulate that the proceeding should be heard on the affidavits and documents to which reference has been made finds no support in the record. The recital in the findings above quoted and the declaration in the judgment that "documentary evidence having been introduced, and the matter and the issues involved argued and submitted for decision" is conclusive that no objection was made to the procedure followed. Appellant had the privilege and opportunity of presenting evidence on his own behalf and of controverting that presented by respondents but failed to take advantage of his opportunity.

[2] The appeal is on the judgment roll. If appellant was dissatisfied with the action of the court in deciding the case and rendering judgment on the record before it at the hearing his objections should have been presented to the trial court by a motion for a new trial, supported by affidavits stating the facts as to whether he consented or objected to the procedure adopted by the court. No affidavits having been filed indicating that appellant did not approve the submission of the cause in the manner above described, we must accept the declarations of the court as found in the findings and judgment.

[3, 4] Although we have treated the affidavits and documents in the form tendered by respondents as an answer to the amended petition, we do not approve the unorthodox method of presenting the defense adopted in this case as an example of good pleading, for it is not, and it should not be followed in similar proceedings. There seems to be a belief in the minds of some persons that section 1094.5 of the Code of Civil Procedure, adopted in 1945, changed the established procedure in mandamus proceedings that are prosecuted for the purpose of reviewing the actions of administrative boards. Such is not the case. In a mandamus proceeding, as in any other case, an answer should be filed denying such allegations as the defendants do not admit to be true and setting up any matters of defense on which they rely. In this manner the issues that the court is called upon to decide are clearly presented. It is, of course, proper to file affidavits and copies of records in response to the alternative writ or the order to show cause as evidence in refutation of the allegations of the petition or as proof of the defensive matters pleaded in the answer. Unless objection be made such affidavits and records are to be considered as evidence and if not controverted by counteraffidavits or by oral evidence offered at the hearing their contents will be deemed to be true.

2. Appellant contends that since the City Council found nothing against his character or reputation and nothing militating against the issuance of the permit because

of the proposed location of the business the denial of the petition was arbitrary and that the finding of the court that the action of the council was not arbitrary, unreasonable or capricious is not sustained by the evidence.

[5-7] It is conceded that the application for a permit was in proper form, that no evidence was introduced at the hearing before the City Council with regard to petitioner's character, reputation or standing in the community, and that the proposed location of the business was in a zone in which a used motor vehicle business might be conducted. Notwithstanding these facts the council was not obliged to grant the permit. The granting of appellant's petition was not a matter of right which he could have for the asking. Upon the hearing of such applications as the one under consideration the City Council may determine the suitableness of the place for the business even though it may be in a zone in which such a business may be lawfully maintained, and the refusal of the permit does not take away a property right of the applicant. If it is not a proper place for the business a permit need not be granted. Reed v. Collins, 5 Cal.App. 494, 500, 502, 90 P. 973. That the filing of an application for a permit vests no property right or other right in the applicant is established by decisions to the effect that a zoning ordinance adopted after an application for a permit is filed which prevents the operation of the proposed business is an effectual bar to the granting of the privilege. Sunny Slope Water Co. v. City of Pasadena, 1 Cal.2d 87, 91, 33 P.2d 672; Wheat v. Barrett, 210 Cal. 193, 197, 290 P. 1033; Brougher v. Board of Public Works, 205 Cal. 426, 432, 271 P. 487.

Cases cited by appellant in which the council or board conducted no formal hearing (Martin v. Board of Supervisors, 135 Cal.App. 96, 26 P.2d 843) or acted contrary to the evidence (Smith v. Board of Police Commrs., 1 Cal.App.2d 292, 36 P.2d 670; Peters v. Sacramento etc. System, 27 Cal. App.2d 10, 80 P.2d 179) or the official whose duty it was to pass on the application did not hear or read the evidence (Morgan v. United States, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288) are of no aid to appellant since in the instant case the City Council conducted a hearing, heard evidence and acted thereon.

That the action of the council was not arbitrary or capricious nor directed specifically against appellant is indicated by its previous actions relating to similar businesses. Prior to the filing of appellant's application for a permit an application, filed by another party for a permit to conduct a like business at the same location, had been denied. Furthermore, before appellant's application was filed the City Council had adopted a resolution reciting that it had received overtures for the establishment of automobile used car sales lots on Manchester Boulevard between Prairie Avenue and the easterly city limits [this included the property covered by appellant's application] and had received numerous petitions from residents along and near that portion of Manchester Boulevard protesting against the granting of permits for such purpose, and that the processing of such applications consumed large amounts of time of all parties concerned and involved considerable items of expense. Therefore the council resolved that it would not be disposed to look with favor upon applications for used car lot purposes on said portion of Manchester Boulevard; that nothing contained in the resolution should be construed as indicating what the decision of the council might be upon a proper showing, but that the council intended merely to inform the general public of its attitude to the end that insofar as reasonably possible the time of the council and of the general public and the resources of the city and of individual citizens might be conserved. Appellant was conversant with the stand taken by the council and made his application with full knowledge thereof. He therefore cannot complain by reason of the fact that the filing of his application did not cause the council to reverse the attitude expressed in the resolution.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

## BIXBY v. CALIFORNIA TRUST CO.*

Civ. 15964.

District Court of Appeal, Second District, Division 3, California.

March 5, 1948.

Rehearing Denied March 23, 1948.

Hearing Granted April 29, 1948.

1. Trusts ⇐59(1)

Where a valid and effective voluntary trust has been created and no power of revocation has been reserved, trust cannot be revoked by creator without consent of beneficiaries, and if any of beneficiaries are not in being or are not sui juris and hence cannot consent, the trust agreement cannot be revoked.

2. Trusts ⇐61(3)

Where all of the beneficiaries under trust agreement, other than spendthrift trust, are sui juris and consent to termination agreement may be terminated by court of equity if court concludes that it is to best interests of beneficiaries, even though agreement expressly provides that agreement shall be irrevocable.

3. Trusts ⇐61(3)

A court of equity in its discretion can terminate trust on request of sole beneficiary even though it is provided in specific words by terms of trust instrument that trust shall be irrevocable and although purposes of trust have not been accomplished.

4. Remainders ⇐3

The rule against remainder to grantor's heirs is inapplicable in California, and statute providing that when remainder is limited to heirs or heirs of body of person to whom life estate in same property is given, the persons who on termination of life estate are successors or heirs of body of owner for life are entitled to take by virtue of remainder so limited to them and not as mere successors of owner for life, creates remainder in grantor's heirs when preceded by valid life estate. Civ. Code, § 779.

5. Trusts ⇐59(1), 124, 153

Under irrevocable trust instrument providing for payment of income to creator for life and for payment of principal on his death to his heirs at law, creator reserved life estate in himself with contingent remainder to his heirs, who would take by purchase and not by descent, no person could answer description of heir until death of creator, and creator was not sole beneficiary, and hence trust could not be terminated without consent of beneficiaries. Civ. Code, § 779.

6. Trusts ⇐153

Where person creates trust for his own benefit with provision restraining voluntary or involuntary transfer of his interest, his creditors can reach his interests without regard to whether such person's intent was fraudulent.

7. Trusts ⇐59(1)

A trust cannot be terminated or extinguished merely because trust was created by trustor for his own benefit with provision restraining transfer of his interest.

8. Fraudulent conveyances ⇐174(3)

A person having placed property out of reach of his creditors may not compel a reconveyance.

9. Trusts ⇐59(1)

Spendthrift provisions of trust of which creator was not sole beneficiary did not entitle creator to terminate trust, notwithstanding that such provisions were void insofar as they operated to defeat claims of creator's creditors.

10. Appeal and error ⇐113(1)

An order denying plaintiff's motion for order setting aside order for judgment made prior to entry of judgment was not appealable.

11. Appeal and error ⇐110

An order denying motion for new trial is not appealable.

---

Appeal from Superior Court, Los Angeles County; Reuben S. Schmidt, Judge.

Action to terminate a trust by Fred H. Bixby, Jr., against California Trust Company. From a judgment for defendant and from an order denying a motion



* Subsequent opinion 202 P.2d 1018.

for an order setting aside the order for judgment for defendant and from an order denying motion for a new trial, the plaintiff appeals.

Judgment affirmed and appeals from orders dismissed.

Robert L. Moore, of Los Angeles, for appellant.

Swanwick, Donnelly & Proudfit and Donald O. Welton, all of Los Angeles, for respondent.

VALLEE, Justice pro tem.

Appeal by plaintiff from a judgment for defendant in an action to terminate a trust. Plaintiff also appeals from an order denying a motion for an order setting aside the order for judgment for defendant and from an order denying his motion for a new trial.

On February 17, 1947, appellant, without consideration, delivered $75,000 to respondent. The money was appellant's property. Contemporaneously therewith, appellant "as Trustor and/or Beneficiary," and respondent, as Trustee, executed a declaration of trust in writing. The declaration acknowledged receipt of the money in trust. The trust instrument provides that it should be irrevocable. It says that after payment of any expenses of management and administering the trust, including compensation of the Trustee, all income available for distribution shall be distributed monthly to appellant "Trustor and Beneficiary herein during his lifetime." The pertinent provision reads: "Upon the death of said Trustor and Beneficiary, Fred H. Bixby, Jr., and after payment of any expenses of management of the Trust Estate and administering this Trust, including the compensation for the services of the Trustee, and the expenses of the last illness and funeral of said Fred H. Bixby, Jr., all of the residue and remainder of said Trust Estate shall be by said Trustee, or its successor, distributed and delivered to the heirs at law of said Fred H. Bixby, Jr., in accordance with the laws of succession of the State of California then in effect * * *."

Appellant sued in equity for a decree terminating the trust, claiming that he is the sole beneficiary named in the trust instrument and, as such, is entitled in equity to a decree of termination. It was stipulated that appellant has a wife, a father, a mother, and sisters living. The trial court decided that appellant was not the sole beneficiary and rendered judgment for respondent.

Respondent says that under the decisions in Barnett v. Barnett, 104 Cal. 298, 37 P. 1049, Gray v. Union Trust Co., 171 Cal. 637, 154 P. 306, and Bixby v. Hotchkis, 58 Cal.App.2d 445, 136 P.2d 597, appellant is not the sole beneficiary named in the instrument. Appellant says that these cases are not controlling; that the question upon the facts here has not been decided in California; that under general principles of jurisprudence and authoritative, well-considered decisions in other jurisdictions, he is the sole beneficiary named in the instrument and entitled in equity to a decree terminating the trust.

[1] It is well settled that where a valid and effective voluntary trust has been created and no power of revocation has been reserved, it cannot be revoked by the creator without the consent of the beneficiaries thereunder. If any of the beneficiaries are not in being or are not sui juris and, hence cannot consent, the trust agreement cannot be revoked. Scrivner v. Dietz, 84 Cal. 295, 297, 24 P. 171; Kopp v. Gunther, 95 Cal. 63, 74, 30 P. 301; Gray v. Union Trust Co., 171 Cal. 637, 641, 154 P. 306; Woestman v. Union Trust Etc. Bank, 50 Cal.App. 604, 608, 195 P. 944; Estate of Madison, 26 Cal.2d 453, 465, 159 P.2d 630; 54 Am.Jur. p. 80, sec. 78; Annotations 38 A.L.R. 941; 91 A.L.R. 102; 131 A.L.R. 457.

[2] It is equally well settled that where all of the beneficiaries under a trust agreement, other than a spendthrift trust, are sui juris and consent to a termination, the agreement may be terminated by a court of equity if the court concludes that it is to the best interests of the beneficiaries. This is so even though the agreement expressly provides that it shall be irrevocable. Fletcher v. Los Angeles Trust Etc. Bank, 182 Cal. 177, 179, 187 P. 425; Eakle v. Ingram, 142 Cal. 15, 16, 75 P. 566, 100 Am.St.Rep.

99; Moor v. Vawter, 84 Cal.App. 678, 682, 258 P. 622; Estate of Easterday, 45 Cal. App.2d 598, 607, 608, 114 P.2d 669; Rest., Trusts, p. 1021, sec. 337.

[3] A court of equity, in its discretion, may terminate a trust upon the request of a sole beneficiary even though it is provided in specific words by the terms of the trust instrument that the trust shall be irrevocable and although the purposes of the trust have not been accomplished. Gray v. Union Trust Co., 171 Cal. 637, 154 P. 306; Whittingham v. California Trust Co., 214 Cal. 128, 134, 4 P.2d 142; Rest., Trusts, p. 1038, sec. 339; 3 Scott on Trusts, p. 1861, sec. 339.

The parties agree that as to this phase of the case the question is whether appellant is the sole beneficiary under the trust instrument. Civil Code section 779 provides: "When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder so limited to them, and not as mere successors of the owner for life."

In Barnett v. Barnett, 104 Cal. 298, 37 P. 1049, a deed of conveyance of land was executed to the plaintiff by which the grantor purported to "give, grant, alien, and confirm unto the said party of the second part, and to his heirs * * * all those certain lots, pieces, or parcels of land, * * * to have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second part * * * for and during his natural life, and to the issue and heirs of the body of the said party of the second part." The plaintiff claimed that the instrument conveyed the land to him in fee. The defendant, the sole issue of the plaintiff, claimed that the plaintiff took only a life estate and that at his death the heirs of his body took the fee. The court said that at common law and in this state prior to the adoption of the Civil Code, by the rule in Shelley's Case, the instrument gave the plaintiff an estate in fee tail; but that the effect of the enactment of section 779 of the Civil Code was to abrogate the rule in Shelley's Case. After quoting Civil Code section 779, the court declared page 301 of 104 Cal., page 1050 of 37 P. "By section 779, Civ.Code, the term 'heirs' is changed from a word of limitation to one of purchase, and becomes a specific designation of a class which will have the right to the property upon the termination of the life estate. Upon that event they take the property, not by descent or as successors of the plaintiff, but by virtue of the remainder which was created for them at the execution of the deed to him. This remainder, although not capable of immediate enjoyment (Id. § 690), and therefore denominated a 'future interest,' is, nevertheless, an estate in the property capable of being transferred in the same manner as a present interest. Id. § 699."

Gray v. Union Trust Co., 171 Cal. 637, 154 P. 306, 307, had to do with a declaration of trust which contained this provision: "This trust shall be irrevocable and shall last during the lifetime of said trustor, and upon her death the trust property shall go to and vest as she shall provide in her last will and testament, and leaving no last will and testament, said property shall go to and vest in her heirs at law, according to the laws of succession of the state of California as such laws now exist." In the Gray trust, as here, the trustor had transferred the property subject to the trust, to the trustee and was entitled to the net income. The court held that the heirs of the trustor, in the contingency provided by the trust, did not take as inheritors of the trustor; that the laws of succession, as they existed at the time of the creation of the trust, would fix the class entitled to take; and that class would take, not as heirs of the trustor by virtue of her intestacy, but as a class designated in the trust instrument in the event that the trustor failed to exercise her power to nominate others. The court also said that upon the death of the trustor intestate, it would not be the court in probate but in equity which would determine to whom the trust property would go. It was further said that the trustor's "usufructuary interest in the whole estate during her life is her equitable life estate, * * *." It was stated that the question whether the

trust created "a remainder" or "remainderdermen" was the heart of the controversy; that if it did, and each remainderman was "sui generis" and before the court, it was within the discretionary power of a court of equity to terminate the trust. On the other hand, "If all of the parties in interest are not before the court, equity has no power to terminate the trust." In determining that remainders were created, the court, in the Gray case, reasoned page 642 of 171 Cal., page 308 of 154 P.: "Our Civil Code, § 769 declares that: 'When a future estate, other than a reversion, is dependent on a precedent estate, it may be called a remainder, and may be created and transferred by that name.' We have in this trust apt language to create such a future estate, dependent for its enjoyment upon the termination of a precedent life estate. We have therefore apt language to create a remainder, and it is quite permissible that it should be created to commence at a future day and be limited upon a life estate. Civ. Code, § 773. There is in this trust a power of appointment or nomination reserved to the trustor. It can be exercised in but one way, and that is by her will. But such power of appointment does not prevent the vesting of the future estate in remainder. Civ. Code, § 781. Everything then which the law contemplates shall exist for the creation of equitable remainders or remainders in trust is found in this trust. Whether they be regarded as vested or contingent is immaterial, for in either case the estate and interest are alienable. Davis v. Willson, 115 Ky. 639, 74 S.W. 696; McDonald **v.** Bayard Sav. Bank, 123 Iowa, 413, 98 N.W. 1025; Sikemeier v. Galvin, 124 Mo. 367, 27 S.W. 551. But in truth these remainders are to be regarded as vested remainders, subject to divestiture only upon the exercise of the power of nomination by will reserved to the trustor." Cases relied upon by the respondent in the Gray case as supporting the decree terminating the trust were reviewed at length and distinguished as dealing with a dry, naked trust or with a trust where each party in interest was before the court, joining in the application, or resting—expressly or by necessary implication—upon the rule in Shelley's Case. The court concluded its discussion by saying that the question before it was conclusively disposed of by Barnett **v.** Barnett, 104 Cal. 298, 37 P. 1049.

In Bixby v. Hotchkis, 58 Cal.App.2d 445, 136 P.2d 597, the plaintiff executed a trust instrument creating an irrevocable trust. Later, the plaintiff's father, with the approval of the plaintiff, transferred additional assets to the trustee subject to the trust. The relevant provision of the trust instrument read: "Upon the expiration of the term of this trust, hereinabove specified, to-wit, a period of Twenty (20) years from the date hereof, my trustee shall distribute, or cause to be distributed, my trust estate, together with all accumulations, in the manner following: (a) The whole thereof to me personally if I be living at the time. (b) In the event that I should die prior to the expiration of said period the whole thereof to my heirs at law in accordance with the laws of succession of the State of California then in effect." The court concluded page 451 of 58 Cal.App.2d, page 600 of 136 P.2d, that the plaintiff was not the sole beneficiary "for it is provided in the instrument that in the event of plaintiff's death prior to the expiration of the twenty year period the estate at the end of the period is to pass to plaintiff's heirs at law. One who creates a voluntary trust is not the sole beneficiary if he manifests an intention to create a contingent interest in others, such as his heirs at law. Restatement of the Law of Trusts, Comment b, p. 1039; Gray v. Union Trust Co., supra [171 Cal. 637, 154 P. 306]."

The rule for ascertaining whether the trustor is the sole beneficiary as declared by the Restatement is this: "The settlor is the sole beneficiary of a trust if he does not manifest an intention to give a beneficial interest to anyone else. If, however, he manifests an intention to create a vested or contingent interest in others, as for example, his children, or the persons who may be his heirs or next of kin on his death, he is not the sole beneficiary, unless such intended interests are invalid, either under the rule in Shelley's Case or otherwise. * * * Illustrations: * * * 2. A transfers property to B in trust to pay the income to A for life and on A's death to pay

the principal as A may by deed or by will appoint and in default of appointment to A's heirs or next of kin. A reserves no power of revocation. A can compel B to transfer the property to him." (Rest., Trusts, pp. 1038, 1039, sec. 339.) The Restatement also says: "Where the owner of property transfers it in trust to pay the income to himself for life and upon his death to pay the principal to his heirs or next of kin, he is the sole beneficiary of the trust if the rule in Shelley's Case is in force (see Comment d), and even if the rule in Shelley's Case is not in force he is the sole beneficiary in the absence of a manifestation of intention by him that his heirs or next of kin should also be beneficiaries of the trust. * * * Illustrations: * * * 2. A transfers property to B in trust to pay the income to A for life and on A's death to pay the principal as A may by deed or by will appoint and in default of appointment to A's heirs or next of kin. A is the sole beneficiary of the trust." (Rest., Trusts, pp. 321, 322, sec. 127.)

Scott, in his work on Trusts, says (p. 656): "A * * * difficult question arises where the settlor conveys property in trust to pay the income to himself for life and on his death to pay the principal to his heirs or next of kin. In such a case it has been held in a number of cases that the settlor is the sole beneficiary of the trust." He says that one "ground for the result is the common-law rule that a disposition in favor of the heirs of the grantor creates a reversion in him and not a remainder in his heirs" and that "Under the modern authorities the question is whether the settlor in the particular case intended to create an interest in the persons who should be his heirs at the time of his death, or whether he intended to retain the whole beneficial interest in the property. The inference is that he does not intend to create an interest in his heirs which would prevent him from dealing with the beneficial interest as he likes. The inference is the opposite of that which arises where the settlor gives a life interest to a third person with a limitation over to the heirs of the third person. In the latter case, as we shall see, the inference is that he intends the first taker to have only a life estate. Where, however, he reserves a life estate for himself, he does not ordinarily intend to create an interest in his heirs." (1 Scott on Trusts, p. 656, sec. 127.1)

The case chiefly relied upon by appellant is Doctor v. Hughes, 225 N.Y. 305, 122 N.E. 221. Scott says it is the leading case on the subject. In that case, a trustor, called "grantor" in the opinion, conveyed a house and lot to a trustee. The conveyance provided for payment of the income to the trustor and upon his death the trustee was to "convey the said premises (if not sold) to the heirs at law of the party of the first part." In case of a sale, he was to pay to the heirs at law "the balance of the avails of sale remaining unexpended." In the opinion by Cardozo, J., it was said page 221 of 122 N.E.: "The direction to the trustee is the superfluous expression of a duty imposed by law. 'Where an express trust is created, every legal estate and interest not embraced in the trust, and not otherwise disposed of, shall remain in or revert to, the person creating the trust or his heirs.' Real Property Law, § 102. (Consol. Laws, c. 50.) What is left is not a remainder (Real Property Law, § 38), but a reversion (Real Property Law, § 39). To such a situation neither the rule in Shelley's Case (1 Coke Rep. 104), nor the statute abrogating the rule (Real Property Law, §54), applies. The heirs mentioned in this deed are not 'the heirs * * * of a person to whom a life estate in the same premises is given.' Real Property Law, § 54. The life estate belongs to the trustee. The heirs are the heirs of the grantor. There is no doubt that a gift to A. for life, with remainder to A.'s heirs, gives to such heirs a vested, though defeasible, estate. [Citations.] But here the question is not whether a remainder is contingent or vested. The question is whether there is any remainder at all. In the solution of that problem, the distinction is vital between gifts to the heirs of the holder of a particular estate, and gifts or attempted gifts to the heirs of the grantor. 'A man cannot, either by conveyance at the common law, by limitation of uses, or devise, make his right heir a purchaser.' [Citations.] 'It is a positive rule of our law.' Hargrave's Law Tracts (1787) p. 571. 'If a

man make a gift in taile, or a lease for life, the remainder to his own right heirs, this remainder is void, and he hath the reversion in him; for the ancestor during his life beareth in his body (in judgment of law) all his heires, and therefore, it is truly said that haeres est pars antecessoris.' Co. Litt. 22b. To the same effect are all the commentators. [Citations.] The heirs have a mere expectancy, spes successionis (Matter of Parsons Stockley Parsons, L.R. 45 Ch.D. 51, 55), which may be barred by deed or will. This rule, that a reservation to the heirs of the grantor is equivalent to the reservation of a reversion to the grantor himself, is not to be confused with the rule in Shelley's Case. The two are quite distinct. Alexander v. De Kermel, 81 Ky. 345, 351, 352. The one 'applies only to the acts of an ancestor as between him and his own heirs.' Hargrave, supra. The other is confined to the limitation of estate of inheritance to the heirs of a person who has taken under the same instrument a prior estate of freehold Campbell v. Rawdon, 18 N.Y. 412, 420; 29 L.R.A., N.S., 1016.

"At common law, therefore, and under common-law conveyances, this direction to transfer the estate to the heirs of the grantor would indubitably have been equivalent to the reservation of a reversion. * * * to transform into a remainder what would ordinarily be a reversion, the intention to work the transformation must be clearly expressed. Here there is no clear expression of such a purpose. * * * They [the heirs] had an expectancy, but no estate."

The New York statute which abolished the rule in Shelley's Case is almost identical with Civil Code section 779 and is, no doubt, its predecessor. N.Y. Real Property Law, Consol.Laws, C. 50, sec. 54; Thornton v. White, 186 App.Div. 566, 174 N.Y.S. 666.

In later New York cases it has been held that the doctrine of Doctor v. Hughes, supra, 225 N.Y. 305, 122 N.E. 221, was no more than a prima facie precept of construction which may serve to point the intent of the author when the interpretation of the trust instrument is not otherwise plain. See, Engel v. Guaranty Trust Co. of N.Y., 280 N.Y. 43, 47, 19 N.E.2d 673, 675; Minc v. Chase Nat. Bank of City of N.Y., 263 App.Div. 141, 31 N.Y.S.2d 592, 595, holding that a provision for distribution at the end of the trust period to the next of kin and heirs at law of the trustor according to the "Statutes of Descent and Distribution of the State of New York," indicated a gift by purchase.

After referring to Doctor v. Hughes, supra, 225 N.Y. 305, 122 N.E. 221, Scott says: "On the other hand, in some cases the courts have reached the opposite result, holding that where the grantor created a trust for himself for life, and on his death as he might by will appoint and in default of appointment for his heirs, the heirs took as purchasers," citing Gray v. Union Trust Co., 171 Cal. 637, 154 P. 306. 1 Scott on Trusts, p. 658, sec. 127.1.

Other cases relied upon by the appellant will be reviewed briefly:

In Berlenbach v. Chemical Bank & Trust Co., 235 App.Div. 170, 256 N.Y.S. 563, affirmed 260 N.Y. 539, 184 N.E. 83, the trustor, with a wife and infant son, brought suit to terminate the trust, urging that he was the sole person beneficially interested. The facts are identical with those in Bixby v. Hotchkis, 58 Cal.App.2d 445, 136 P.2d 597, except that in the Berlenbach case the trustee was without power to change the investments constituting the trust estate without the trustor's consent. The court relied on Doctor v. Hughes, 225 N.Y. 305, 122 N. E. 221, and found from the trust instrument that it was not the intention of the trustor to create a remainder in his heirs.

Bottimore v. First & Merchants Nat. Bank, 170 Va. 221, 196 S.E. 593, supports appellant's contention. The opinion states that the authorities are not in accord on the subject but that the better reasoned decisions support the view that upon a state of facts, such as we have in the instant case, the trustor merely conveyed to the trustee a life interest in the property for the benefit of the trustor's heirs, leaving in the trustor a reversion in the property and that she was the sole beneficiary.

Stephens v. Moore, 298 Mo. 215, 249 S. W. 601, Dunnett v. First Nat. Bank & Trust Co. of Tulsa, 185 Okl. 82, 85 P.2d 281, and Burton v. Boren, 308 Ill. 440, 139

N. E. 868, support appellant's claim. The conclusions are predicated upon the rule of the worthier title, which is this: If one makes a limitation to another for life, with a remainder over, either mediately or immediately, to his heirs or the heirs of his body, the heirs do not take remainders at all, but the word "heirs" is regarded as defining or limiting the estate which the first taker has, and his heirs take by descent and not by purchase. See, also, Shawmut Bank v. Joy, 315 Mass. 457, 53 N.E.2d 113; 4 Tiffany, Real Property, p. 378, sec. 1118.

Fidelity Union Trust Co. v. Parfner, 135 N.J.Eq. 133, 37 A.2d 675, supports appellant's claim. The conclusion that the words "next of kin" merely indicate a reversion retained by the trustor, was based on the intention of the trustor as disclosed by the trust instrument.

The principle applied in the cases relied upon by appellant, is that, in the absence of a contrary intent deducible from the trust instrument, the rule of the worthier title applies and that the word "heirs," when used in the trust instrument, should not be construed as a word of purchase unless it is clearly used with that intent.

The worthier title principle, more properly called, says Warren of Harvard Law School, "a rule against a remainder to a grantor's heirs" (22 Tex.L.Rev. 22, 26), has been held to be unaffected by statutes abrogating the rule in Shelley's Case through a provision similar to Civil Code section 779, to the effect that where a remainder is limited to the heirs of a person in whom a life estate in the same property is given, the persons who are heirs at the termination of the life estate shall take as purchasers by virtue of the remainder so limited to them. Wilcoxsen v. Owen, 237 Ala. 169, 185 So. 897, 901, 125 A.L.R. 539; Doctor v. Hughes, 225 N. Y. 305, 122 N.E. 221; Whittemore v. Equitable Trust Co. of New York, 223 App. Div. 693, 229 N.Y.S. 440, 442, reversed on other grounds 250 N.Y. 298, 165 N.E. 454; Robinson v. Blankinship, 116 Tenn. 394, 92 S.W. 854, 855; Mayes v. Kuykendall, Ky., 112 S.W. 673; 1 Simes, Law of Future Interests, p. 266, sec. 148. Almost all of the American courts, to which the problem of the application of the rule against a remainder to the grantor's heirs has been presented, have applied the common law dogma. 39 Col.L.Rev. 628, 661, and cases cited; 24 Ill.L.Rev. 627, 642, and cases cited. Gray v. Union Trust Co., 171 Cal. 637, 154 P. 306, is said to be contra to these decisions. 17 Minn.L.Rev. 346, 347.

Although the result of the application of the rule in Shelley's Case and the rule against a remainder to the grantor's heirs is the same in that it vests in one person the entire interest, their spheres of application are different. The rule in Shelley's Case operates upon a limitation to the heirs of the grantee; the other rule, upon a limitation to the heirs of the grantor. If the limitation is to the heirs of the grantor and the rule against a remainder to the grantor's heirs is applicable, it is held that the heirs do not take by purchase and that the grantor can terminate the trust because he is the sole beneficiary. May v. Marx, 300 Ill.App. 144, 20 N.E. 2d 821, 824; Biwer v. Martin, 294 Ill. 488, 128 N.E. 518; Akers v. Clark, 184 Ill. 136, 56 N.E. 296, 75 Am.St.Rep. 152; 1 Simes, Law of Future Interests, p. 266, sec. 148; 34 Ill.L.Rev. 835, 35 Ill.L.Rev. 590, 592.

Nossaman, in his exhaustive and comprehensive treatise on "Trust Administration and Taxation," says (sec. 303): "Some courts do not apply the rule in Shelley's case to equitable interests; and in some jurisdictions, including California, the rule does not apply at all. In others, it has been abolished in case of limitations over to heirs. In such cases, remainders are created in their favor," discussing Gray v. Union Trust Co., 171 Cal. 637, 154 P. 306, and citing Bixby v. Hotchkis, 58 Cal. App.2d 445, 136 P.2d 597. The doctrine applied in Doctor v. Hughes, 225 N.Y. 305, 122 N.E. 221, is stated by Nossaman to be cognate to the rule in Shelley's Case. It is the rule against a remainder to the grantor's heirs. Nossaman comments, "More quaint than sensible, the rule seems to have no place under other than a feudal system * * *." (Nossaman, Trust Administration and Taxation, pp. 284, 285, sec. 303.) (See, Rest., Property, sec, 314; 24 Ill.L.Rev. 627; 43 Mich.L.Rev. 976; 44

Dickenson L.Rev. 247; 4 Md.L.Rev. 50; 39 Col.L.Rev. 628, 656. The rule was abolished in England in 1833. (3 and 4 Wm. IV, c. 106, sec. 3.)

Simes says that the feudal reasons for the rule against a remainder to the grantor's heirs "have long since disappeared, and no other valid ones have come to take their place. If it is a positive rule of law, like the rule in Shelley's Case, as the rule under consideration was in the English law, then its principal function would seem to be to defeat the legitimate intent of a grantor. Indeed, about all that can be said for the rule, if it be a positive rule of law, is that it tends to make land more readily alienable. This has not been said by the courts, however, and, if it were, it would seem to be quite as inadequate to justify the rule as it is to justify the rule in Shelley's case, in support of which it has been sometimes urged. Hence, it is not surprising to find a tendency among modern courts to minimize its legal effect." He says that Gray v. Union Trust Co., 171 Cal. 637, 154 P. 306, held that a remainder interest was created. (1 Simes, Law of Future Interests, p. 265, sec. 147 and footnote.)

It appears to be true, as appellant says, that the rule of the Restatement, and the overwhelming weight of authority, is that by the language used in the instrument here, the heirs take by descent from the trustor and not by purchase under the terms of the trust instrument; that the instrument did not create a remainder in the heirs but was a reservation of a reversion in the trustor, and that appellant is the sole beneficiary. It is also true, as appellant urges, that in Gray v. Union Trust Co., 171 Cal. 637, 154 P. 306, the grant was to the heirs of the grantor as they existed on the date of the grant; while here, the grant is to the heirs of the grantor as they exist on the day of his death. It is also true that the court in the Gray case relied, at least in part, upon the abrogation of the rule in Shelley's Case, when, in fact, the rule in Shelley's Case was not applicable to the situation by reason of the fact that the grant was to the heirs of the grantor and not to the heirs of a grantee. The limitation was not within the terms of the rule in Shelley's Case. (4 Cal.L.Rev. 354.) The heirs mentioned in the trust instrument were not "the heirs * * * of a person to whom a life estate in the same property is given, * * *." Civ.Code, sec. 779. It is also true that the court in the Gray case did not give consideration to the fact that the weight of authority is to the effect that the rule against a remainder to a grantor's heirs applies even though the rule in Shelley's Case has been abolished. We are also inclined to the view urged by appellant that in Bixby v. Hotchkis, 58 Cal.App.2d 445, 136 P.2d 597, the distribution to the heirs of the trustor was to take place at a specified time of distribution (twenty years from the date of the creation of the trust) according to the laws of succession in effect at such time, and not in accordance with the laws in effect on the date of death of the trustor. See, Schoellkopf v. Marine Trust Co., 267 N.Y. 358, 196 N.E. 288; 1 Scott on Trusts, p. 659, sec. 127.1.

[4] However, the Gray case definitely held that by section 779 of the Civil Code, the word "heirs" is changed from a word of limitation to one of purchase and becomes a specific designation of a class which will have the right to the property upon the termination of the life estate, and that the heirs take the property not by descent but by reason of the remainder which was created for them by the execution of the declaration of trust. Consequently, we are constrained to agree with Nossaman, Scott, Simes, and other authorities, that the effect of the decision in the Gray case is that the rule against "a remainder to the grantor's heirs" is not applicable in California; that Civil Code section 779 is effective to create a remainder in the grantor's heirs when it is preceded by a valid life estate. We are unable to concur in appellant's contention that this case is controlled by the authorities upon which he relies.

[5] We conclude that the effect of the instrument was that appellant reserved a life estate in himself with a remainder to his heirs. The heirs take by purchase and not by descent. Using the word "heirs" in a strict and accurate sense, there can be no person answering that description until the death of the ancestor and the remainder is contingent. Blackburn v.

Webb, 133 Cal. 420, 65 P. 952; County of Los Angeles v. Winans, 13 Cal.App. 234, 242, 109 P. 640. Appellant is not the sole beneficiary.

As a valid and effective trust was created and no power of revocation reserved, and as appellant is not the sole beneficiary, the trust cannot be terminated without the consent of the other beneficiaries thereunder. If any of the beneficiaries are not in being or are not sui juris and, hence, cannot consent, the trust cannot be terminated. All who might, by survival, or other event, become members of the class entitled to the remainder at the time of the trustor's death, have a beneficial interest in the trust. The heirs of appellant having taken by purchase, their interest prevents him from acquiring the fee. Their interest may not be destroyed without their consent. None of the beneficiaries, other than appellant, is a party to this suit or has consented to the termination of the trust. The court may not, therefore, terminate it.

[6, 7] Appellant next contends that the trust should be declared terminated or extinguished as an invalid spendthrift trust. The declaration of trust contains spendthrift provisions. Respondent concedes that the spendthrift provisions of the trust are invalid as to appellant but not as to the other beneficiaries. We take it that this concession means no more than that creditors of appellant could subject the assets of the trust to the payment of his debts. Where a person creates a trust for his own benefit, with a provision restraining the voluntary or involuntary transfer of his interest, his creditors can reach his interest. McColgan v. Magee, Inc., 172 Cal. 182, 186, 155 P. 995, Ann.Cas.1917D, 1050; Rest., Trusts, p. 386, sec. 156; Annotation, 119 A.L.R. 35. The doctrine does not depend upon fraudulent intent of the trustor. McColgan v. Magee, Inc., supra. We have not been cited to any law holding that a trust should be terminated or extinguished because it was created by a trustor for his own benefit with a provision restraining transfer of his interest. Appellant relies upon McColgan v. Magee, Inc., 172 Cal. 182, 155 P. 995, Ann.Cas.1917D, 1050. All that was held in the McColgan case was that where the beneficiary of a trust transferred property to trustees upon a trust which provided that the income should be paid to him free from all claims of creditors, the property was subject to execution in the same manner as any other property. Whether the trust could be terminated or extinguished was not discussed or mentioned. To the same effect, see Estate of Camm, 76 Cal.App.2d 104, 106, 172 P. 2d 547.

[8] The rule of the Restatement is that a settlor cannot revoke a trust if, by the terms of the trust, he did not reserve a power of revocation, except where he is the sole beneficiary, or the power of revocation was omitted by mistake, or upon grounds upon which a transfer of property not in trust can be rescinded or reformed. (Rest., Trusts, secs. 330, 331, 332, 333.) The Restatement says that if the settlor creates a trust for himself for life with remainder to others because of the fact that he was a spendthrift, the mere fact that he subsequently ceased to be a spendthrift is not a sufficient ground for enabling him to revoke the trust. (Rest., Trusts, p. 1007, sec. 332.) A person having placed property out of reach of his creditors may not compel a reconveyance. Tognazzi v. Wilhelm, 6 Cal.2d 123, 56 P.2d 1227.

[9] As respondent says, there is no evidence in the case that appellant created the trust for the purpose of defrauding his creditors or for any other improper purpose. Had he done so, he could not take advantage of his own wrong in a court of equity to compel termination or extinguishment of the trust on that ground. As we have held, the declaration of trust created contingent remainders in appellant's heirs. Its purpose was to secure the income to appellant and to preserve the principal for his heirs. Equity treats it as void only insofar as it operates to defeat claims of appellant's creditors. In all other respects it is valid and its purposes have not been accomplished.

In view of our conclusion that appellant is not the sole beneficiary of the trust and that it cannot be revoked, consideration need not be given to appellant's further claim that the court erred in not receiving

evidence for the purpose of enabling it to exercise its discretion in determining whether the trust should be terminated.

[10, 11] The order denying plaintiff's motion for an order setting aside the order for judgment was made prior to the entry of judgment. An appeal does not lie from that order. Litvinuk v. Litvinuk, 27 Cal. 2d 38, 43, 162 P.2d 8. An order denying a motion for a new trial is not an appealable order. Carlin v. Prickett, 81 Cal.App. 2d 688, 184 P.2d 945. The appeals from the order denying plaintiff's motion for an order setting aside the order for judgment and from the order denying the motion for a new trial are dismissed.

Judgment affirmed.

SHINN, Acting P. J., and WOOD, J., concur.




84 Cal.App.2d 276

**PEOPLE v. JEWETT.**

**Cr. 4199.**

District Court of Appeal, Second District, Division 2, California.

March 8, 1948.

Hearing Denied April 6, 1948.

**1. Sodomy ⇐6**

Evidence of prosecuting witness was sufficiently corroborated to sustain conviction for sodomy. Pen.Code, § 286.

**2. Criminal law ⇐372(1)**

In sodomy prosecution, testimony of prosecuting witness that on occasions other than those named in information defendant had committed similar acts upon her was admissible. Pen.Code, § 286.

**3. Criminal law ⇐641(1)**

An accused person may waive right to counsel.

**4. Criminal law ⇐593**

Where, at beginning of trial, one of defendant's attorneys stated that they were having a little difficulty and that she felt in all fairness to defendant counsel should ask that case be continued until defendant could seek another attorney, and defendant elected to conduct his own defense with one of his then attorneys remaining in an advisory capacity, even if attorney's statement could be construed as a motion for continuance, failure to grant continuance was not error.

Appeal from Superior Court, Los Angeles County; C. C. McDonald, Judge.

Albert E. Jewett was convicted of sodomy and he appeals.

Affirmed.

Philip S. Schutz, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Appellant was charged with two counts of violation of section 286 of the Penal Code and with two prior convictions of a felony. At first he denied the prior convictions but later admitted them. He was convicted on both counts of violating section 286, and appeals from the judgment of conviction and from the order denying his motion for a new trial. As grounds of appeal he specifies (1) insufficiency of the evidence to sustain the conviction by reason of the inherent improbability of the testimony of the complaining witness and the corroborating witnesses; (2) error in the admission of evidence of other similar offenses; (3) error in denying a continuance of the trial in order that he might secure other counsel.

1. *Sufficiency of the evidence.* Appellant and the complaining witness although not married to each other had been living together as husband and wife for more than four years prior to the commission of the offenses. The prosecuting witness testified that on the date specified in the first count she and appellant had been drinking a considerable amount of intoxicating liquor; appellant stated that he desired to engage in sexual intercourse but the complaining witness was not in the mood at that

time; appellant then beat and kicked her, inflicting severe injuries on her, threw her on the bed and committed the act charged. She further testified that on the date named in the second count he again assaulted her and committed the act charged therein.

The prosecutrix was corroborated as to the first offense by the landlady of the apartment house in which she and appellant were residing. The landlady testified that she heard the commotion in the apartment, heard the blows struck and the vile language used by appellant, and heard the prosecuting witness screaming. The door of the apartment apparently was not locked, and the landlady opened it, looked in and saw appellant committing the act. The corroboration of the second charge was furnished by a maid in the apartment house who was cleaning an adjoining apartment when she heard the quarreling between the parties and heard the defendant swearing at the prosecutrix. She looked through a hole in the door between the apartment in which she was working and the apartment occupied by the prosecutrix and appellant and saw him throw the prosecutrix on the bed and commit the act charged. A few days after the second offense the prosecutrix was examined by a physician who testified that he found contusions all over her body, bruises and black marks on her breast and abdomen and around her anus. An examination of the anal area revealed a slight swelling and a very severe tenderness. This condition, the doctor said, could have been caused by the commission of the act charged against appellant.

[1] The evidence of the prosecuting witness was sufficiently corroborated, but, contends appellant, the evidence of both the prosecutrix and the landlady who witnessed the first act is inherently improbable in that they both testified that the act continued for an hour and a half. The landlady, after her first observation of the parties, retired to her own apartment and prayed. She then tried to find someone who would call the police. In the latter effort she seems to have been no more successful than in the former for no police officers arrived. She opened the door and looked in on the parties two or three times. Her testimony corroborated the evidence as to the time during which the act continued. Members of the jury are presumably persons of sufficient age and experience to evaluate testimony after having heard it from the mouths of the witnesses. They found nothing inherently improbable in it. The conclusion of the jury as indicated by the verdict will not be disturbed.

[2] 2. *Evidence of other offenses.* During the examination of the prosecuting witness she testified that on occasions other than those named in the information appellant had committed similar acts upon her. The admission of this evidence is assigned as error. In prosecutions for rape, incest and other lewd and licentious crimes evidence of similar acts committed by the defendant upon the same person who is named in the information or indictment is admissible to show the disposition of the defendant to commit the act charged and the probability of his having committed it. People v. Hall, 25 Cal.App.2d 336, 339, 77 P.2d 244; People v. Troutman, 187 Cal. 313, 318, 201 P. 928; People v. Foster, 117 Cal.App. 439, 443, 4 P.2d 173; People v. Fuhrman, 130 Cal.App. 267, 269, 19 P.2d 821; People v. Koller, 142 Cal. 621, 625, 76 P. 500; People v. Christian, 48 Cal.App. 646, 648, 192 P.182; People v. Martinez, 59 Cal.App. 121, 123, 210 P. 61; People v. Castro, 133 Cal. 11, 12, 65 P. 13. The cases cited by appellant (People v. Huston, 45 Cal.App.2d 596, 114 P.2d 607; People v. Wyett, 49 Cal.App. 289, 193 P. 153; People v. Singh, 121 Cal.App. 107, 8 P.2d 898) are not pertinent since in each of the cases evidence was admitted as to similar crimes committed by the defendant upon persons other than the prosecuting witness. There was no error in the admission of evidence of other crimes committed by appellant upon the prosecuting witness.

3. *Alleged error in denying a continuance of the trial.* The record discloses that before the commencement of the trial there had been a disagreement between appellant and the two attorneys then representing him (not counsel appearing for him on the appeal) as to whether appellant should admit the prior convictions charged against him. Out of the presence of the jury the court was advised of the situation, but the trial nevertheless proceeded with both at-

torneys representing appellant. After the direct examination of the complaining witness had been concluded appellant stated to the court that he felt that he knew the action better than anyone else, that he felt capable of defending himself, and that he desired to handle his own defense, having had two years in law in Reno, Nevada. One of his counsel stated that appellant's statement to the court was the first intimation that he had had that appellant intended to take such a course, and that if he desired to represent himself it would be all right with them, the attorneys. After receiving some excellent advice from the court and a suggestion from the deputy district attorney that he probably would have a better defense if he retained his counsel, he persisted in his desire to conduct his case in his own way. After a recess, during which the situation apparently was further discussed, the following colloquy took place out of the presence of the jury:

"The Court: Mr. Jewett, you announced to the Court that you want to present your own defense and have your attorneys excused. It is satisfactory to you to have Mr. McPherson to assist in the case in an advisory capacity?

The Defendant: Yes, your Honor.

The Court: Very well. Mr. McPherson will remain as your attorney in an advisory capacity. The other counsel for the defendant, Mrs. Root, will be excused.

Mr. Johnstone (Deputy District Attorney): Is that satisfactory to you that Mrs. Root be excused?

The Defendant: Yes, your Honor, yes.

Mr. Johnstone: And you have now decided that you want to represent yourself with what assistance—

The Defendant: With the assistance of Mr. McPherson.

Mr. Johnstone: All right. So stipulated."

Mr. McPherson remained with appellant as his advisor during the trial, and the transcript discloses that on several occasions he objected to questions on behalf of appellant. Appellant's cross-examination of witnesses was as thorough and complete as could be expected if it had been conducted by an attorney. He seemed well able to conduct his case and thoroughout the trial had the advice and at times the active participation of an attorney.

At no time was a motion made for a continuance in order that appellant could procure other counsel. At the beginning of the trial one of his attorneys stated that they were having a little difficulty and that she felt that in all fairness to the defendant counsel should ask that the case be continued until he could seek another attorney. Since there was no motion there was nothing upon which the court could rule.

[3] An accused person may waive the right to counsel. In re Connor, 16 Cal.2d 701, 706, 108 P.2d 10. Since appellant showed a keenness of intellect in the cross-examination of witnesses he must be deemed to have had "an intelligent understanding of his acts," when he insisted on conducting his own defense. With one of his counsel sitting beside him to advise him as the trial proceeded he was not without competent legal assistance at all stages of the proceedings.

[4] Moreover, appellant did not have an absolute and unlimited right to insist on a continuance. Even though the statement of appellant's attorney regarding the disagreement between counsel and appellant could be construed as a motion for a continuance for the purpose of permitting appellant to obtain new counsel, the denial of the motion would not have been error in the circumstances then existing. People v. Shaw, 46 Cal.App.2d 768, 774, 117 P.2d 34; People v. Russell, 156 Cal. 450, 455, 105 P. 416; People v. Warren, 130 Cal. 678, 681, 63 P. 87.

The judgment and the order denying appellant's motion for a new trial are affirmed.

MOORE, P. J., and McCOMB, J., concur.

84 Cal.App.2d 185

## WILLSON v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.

No. 13669.

District Court of Appeal, First District, Division 2, California.

March 3, 1948.

1. Statutes ⇐225

Statute providing for final divorce judgment to be entered when a year has expired after entry of interlocutory judgment, statute authorizing entry of final judgment nunc pro tunc as of date judgment could have been entered if applied for, and statute authorizing entry of interlocutory divorce judgment nunc pro tunc as of day interlocutory judgment was actually granted, would not be read together in determining whether last described statute authorized entry of interlocutory judgment nunc pro tunc as of date interlocutory judgment was actually granted. Civ. Code, §§ 131.5, 132, 133.

2. Divorce ⇐162

Under statute authorizing entry of interlocutory divorce judgment nunc pro tunc as of day interlocutory judgment was actually granted, an interlocutory judgment can only be entered where, by mistake, negligence, or inadvertence, one has not already been entered. Civ. Code, § 131.5.

3. Divorce ⇐162

Where interlocutory divorce judgment had been entered on date subsequent to granting of interlocutory judgment, interlocutory judgment could not be entered nunc pro tunc as of date judgment was actually granted so as to permit entry of final divorce judgment nunc pro tunc as of a year after actual granting and so validate remarriage of divorced wife entered into a year after granting of interlocutory judgment before granting interlocutory judgment but before entry of judgment. Civ. Code, § 131.5.

---

Petition by Mary Eleanor Willson against the Superior Court of the State of California, in and for the County of Alameda, and Honorable T. W. Harris, Presiding Judge, for a writ of mandate requiring judge to enter a final judgment of divorce nunc pro tunc as of a year after granting of interlocutory judgment.

Writ denied and alternative writ discharged.

Max Bamberger, of Los Angeles, for petitioner.

J. F. Coakley, Dist. Atty., of Oakland, for respondent T. W. Harris, etc.

Herman W. Mintz, of Oakland, for respondents Phyllis and Donald Del Willson.

BRAY, Justice.

The chronology of events in this matter is as follows:

August 18, 1942—Phyllis Willson was granted by default an interlocutory decree of divorce against Del Willson, in the superior court of Alameda County.

October 30, 1942—Interlocutory decree of divorce entered.

August 21, 1943—Three days after one year had expired from the actual granting of the interlocutory decree, but over two months less than one year from its actual entry, Del Willson married Mary Eleanor Willson (the petitioner herein). Apparently both Del and Mary in good faith believed that the divorce had become final and Del was free to marry.

November 8, 1943—Final decree of divorce entered.

March 3, 1945—Del Willson was killed at Iwo Jima, leaving a national service life insurance policy of $10,000, in which Mary was named as beneficiary. Under the rules governing veterans' insurance, Mary cannot collect on this policy unless she was the legal wife of Del, and the government has held up its payment to give her an opportunity of establishing the validity of her marriage. After the petition for the writ of mandate was filed in this court, it was learned that Del left surviving him, as issue of his first marriage, a minor child named Donald Del Willson. An order was made requiring service of the petition and writ upon him, and he has appeared through his guardian ad litem, Phyllis Willson, Phyllis Willson, the former wife, ad-

mittedly has no claim on the insurance policy, as unquestionably her divorce from Del is a valid one.

August 27, 1947—Mary petitioned the superior court of Alameda County to enter an interlocutory decree of divorce nunc pro tunc as of the day of granting same; August 18, 1942, and a final decree as of one year thereafter, August 19, 1943. Were this done, it would validate her marriage to Del two days later, August 21, 1943, and would establish her right to collect the insurance.

The judge of the superior court before whom the petition was heard refused to enter the interlocutory decree on the sole ground that the court had no power to enter such decree where one had already been entered. It must be emphasized here that if such power exists, whether the court will permit the entry nunc pro tunc is in the sole discretion of the court. In this case, the court did not exercise its discretion, but denied the petition solely upon the ground of the court's lack of power. Hence, this presents to this court the single question whether the superior court has the power, under section 131.5 of the Civil Code, to enter an interlocutory decree of divorce nunc pro tunc as of the date it was granted, where an interlocutory decree is already of record.

There is a little confusion in the record as to whether the judge refused to enter nunc pro tunc the proposed final decree. Apparently he refused to enter the final decree nunc pro tunc as of the requested date, August 19, 1943, a year after the actual granting of the interlocutory decree, upon the ground that as he could not enter an interlocutory decree ahead of the one on file, he could not enter a final decree until a year had elapsed from the actual date of entry of the interlocutory decree. He probably did not refuse to enter the final decree nunc pro tunc as of October 31, 1943, which would be one year after the actual entry of the interlocutory decree. However, such an entry would be of no value to petitioner, as her marriage took place on August 21, 1943.

The history of divorce decrees nunc pro tunc in California is interesting. Prior to 1903 there was no provision in our statutes for an interlocutory decree of divorce. In that year sections 131 and 132 were added to the Civil Code. Section 131 provided for the interlocutory decree. Section 132 provided for the final decree to be entered when a year had expired after the entry of the interlocutory decree. Subsequently it was held that the mere lapse of one year after the entry of the interlocutory decree did not finally dissolve the marriage but that it required also the entry of a final decree. Estate of Dargie, 162 Cal. 51, 121 P. 320.

In Grannis v. Superior court, 146 Cal. 245, 79 P. 891, 106 Am.St.Rep. 23, the court reviews the circumstances leading up to the enactment of sections 131 and 132 as follows: "It has also been found that in some cases difficult complications occur arising from divorced persons contracting a subsequent marriage before the judgment of divorce became final by the expiration of the time within which an appeal could be taken. To prevent or mitigate these evils, it has always been the legislative policy to make many restrictions in the procedure in divorce cases which are not applicable in ordinary actions.

"In continuation of this policy the Legislature in 1897 amended section 61 of the Civil Code so as to provide that a marriage contracted by a divorced person during the life of the former spouse, and within one year after the time of the judgment of divorce, should be illegal and void. St. 1897, p. 34, c. 36. Immediately it was contended that this law was of no effect beyond the confines of the state, and that marriages solemnized during the year after the divorce, within another state or territory, which were valid by the laws of such state or territory, must be recognized as valid in this state. Numerous attempts thus to evade the law were made, and much difference of opinion existed as to the legality of such marriages, until finally, in August, 1902, it was decided by this court that such marriages were valid in this state, and the question was thus settled. Estate of Wood, 137 Cal. 129, 69 P. 900. Thereupon the act of 1897 became practically a dead letter. All who wished to enter into an-

other marriage within the year easily accomplished their purpose and evaded the law by a short journey beyond the borders of the state." 146 Cal. at pages 248, 249, 79 P. at page 893, 106 Am.St.Rep. 23. It then goes on to state that at the next session (1903) the Legislature again amended section 61 by providing that no marriage of either party would be valid if contracted within one year after the entry of the interlocutory decree of divorce, and also enacted sections 131 and 132. After pointing out that these sections require the expiration of a year after the entry of the interlocutory decree of divorce before a final decree can be granted, the court says, 146 Cal. at page 252, 79 P. at page 894, 106 Am.St. Rep. 23: "These provisions, interpreted in the light of the previous legislation and decisions and the purpose to be accomplished by the law, are clearly to be understood as a limitation on the power of the court in the matter, and as intended to forbid the entry of a final judgment until after the prescribed period."

The first time the question of using a nunc pro tunc decree in a divorce case was raised was in Claudius v. Melvin, 146 Cal. 257, 79 P. 897. There the court held that "the year which must elapse before final judgment can be given begins to run from the time of the actual entry of the interlocutory judgment, and not from any theoretical nunc pro tunc date of entry." 146 Cal. at page 259, 79 P. at page 897. In Harris v. Superior Court, 10 Cal.App.2d 586, 52 P.2d 605, and in Nolte v. Nolte, 29 Cal.App. 126, 154 P. 873, the court flatly held that no power existed in the court to enter an interlocutory decree as of a prior date. Along the same lines, it was held in Corbett v. Corbett, 113 Cal.App. 595, 298 P. 819, that the court had no power to enter a final decree of divorce nunc pro tunc as of a prior date, so as to invalidate a marriage occurring over one year subsequent to the entry of the interlocutory decree, but prior to the actual entry of the final decree.

In 1935, section 133 was added. This section provided that whenever either of the parties to a divorce action is, under the law, entitled to a final judgment, but by mistake, negligence or inadvertence the same has not been signed, filed or entered, and no appeal or motion for new trial is pending, the court, on the motion of either party, or its own motion, could cause a final judgment to be entered nunc pro tunc as of the date when the same could have been given or made if applied for, thus validating a marriage taking place subsequent to one year from the entry of the interlocutory decree and before the actual entry of the final decree.

Following the enactment of this section the question arose as to whether a final decree could be entered nunc pro tunc thereunder where a final decree was already of record. In De Freece v. Industrial Accident Commission, 26 Cal. App.2d 584, 80 P.2d 129, decided in 1938, the petitioner was granted and had entered an interlocutory decree of divorce on May 6, 1927. Through inadvertence and possibly because of the death of her attorney, the final decree was not entered until January 25, 1935. In 1928, more than one year after the entry of the interlocutory decree, petitioner had entered into a common-law marriage in another state. The husband of this marriage died January 20, 1935. In attempting to collect compensation for his death, petitioner was faced with the illegality of her second marriage. More than two years after the final decree was entered, in an endeavor to validate the marriage, "acting under the authority of a new code section (Civ.Code, sec. 133 as added by St.1935, p. 1459), which became effective approximately eight months after the date on which her final decree was entered, she obtained an amended final decree purporting to restore her to the status of a single person as of May 8, 1928 * * *." 26 Cal.App.2d at page 587, 80 P.2d at page 130. The appellate court held such a decree was a nonentity, because the section at that time provided that a nunc pro tunc final decree could be obtained only when a final decree had not been signed, filed, or entered.

Up to this time there was no statutory provision for the granting of a nunc pro tunc interlocutory decree. In 1939 the Legislature enacted section 131.5. This section made practically the same provisions con-

cerning the entry of an interlocutory decree nunc pro tunc as were contained in section 133 concerning the entry of an nunc pro tunc final decree. Other than for an amendment in 1945, allowing the court to act on its own motion, it stands today the same as when first enacted. It uses the language upon which the decision in the De Freece case relied when holding that a nunc pro tunc final decree could not be entered where a final decree had already been entered. "In cases in which the court has determined that a divorce ought to be granted, but by mistake, negligence or inadvertence, *the interlocutory judgment has not been signed, filed or entered,*" the court may cause an interlocutory decree to be entered nunc pro tunc as of the day upon which the decree was actually granted. (Emphasis added.)

Apparently because of the De Freece decision, the Legislature in 1941 amended section 133 by adding, "The court may cause such final judgment to be signed, dated, filed and entered nunc pro tunc as aforesaid, even though a final judgment may have been previously entered where by mistake, negligence or inadvertence the same has not been signed, filed or entered as soon as it could have been entered under the law if applied for." However, it is significant that the Legislature did not make a similar change in section 131.5, either when making the above amendment or later in 1945, when it amended section 131.5 to permit the court to act of its own motion. As the latter section now reads, and applying the reasoning in the De Freece case, an interlocutory decree of divorce nunc pro tunc can only be entered where by mistake, etc., one has not already been signed, filed or entered.

[1] It is contended that sections 131.5, 132 and 133 should be read together, and that by so doing, in view of the 1941 amendment to section 133 (providing that another final decree may be entered even though one is already of record) this court can hold that the Legislature intended to provide that an interlocutory decree could likewise be entered even though there be one already filed. For us to so hold would be judicial legislation. In view of the De Freece case expressly construing a section (133 as it then existed) which contained identical language with section 131.5 as it now stands, we cannot say that the Legislature did not have in mind that where an interlocutory decree has already been entered, the time for appeal, and even for a motion in default cases under section 473, Code Civ.Proc. has been started running, and the Legislature did not wish to provide a procedure which by an entry nunc pro tunc could possibly bar all right to appeal from the default interlocutory decree or to move under section 473 in regard thereto. Section 131.5 provides that in contested cases a showing must be made that there is to be no appeal or motion for a new trial. Of course, the rather absurd situation remains that if no interlocutory decree has been entered in a default case, the court may by a nunc pro tunc entry of both interlocutory and final decrees wipe out the right to appeal from or move as to the interlocutory decree, while if an interlocutory decree has actually been entered, even though late, such rights are not barred. However, that is a matter for the Legislature to consider and not the courts. Particularly is this so in view of the fact that section 61 of the Civil Code still provides: "In no case can a marriage of either of the parties during the life of the other, be valid in this state, if contracted within one year after the entry of an interlocutory decree in a proceeding for divorce." It is possible that the Legislature, for reasons of its own, still wanted a full year to elapse before either party could marry once an interlocutory decree had actually been entered, even though it permitted the year to run from the date of granting the decree, where no interlocutory decree has been entered and a nunc pro tunc one is obtained. It truly leaves an anomalous situation which only the Legislature can change.

Estate of Hughes, 80 Cal.App.2d 550, 182 P.2d 253, relied upon by petitioner, does not meet the situation here. In that case the point involved was whether a nunc pro tunc *final* decree of divorce to validate a marriage entered into after one year from the entry of the interlocutory decree and prior to the entry of a final decree, could be

obtained after the death of one of the parties. In holding that it could, the court was proceeding under sections 133 and 132, and not under section 131.5, the section involved here. It held that sections 133 and 132 should be considered together, but if the case be authority for the proposition that sections 131.5, 132 and 133 must be considered together, we are still faced with the situation that section 131.5, the section dealing with interlocutory decrees, only permits a nunc pro tunc entry where there is not already an interlocutory decree on file.

Ringel v. Superior Court of Alameda County, 54 Cal.App.2d 34, 128 P.2d 558, likewise is not in point, as it holds merely that where no final decree has been entered, one may be entered nunc pro tunc as of one year after the entry of the interlocutory decree. This case holds that the right to a final decree is statutory. The same would be true of the interlocutory decree, and, as said in the extract from the Grannis case hereinbefore quoted, sections 131 and 132 are limitations on the power of the court. Sections 131.5 and 133 constitute exceptions to such limitations, and hence, where the Legislature continued section 131.5 with the provision that it applied only where there was no interlocutory decree on file, the original limitation still applies in a situation where there is an interlocutory decree already on file.

We do not deem it necessary to consider respondents' contention that the second wife is not one of the parties referred to in section 131.5 who may move the court to permit the entry of an interlocutory decree, for the reason that the section now provides that in a proper case, the court may of its own motion order such entry. We prefer to treat the case as if it were one in which the trial court has been requested to make such order of its own motion, and has declined to do so solely because of doubt of its power. It is significant, however, that in Estate of Hughes, supra, 80 Cal.App.2d 550, 182 P.2d 253, although the question was apparently not raised, the court upheld the entry of a nunc pro tunc final decree, on application of the second wife, whose marriage was thereby validated.

Also it is unnecessary for us to consider the contention that the court should not permit the validation of the second marriage by the entry of nunc pro tunc decrees, in view of the claim of the child to the proceeds of the insurance policy. In Macedo v. Macedo, 29 Cal.App.2d 387, 84 P.2d 552, 554, where the court permitted the entry of a final decree nunc pro tunc, the court, referring to section 133 as it stood in 1936, stated: "The act is both curative and remedial, and the retroactive operation of such statute should be given effect unless it disturbs some vested right or impairs the obligation of some contract."

Section 133 contains this language: "Upon the filing of such final judgment" (that is, a final judgment nunc pro tunc procured under its provisions) "* * * any marriage of either of such parties subsequent to one year after the granting of the interlocutory judgment as shown by the minutes of the court, and after the final judgment could have been entered under the law if applied for, shall be valid for all purposes as of the date affixed to such final judgment, upon the filing thereof." Any marriage subsequent to one year after the granting of the interlocutory judgment as shown by the minutes, to be valid under this section, depends, first, upon the filing of the nunc pro tunc final judgment, and secondly, upon the marriage occurring "after the final judgment could have been entered under the law if applied for." Therefore, if no final judgment can be filed because the year required by section 132 from the entry of the interlocutory decree of divorce has not expired, then the portion of the section reading "subsequent to one year after the granting of the interlocutory judgment as shown by the minutes of the court" does not apply. The very same language was in the section before its last amendment, and at the time the De Freece case held that a final decree nunc pro tunc could not be granted where a final decree was already of record. Hence, it follows that the "minutes of the court" language is applicable only after a proper final decree nunc pro tunc is obtained, which, of course, can only be after one year from the entry of the interlocutory decree.

[2, 3] As the Legislature did not change the provisions of section 131.5 and did not make any other provision concerning interlocutory decrees of divorce, there is no power given the courts to enter an interlocutory decree nunc pro tunc where one is already on file.

The petition for a writ of mandate is denied, and the alternative writ is discharged.

PETERS, P. J., and WARD, J., concur.




84 Cal.App.2d Supp. 845

**STOWERS v. FLETCHER et al.**

**C. A. 139557.**

Superior Court, Appellate Department, San Diego County, California.

Jan. 22, 1948.

**1. Execution ⇐348**

To entitle a judgment debtor to contribution against his joint judgment debtor, court must have before it some evidence, from the records, papers or files, or from a subsequent affidavit or other evidence, as to what proportion is between joint debtors, that one has paid more than his proportion and what that proportion is. Code Civ.Proc. § 709.

**2. Execution ⇐348**

Notice of motion for execution against joint judgment debtor for contribution, which failed to allege the proper apportionment of judgment indebtedness between judgment debtors, was insufficient. Code Civ.Proc. § 709.

**3. Execution ⇐348**

Under statute authorizing party who pays more than his share of joint judgment debt to compel contribution, proper procedure contemplates that judgment debtor prepare a notice of motion for issuance of execution; that he allege the fact as to what his proportion is and what proportion is that his joint codebtor should pay; that codebtor have an opportunity to meet allegation by affidavit or evidence; that court hear the evidence; and that court, after hearing, make an order determining from the evidence how much more than his proportion one judgment debtor has paid and order execution thereon. Code Civ.Proc. § 709.

Appeal from Municipal Court of City of San Diego, San Diego County; Stanley T. Howe, Judge.

Action by L. T. Stowers against Ed Fletcher, Sr., and others for breach of contract wherein plaintiff recovered a joint judgment against the defendants Ed Fletcher Company, a corporation, and C. M. Davis. The corporate defendant satisfied judgment by payment and thereafter filed a notice of payment of joint judgment and claim to contribution and moved for issuance of execution against joint debtor for contribution. From an order for issuance of execution, defendants C. M. Davis and Ed Fletcher Company appeal.

Reversed.

Miller, Higgs, Fletcher & Glen and Ferdinand T. Fletcher, all of San Diego, for appellant Ed Fletcher Co.

Garfield & Garfield and R. Fenton Garfield, all of San Diego, for appellant C. M. Davis.

Jasper J. Barrett, of San Diego, for respondent.

TURRENTINE, Presiding Judge.

The plaintiff recovered a joint judgment against the defendants Ed Fletcher Company, a corporation, and C. M. Davis, on a contract action and so far as material to the determination of the issues in the case the judgment reads as follows: "That plaintiff, L. T. Stowers, have judgment against the defendants, Ed Fletcher Company, a corporation, and C. M. Davis, in the sum of four hundred sixty-six and 15/100 dollars ($466.15) * * *."

There is nothing in the complaint, findings of fact, or judgment which determines or discloses what the relationship of the defendants Ed Fletcher Company, a cor-

poration, and C. M. Davis was as between themselves.

Subsequently, the Ed Fletcher Company, a corporation, satisfied the judgment by paying the same. Thereupon it filed a Notice of Payment of Joint Judgment and Claim to Contribution in the Municipal Court, the material portions of which read as follows: "To Stewart H. Carse, clerk of the above entitled court; You are hereby notified and you will please take notice that on June 26, 1947, Ed Fletcher Company, a Corporation, one of the joint debtors in the above entitled action, paid the judgment in the above entitled action with accrued costs in the sum of $492.19, and said defendant, Ed Fletcher Company, a Corporation, hereby claims contribution against the defendant C. M. Davis to the extent of one-half thereof together with his costs incurred and interest thereon."

Based on this notice, the defendant Ed Fletcher Company, a corporation, gave Notice of Motion for Issuance of Execution Against Joint Debtor for Contribution. The Notice of Motion referred to states that at a certain time and place a motion will be made against the codefendant, C. M. Davis, for execution in the sum of $246.09, and was made upon the ground–

"* * * that the Ed Fletcher Company, a Corporation, as a joint judgment debtor in the above-entitled action, has paid to the plaintiff the full amount of said judgment together with accrued costs in the sum of $492.19, and that within ten (10) days of said payment, the said defendant, Ed Fletcher Company, a Corporation, served and filed with the Clerk in the above entitled Court a notice of payment of joint judgment and claim to contribution against the co-defendant, C. M. Davis.

"Said motion will be made pursuant to the provisions of Section 709 of the Code of Civil Procedure upon this notice and upon the records, papers and files in the above-entitled action."

On the hearing of this motion and based thereon, the trial court made an Order for Issuance of Execution Against Joint Debtor for Contribution in the sum of $246.09. It is therein recited that the Court listened to the argument of counsel, examined the records, papers and files in the above-entitled action, and was fully advised in the premises. Thereupon it made its Order for Issuance of Execution Against Joint Debtor for Contribution, to wit, an order for contribution against C. M. Davis in the sum of $246.09, being one-half of the judgment, together with costs, interest, etc. Thereafter the defendant, C. M. Davis, appealed from this Order, and execution was ordered stayed pending the determination on appeal.

In obtaining the Order for Issuance of Execution Against Joint Debtor for Contribution, the defendant, Ed Fletcher Company, a corporation, attempts to pursue the remedy provided by Section 709 of the Code of Civil Procedure. So far as material to the determination of this case, Code of Civil Procedure, Section 709, reads as follows: "Party who pays more than his share may compel contribution. When property, liable to an execution against several persons, is sold thereon, and more than a due proportion of the judgment is satisfied out of the proceeds of the sale of the property of one of them, or one of them pays, without a sale, more than his proportion, he may compel contribution from the others; * * *."

We think that the phrase in Section 709 "more than his proportion" is the important and crucial portion of the section in deciding this case. We have examined the same things which the lower court said it examined in making the Order for Issuance of Execution Against Joint Debtor for Contribution challenged herein, to wit: "The records, papers and files in the above entitled action."

[1-3] We can find nothing therein which determines or alleges what the proportion of the contractual indebtedness as between the joint debtors, Ed Fletcher Company, a corporation, and C. M. Davis, was. We think that to entitle one judgment debtor to contribution against his joint judgment debtor that it must appear from the "records, papers and files" or from a subsequent affidavit, or other evidence, what the proportion of each judgment debtor is as between themselves, and that without such a showing in the "rec-

ords, papers and files" or by affidavit, or other evidence, the court has no basis on which to determine the amount due as between the judgment debtors, or that one judgment debtor has paid more than his proportion. In other words, we think it mandatory that the court must have before it some evidence as to what the proportion is between joint debtors and that one has paid more than his proportion, and what that proportion is before it can issue an execution therefor. The Notice of Motion, therefore, was insufficient in its allegations as a matter of law, and the court was without power to order the issuance of the execution. We think that the proper procedure to be followed is, first, for the judgment debtor to make his Notice of Motion for Issuance of Execution and allege that he has paid more than his proportion, and allege the fact as to what his proportion is, and also what the proportion is that his joint codebtor should pay. The defendant should then have an opportunity to meet this issue of fact and when he has had this opportunity to meet it by affidavit or evidence, the court should hear the evidence; and after hearing, determine from the evidence how much more than his proportion one judgment debtor has paid and then make an order so determining, and order execution issued thereon. The Order appealed from is reversed without prejudice to the defendant Ed Fletcher Company, a corporation, to take further proceedings, if it is so advised, in accordance with this Opinion.

BURCH, and THOMPSON, JJ., concur.

31 Cal.2d 523

## BENJAMIN et al. v. DALMO MFG. CO.

S. F. 17606.

Supreme Court of California, in Bank.

March 9, 1948.

**1. Appeal and error ⇐935(2)**

Appellate courts are favorably disposed toward such action upon part of trial courts as will permit, rather than prevent, adjudication of legal controversies upon their merits. Code Civ.Proc. § 473.

**2. Judgment ⇐139**

Although a large amount of discretion is vested in trial court in matter of application for setting aside a default judgment, the ensuing decision must rest upon sound considerations consistent with showing made for relief sought. Code Civ.Proc. § 473.

**3. Judgment ⇐153(1)**

Under statute authorizing vacation of a default, in addition to being made within six months' period, the application must be made within a "reasonable time", and what is a reasonable time depends upon circumstances. Code Civ.Proc. § 473.

**See Words and Phrases, Permanent Edition, for all other definitions of "Reasonable Time".**

**4. Judgment ⇐153(1)**

The rule that very slight evidence will be required to justify a court in setting aside default when plaintiff files no counter affidavit and makes no showing that he has suffered any prejudice does not obviate a showing of compliance with the "reasonable time" requirement in making the motion. Code Civ.Proc. § 473.

**5. Judgment ⇐143(10)**

Although courts are somewhat loath to penalize a litigant on account of some omission on part of his attorney, particularly where litigant himself has acted promptly and has relied upon attorney to protect his rights, litigant must plead excusable mistake or neglect on part of his counsel as ground for vacating a judgment by default. Code Civ.Proc. § 473.

**6. Judgment ⇐153(1)**

Setting aside a default and default judgment allegedly entered through excusable neglect of defendant was abuse of discretion on ground that motion therefor was not filed within "reasonable time", even if there was reasonable ground to excuse defendant's conduct to point of entry of default judgment, where defendant's attorney, without explanation, delayed for more than three months in filing the motion to set aside default judgment after learning of its entry. Code Civ.Proc. § 473.

CARTER, J., dissenting.

---

Appeal from Superior Court, San Francisco County; E. P. Mogan, Judge.

Action on the common counts by David M. Benjamin and others, as trustee for Paullette Benjamin, against Dalmo Manufacturing Company, to recover purchase price of certain goods allegedly sold and delivered to defendant, wherein a default judgment was entered against the defendant. From a minute order and a written order setting aside the default and default judgment taken against defendant, the plaintiffs appeal.

Reversed.

Prior opinion, 182 P.2d 326.

Wolff & Wolff and Norman Sanford Wolff, all of San Francisco, for appellants.

Hilary H. Crawford, Walter Slack and H. W. Glensor, all of San Francisco, for respondent.

SPENCE, Justice.

Plaintiffs appeal from a minute order and a written order setting aside a default and default judgment taken against defendant corporation. It is urged that the trial court abused its discretion in granting such relief under authority of section 473 of the Code of Civil Procedure. This point is well taken in the light of the record and the applicable legal principles governing our consideration of the propriety of the trial court's action.

On October 9, 1945, plaintiffs brought an action in the city and county of San Francisco to recover the purchase price of certain goods allegedly sold and delivered to defendant. Defendant's president and secretary were served, respectively, with copy of summons and complaint on December

10, 1945, in the county of San Mateo, the county of defendant's residence. Defendant having failed to appear in the action within the thirty-day period allowed by law, plaintiffs six days thereafter—on January 15, 1946—caused defendant's default to be taken and formal judgment to be entered against it for the full sum sought in their complaint, $9,538.13, plus costs. On May 1, 1946, defendant served and filed a notice of motion to set aside the default. Supporting affidavits by defendant's president and secretary and a proposed verified answer accompanied the motion. No counter-affidavit was filed in opposition to defendant's showing. A hearing on the motion was had on May 9, 1946, at which time the trial court ordered the default judgment to be set aside and approved the filing of defendant's verified answer. A formal order was entered accordingly on May 15, 1946.

[1] It is well settled that appellate courts have always been and are favorably disposed toward such action upon the part of the trial courts as will permit, rather than prevent, the adjudication of legal controversies upon their merits. (Nicoll v. Weldon, 130 Cal. 666, 667, 63 P. 63; Jergins v. Schenck, 162 Cal. 747, 748, 124 P. 426; Downing v. Klondike Mining & Milling Co., 165 Cal. 786, 789, 134 P. 970; Waite v. Southern Pacific Co., 192 Cal. 467, 470, 221 P. 204; California National Bank of Sacramento v. El Dorado Lime & Minerals Co., 200 Cal. 452, 454, 253 P. 704; John A. Vaughan Corp. v. Title Insurance & Trust Co., 123 Cal.App. 709, 711, 12 P.2d 117; Morgan v. Brothers of Christian Schools, 34 Cal.App.2d 14, 15, 92 P.2d 925.) Apt expression of this attitude is found in Jones v. Title Guaranty and Trust Co., 178 Cal. 375, at pages 376, 377, 173 P. 586, 587: "This court has always looked with favor upon orders excusing defaults and permitting controversies to be heard upon their merits. Such orders are rarely reversed, and never 'unless it clearly appears that there has been a plain abuse of discretion.' O'Brien v. Leach, 139 Cal. 220, 72 P. 1004, 96 Am.St. Rep. 105." So, too, it is stated in Bonfilio v. Ganger, 60 Cal.App.2d 405, at page 410, 140 P.2d 861, 864: "In California, following the general common law rule, to modify or vacate judgments during the term, the power of courts to control their judgments is regulated by statute specifying a time limit and leaving the matter to the discretion of the court in the interest of substantial justice to set aside its judgments. Code Civ.Proc., sec. 473; Olivera v. Grace, 19 Cal.2d 570, 122 P.2d 564, 140 A.L.R. 1328; Bodin v. Webb, 17 Cal.App.2d 422, 62 P.2d 155."

[2] While a large amount of discretion is thus vested in the trial court in the matter of an application for the setting aside of a default judgment (Gorman v. California Transit Co., 199 Cal. 246, 248, 248 P. 923; Waybright v. Anderson, 200 Cal. 374, 377, 253 P. 148; Brill v. Fox, 211 Cal. 739, 743, 297 P. 25; Kalson v. Percival, 217 Cal. 568, 569, 20 P.2d 330; Beard v. Beard, 16 Cal.2d 645, 647, 107 P.2d 385; Stub v. Harrison, 35 Cal.App.2d 685, 689, 96 P.2d 979; Schoenfeld v. Gerson, 48 Cal.App.2d 739, 742, 120 P.2d 674; Hadges v. Kouris, 71 Cal.App.2d 213, 214, 162 P.2d 476; Fickeisen v. Peebler, 77 Cal.App.2d 148, 151, 174 P.2d 883), the ensuing decision must rest upon sound considerations consistent with the showing made for the relief sought. (Hughes v. Wright, 64 Cal.App.2d 897, 901, 149 P.2d 392; Elms v. Elms, 72 Cal.App.2d 508, 513, 164 P.2d 936.) To this point it is cogently said in Bailey v. Taaffe, 29 Cal. 422, at page 424: "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates. If it be doubted whether the excuse offered is sufficient or not, or whether the defense set up is with or without merit in foro legis, when examined under those rules of law by which Judges are guided to a conclusion, the judgment of

the Court below will not be disturbed. If, on the contrary, we are satisfied beyond a reasonable doubt that the Court below has come to an erroneous conclusion, the party complaining of the error is as much entitled to a reversal in a case like the present as in any other." This appears from the record to be such a situation, and it thus becomes our "duty * * * to reverse the action of the trial court." (Redding Gold & Copper Mining Co. v. National Surety Co., 18 Cal.App. 488, 490, 123 P. 544; Dunn v. Standard Accident Insurance Co., 114 Cal.App. 208, 213, 299 P. 575, 578.)

Here the motion for relief under section 473 of the Code of Civil Procedure was made on the ground that the "default and the * * * default judgment were entered through the mistake, inadvertence, surprise and excusable neglect of the defendant and its officers, to wit, its Secretary and its President." From the supporting affidavits of these officers, which were essentially the same in content, it appears that the president, upon receipt of the copies of summons and complaint by him and by the secretary, directed the secretary—who was also his private secretary—to forward the papers immediately to defendant's attorney; that the secretary "misunderstood" the "directions so given to her * * * and understood [the president] to say that she * * * was to file said papers in the office files"; that "as a result of such misunderstanding" the secretary "failed to forward" the papers to defendant's attorney; that neither of the affiant officers knew of the default "until on or about January 16, 1946," when the president received a letter from defendant's attorney stating that the latter had noticed that on the preceding day a judgment had been taken against defendant; and that the secretary thereupon forwarded the copies of the summons and complaint to defendant's attorney on January 17, 1946. Then follows the usual affidavit of merits on the part of each of the officers. As above stated, plaintiffs filed no counter-affidavit in contest of defendant's showing at the hearing of its motion.

From these considerations demonstrating that defendant's failure to appear in the action within the period prescribed by law was due to the inadvertent omission of defendant's officers, charged with the duty of responding to the legal process in due time, to notify defendant's attorney of the service made upon them, it may be conceded that there was reasonable ground for the trial court to excuse defendant's conduct to the point of entry of the default judgment. As defendant maintains in this regard with respect to its corporate officers: (1) the president's delinquency stemmed from his reliance upon his secretary to follow his forwarding instructions and his failure to anticipate her misunderstanding them, with the result that the process papers were placed in the office files; and (2) the secretary's delinquency stemmed in some measure from the perfunctory nature of her official position, so that while her failure to "read" and "heed" the summons served upon her constituted a neglect of duty (Gillingham v. Lawrence, 11 Cal.App. 231, 233, 234, 104 P. 584), whether or not it was "excusable" was primarily a question for the trial court's discretion (Ross v. Ross, 48 Cal.App.2d 72, 76, 119 P.2d 444), particularly as related to her employee status. Factual situations generally similar to the present case in that they involved an erroneous filing in the office either of the defendant corporation (Gorman v. California Transit Co., supra, 199 Cal. 246, 248, 249, 248 P. 923) or of the attorney (Downing v. Klondike Mining & Milling Co., supra, 165 Cal. 786, 788, 134 P. 970) have been deemed sufficient explanation for failure to make a seasonable appearance in defense of an action. The inadvertence of defendant's officers rested not on mere forgetfulness (Slater v. Selover, 25 Cal.App. 525, 527, 144 P. 298) but on a misunderstanding in the execution of properly given instructions, a mistake which "might be easily made * * * without any culpable carelessness" on the part of the parties concerned. (Downing v. Klondike Mining & Milling Co., supra, 165 Cal. 786, 789, 134 P. 970, 971.) As heretofore stated, the day following the president's receipt of notice from defendant's attorney regarding the

taking of the default judgment, the papers served upon defendant's respective officers were forwarded to the attorney in prompt correction of the prior oversight.

[3] However, there now remains for consideration the matter of defendant's delay in instituting proceedings to set aside the default judgment. As above indicated, the default was known to defendant's officers the day after it was taken, and on the second day the process papers were mailed to defendant's attorney for attention, but no action was taken to open the default for a period of more than three months. So far as the record discloses, defendant furnished no explanation in the trial court, either by affidavit or testimony, for its dilatory procedure. The significance of this "time lag" stems from the provision of section 473 of the Code of Civil Procedure that application for relief thereunder "must be made *within a reasonable time,* in no case exceeding six months, * * *." (Emphasis added.) This time requirement is discussed in Smith v. Pelton Water Wheel Co., 151 Cal. 394, at page 397, 90 P. 934, 935, as follows: "The six months' limitation there provided is simply a limitation upon the power of the court to grant any relief, regardless of any question either as to the merits of the application, or as to whether or not the application was made within what might be held to be a reasonable time under the circumstances. Under this statute, in addition to being made within the six months' period, the application must be made within 'a reasonable time,' and what is a reasonable time in any case depends upon the circumstances of that particular case." While in "the determination of that question, a large discretion is necessarily confided to [the trial] court" (Ibid., 151 Cal. at page 398, 90 P. at page 935), there must be some showing—some evidence—as the basis for the exercise of such discretion. (Freeman on Judgments, 5th Ed., Vol. I, sec. 291, pp. 576, 577.) Instance of this rule is the case of Shearman v. Jorgensen, 106 Cal. 483, 39 P. 863, 864, where the attorney had "drafted an answer, but through inadvertence it was not served or filed," and "the causes for the inadvertency [were] not stated in the attorney's affidavit." Declaring such showing to be "wholly inadequate to meet the requirements of the statute," this court reversed the order setting aside the default judgment, stating its views therefor, 106 Cal. at page 485, 39 P. at page 864: "The reasons and the causes and the excuses for the inadvertence are the matters which concern the court, and these are not stated. Inadvertence in the abstract is no plea upon which to set aside a default. The court must be made acquainted with the reasons for the inadvertence, and, if satisfactory, will act upon them, and relieve from burdens caused by them; but, if the inadvertence is wholly inexcusable, as if it arises from gross negligence, the court will not look upon it kindly, and will have none of it."

Courts do not relieve litigants from the effects of mere carelessness. Defendant has not cited, nor has independent research disclosed, any case in which a court has set aside a default where, in making application therefor, there has been an unexplained delay of anything approaching three months after full knowledge of the entry of the default. On the contrary, the proper procedure appears to involve the presentation of some explanation, by affidavit or testimony, of any extended delay, and the court then determines whether such explanation may be deemed sufficient to justify the granting of the relief sought. Illustrative of this procedure is the case of Smith v. Pelton Water Wheel Co., supra, 151 Cal. 394, 90 P. 934, where, in contrast to the situation here, an explanation was made in the trial court but the excuse—the illness of the attorney "for over two months after learning of the default" and the pressure of "other business" for several weeks thereafter—was deemed insufficient by the trial court. In affirming this ruling on the basis of the showing made in relation to the "reasonable time" requirement of the statute, this court pertinently observed, 151 Cal. at page 398, 90 P. at page 935: "The delay of nearly four months in the matter of making the application, *after full knowledge of the facts,* accompanied by the failure to give any intimation to the opposing party of an intention to so apply,

*certainly required some satisfactory explanation* to warrant a conclusion that the application was made within a reasonable time." (Emphasis added.)

Defendant relies heavily on the case of Wolff & Co. v. Canadian Pacific Railway, 89 Cal. 332, at page 337, 26 P. 825, 827, because of its statement that "where a delay" in instituting proceedings to set aside a default judgment "does not appear to have been injurious to [the] rights" of the other party, "the six-months limitation prescribed by the Code should be considered as the only limit of reasonable time." In that case the application for relief under authority of section 473 of the Code of Civil Procedure was filed three days after the entry of the default judgment. Some five months thereafter a defect was discovered in "the application as first made" and an "amended application" was thereupon filed. Meanwhile the hearing had been delayed with the consent of both parties. In reviewing this situation the court significantly noted, 89 Cal. at page 336, 26 P. at page 826, that "the second application was substantially an amendment of the first * * *, and, for the purpose of determining the question of diligence, must be so regarded." In so fixing the effective date, the "reasonable time" of the making of the application was not open to dispute—a distinct factual consideration bearing no resemblance to the present case where defendant, after learning of the default judgment, waited over three months before instituting proceedings to vacate it and until then, plaintiffs had no knowledge of its intention to so apply. But the quoted language to which defendant refers in the Wolff case was not necessary to the decision there made; and, in addition, it cannot be reconciled with the express wording of the statute so, upon that ground, it must be disapproved. While the statutory six-month limitation is "the standard or criterion in all cases" (Smith v. Jones, 174 Cal. 513, 516, 163 P. 890, 891; see, also, Hollywood Garment Corp. v. J. Beckerman, Inc., 61 Cal.App.2d 658, 661, 143 P.2d 738), as the measure of the court's jurisdiction to grant relief in any event, the "reasonable time" test stands as an independent consideration and in any given situation, its determination, within the maximum six-month period, "depends upon the circumstances of that particular case." (Smith v. Pelton Water Wheel Co., supra, 151 Cal. 394, 397, 90 P. 934, 935.)

Defendant cites certain cases where relief from the burdens of a default judgment has been deemed proper despite an extended period of delay in making the requisite application, but in each instance there was an explanation of all the circumstances involved. Thus, in Waite v. Southern Pacific Co., supra, 192 Cal. 467, 221 P. 204, 206, "defendant did not file its motion to vacate the default judgment until more than five months after it was entered" but "during most of this time defendant was acting upon its honest belief that the state court had no jurisdiction of the action" (192 Cal. at page 471, 221 P. at page 206), and the opposing parties were so contesting the point in the federal court. Moreover, "plaintiffs knew that it was for this reason that defendant did not file an answer in the state court" (192 Cal. at page 469, 221 P. at page 205), and defendant was continuing to deny liability on the claim on which the default judgment was based. Defendant "filed its motion [to open the default] within five weeks after the making of the order by the federal court remanding the cause to the state court" (192 Cal. at page 471, 221 P. at page 206), and under the circumstances, showing plaintiffs' complete information as to defendant's position at all stages of the proceedings, the "delay [was] not such as [would] defeat [the] defendant's right to be relieved under section 473 of the Code of Civil Procedure" (192 Cal. at page 471, 221 P. at page 206). Also, in Bonfilio v. Ganger, supra, 60 Cal.App.2d 405, 140 P.2d 861, the delay of almost six months by the defendants' attorney in filing the motion to vacate the default judgment did not preclude the granting of such relief. But again there was offered upon the presentation of the motion in the trial court a full explanation which would war-

rant the conclusion that "the [attorney's] neglect was excusable by reason of a change in the attorney's office personnel, as averred in affidavits" (60 Cal.App.2d at page 409, 140 P.2d at page 864). While it is there said, 60 Cal.App.2d at page 410, 140 P.2d at page 865 that "there is no claim that appellant has been prejudiced as a result of the order vacating the judgment, or injured as a result of delay in the application therefor," nowhere does it appear in the Bonfilio case, in support of defendant's position, that such consideration alone would constitute a sufficient basis for setting aside a default where the delay in bringing the necessary proceedings was unexplained or the excuse insufficient. On the contrary, it has been said that an "utterly unexplained delay" of some ten weeks in moving for the statutory relief "establishes beyond peradventure the laches of the defendants." Glougie v. Glougie, 174 Cal. 126, 131, 162 P. 118, 120).

[4-6] Although where "the plaintiff files no counter affidavit and makes no showing that he has suffered any prejudice, or that injustice will result from the trial of the case upon its merits, very slight evidence will be required to justify a court in setting aside the default" (John A. Vaughan Corp. v. Title Insurance & Trust Co., supra, 123 Cal.App. 709, 711, 12 P.2d 117), such rule does not obviate a showing of compliance with the "reasonable time" requirement in making the motion. Thus in the cited case it appears that "respondents' motion" was made and the default "judgment was vacated on the very day upon which respondents first learned of its rendition" (123 Cal.App. at page 710, 12 P.2d at page 117), so that the matter of their "seasonable application" (123 CalApp. at page 711, 12 P.2d at page 117) was not a correlative question in connection with the stated rule. But here an entirely different situation prevails. The conduct of defendant's corporate officers in excuse for their inadvertence bearing upon the entry of the default judgment and their prompt action thereafter in mailing the process papers to defendant's attorney are fully presented in the record, but beyond that point there is deep silence. Defendant argues that "if there was a time lag, between the time the papers were forwarded to the attorney and the time when the proceeding was commenced, it was no fault of the defendant." However, while "courts * * * are somewhat loath to penalize a litigant on account of some omission on the part of his attorney, particularly where the litigant himself has acted promptly and has relied * * * upon the attorney to protect his rights" (Stub v. Harrison, supra, 35 Cal.App.2d 685, 689, 690, 96 P.2d 979, 981), the litigant must plead the excusable mistake or neglect on the part of his counsel as a ground for vacating a judgment by default. (Fickeisen v. Peebler, supra, 77 Cal.App.2d 148, 150, 151, 174 P.2d 883). Although "the law ordinarily charges the litigant with the negligence of his agent, namely, his attorney" (Bonfilio v. Ganger, supra, 60 Cal.App.2d 405, 407, 140 P.2d 861, 863), in the measurement of their respective remissness "the same rules" prevail (Morgan v. Brothers of Christian Schools, supra, 34 Cal.App.2d 14, 18, 92 P.2d 925, 928) in guidance of the trial court's determination of the matter upon the basis of the showing made. (O'Brien v. Leach, supra, 139 Cal. 220, 222, 223, 72 P. 1004, 96 Am.St.Rep. 105; Morgan v. Brothers of Christian Schools, supra, 34 CalApp.2d 14, 18, 92 P.2d 925; Stub v. Harrison, supra, 35 Cal.App.2d 685, 690, 96 P.2d 979; Bonfilio v. Ganger, supra, 60 Cal.App.2d 405, 407-409, 140 P.2d 861). So here, in view of the statutory provision that the "application * * * must be made within a reasonable time" (Code Civ.Proc. sec. 473), the circumstances occasioning the attorney's delay of more than three months before the institution of these proceedings should have been presented in support of defendant's motion for relief. While no counter-affidavit was filed by plaintiffs showing that they would be prejudiced by the setting aside of the default judgment, none was necessary until defendant had at least made some excuse for the delay in question. (Bruskey v. Bruskey, 4 Cal.App.2d 472, 479, 41 P.2d 203; Elms v. Elms, sup-

ra, 72 Cal.App.2d 508, 519, 164 P.2d 936.) To hold otherwise—that in the absence of any explanation a delay of more than three months in undertaking to open a default can be excused—would empower the trial court to dispense with the "reasonable time" requirement of the statute. In short, as is said in Ross v. San Diego Glazed Cement Pipe Co., 50 Cal. App. 170, at page 173, 194 P. 1059, 1060, where there was likewise a failure to show "reasons or causes or excuses for the inadvertence or negligence of the attorney" in the premises: "Regrettable as the circumstance may be, the stubborn fact remains that there is in the record no evidence sufficient to justify an order setting aside the judgment or default in this case."

The orders subject of this appeal are reversed.

GIBSON. C. J., and EDMONDS, TRAYNOR and SCHAUER, JJ., concur.

CARTER, Justice.

I dissent.

The majority of this court have again seen fit to usurp the function and power of the trial court in the exercise of a discretion exclusively committed to the latter court by the statutory law of this state as construed in a legion of court decisions.

It is indeed unfortunate that this court should at this time render a decision such as this, designed to inspire and encourage appeals from all discretionary orders and decisions of trial courts regardless of merit. It has almost reached a point where a majority of this court has adopted the policy of substituting its own discretion for that reposed by statute in the trial court. Manifestly, in this field, no rule or standard can be established as a yardstick to guide the trial judge in the exercise of his discretion. No two cases are exactly alike. Each case has its distinguishing features. Trial judges are presumed to be intelligent, honest, and fairminded individuals. They have a grave responsibility in cases of this character. The statute has reposed in them an exceptionally broad power. The power to grant relief from default. The statute has fixed the limit of that power. Within that limit it must be exercised wisely, reasonably and fairly, with the view of advancing the administration of justice. All this a trial judge is presumed to have done when he exercises his discretion in ruling on an application for relief from default under section 473 of the Code of Civil Procedure. The ruling comes before an appellate court fortified with this presumption. The duty of the appellate court is to give full effect to this presumption. The question to be determined by the appellate court is not what it would have done had it been sitting in the place of the trial judge, but whether from the record it can be said that the trial judge failed to act wisely, reasonably and fairly in view of what was presented to him in support of the application. If such failure does not clearly and unmistakably appear, it cannot be said that the trial judge abused his discretion, and his decision should be affirmed.

What does the record disclose in the case at bar? The majority opinion concedes that the showing of mistake, inadvertence, surprise, or excusable neglect was adequate to justify the order relieving the defendant from its default. But the majority assert that the application was not timely made and reverse the order granting relief on this ground.

While I concede that application for relief from default under section 473 of the Code of Civil Procedure must be timely made, the determination of this issue is also within the discretion of the trial judge, and the same considerations are involved as in the determination of any other issue arising on the hearing of such an application. Said section provides that such application "must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken." However, what is a reasonable time must depend somewhat upon the circumstances of each particular case, and is not definitely determined further than that it will not extend beyond the maximum period allowed by the terms of the statute. (14 Cal

Jur., sec. 110, p. 1065; Consolidated Construction Co. v. Pacific Electric Ry. Co., 184 Cal. 244, 247, 248, 193 P. 238; People v. Temple, 103 Cal. 447, 453, 37 P. 414; In re Dahnke's Estate & Guardianship, 64 Cal.App. 555, 561, 222 P. 381.) In other words, while the statutory six-month limitation is "the standard or criterion in all cases" (Smith v. Jones, 174 Cal. 513, 516, 163 P. 890, 891; see, also, Hollywood Garment Corp. v. J. Beckerman, Inc., 61 Cal.App.2d 658, 661, 143 P.2d 738), the applicant in seeking relief within that period must also not be guilty of laches. (Glougie v. Glougie, 174 Cal. 126, 131, 162 P. 118; see, also, Freeman on Judgments, 5th Ed., Vol. I, sec. 270, p. 537.) In legal significance, laches is not mere delay, but delay that works a disadvantage of another. (10 Cal.Jur., sec. 62, p. 523.) The cases cited by defendant furnish apt illustration of this point of distinction in relation to the trial court's exercise of discretion in the opening of defaults. For example, in Smith v. Pelton Water Wheel Co., 151 Cal. 394, 397, 90 P. 934, 935, a case cited in the majority opinion, an order refusing to vacate a default judgment was affirmed where there was not only a "delay of nearly four months in the matter of making the application, after full knowledge of the facts, accompanied by the failure to give any intimation to the opposing party of an intention to so apply," but "the evidence was also sufficient to support a conclusion upon the part of the lower court that relief could not be granted to defendant after [the] long delay without injuriously affecting plaintiff's rights." (151 Cal. at page 398, 90 P. at page 935.)

But "where a delay has been assented to by the other party, or does not appear to have been injurious to his rights, the six-months limitation prescribed by the Code [sec. 473] should be considered as the only limit of reasonable time. In the matter of opening defaults, much is confided to the discretion of the trial court. Dougherty v. Nevada Bank, 68 Cal. 275, 9 P. 112; Chamberlin v. County of Del Norte, 77 Cal. [150] 151, 19 P. 271. And where the circumstances are such as to lead the court to hesitate, it is better to resolve the doubt in favor of the application, so as to secure a trial and judgment upon the merits. Watson v. San Francisco & H. B. R. Co., 41 Cal. 17; Cameron v. Carroll, 67 Cal. 500, 8 P. 45; Lodtman v. Schluter, 71 Cal. 94, 16 P. 540." (Wolff & Co. v. Canadian Pacific Ry., 89 Cal. 332, 337, 26 P. 825, 827.) In accord, see Waite v. Southern Pacific Co., 192 Cal. 467, 471, 221 P. 204.

In the present case a period of over three months elapsed before proceedings were undertaken to open the default herein, although within two days after entry of the default judgment and immediately upon learning of that fact defendant's president had the process papers forwarded to defendant's attorney for action. No explanation for this "time lag" was given at the hearing of defendant's motion, and plaintiffs urge that in view of such unexplained delay the trial court had no basis for setting aside the defendant's default. But there is no claim that in the presentation of their case plaintiffs have been prejudiced as a result of the delay in the application for the order vacating the default judgment. As above stated, defendant's verified answer was served with the notice of motion and became a part of the moving papers. (Beard v. Beard, 16 Cal.2d 645, 649, 107 P.2d 385; Waite v. Southern Pacific Co., 192 Cal. 467, 471, 221 P. 204; Morgan v. Brothers of Christian Schools, 34 Cal.App.2d 14, 18, 92 P.2d 925.) In deciding the motion, the trial court undoubtedly considered all the facts in the case as shown by the record, including the cause of action set forth in the complaint, the proceedings in applying for judgment, the amount of the judgment in favor of plaintiff, as well as the affidavits filed and the verified answer showing "upon its face a good defense on the merits." (Bonfilio v. Ganger, 60 Cal.App.2d 405, 410, 140 P.2d 861, 865.) While defendant's attorney, after knowledge of the entry of the default judgment and prompt receipt of the papers served on defendant's officers, apparently was remiss in the ensuing delay of more than three months before filing the

motion for relief, such single consideration does not determine the impropriety of the trial court's ruling in favor of defendant. Courts are "loath to penalize a litigant on account of some omission on the part of his attorney, particularly where the litigant himself has acted promptly and has relied * * * upon the attorney to protect his rights." (Stub v. Harrison, 35 Cal.App.2d 685, 689, 690, 96 P.2d 979, 981.) Although the showing made in support of defendant's motion was not in all respects of the strongest character by reason of the unexplained delay in question, yet in view of the entire record, it cannot be said that there were not sufficient grounds for setting aside the default in conformity with the oft-declared policy of the law to favor a trial on the merits. The motion was made well within "the extreme limit of six months allowed by section 473 of the Code of Civil Procedure" and "within a reasonable time" as that limitation has been correlated with the "circumstances of the particular case" (Wolff & Co. v. Canadian Pacific Ry., supra, 89 Cal. at page 337, 26 P. at page 826), so that the ruling of the trial court may not be classified as an abuse of discretion. As is said in Hecq v. Conner, 203 Cal. 504, at pages 509, 510, 265 P. 180, 183: *"It is only in extreme cases that an appellate court will interfere with the action of a trial court in refusing or granting an order of this character.* * * * 'Any doubt that may exist should be resolved in favor of the application, to the end of securing a trial upon the merits.' Jergins v. Schenck, 162 Cal. 747, 124 P. 426; Savage v. Smith, 170 Cal. 472, 150 P. 353. * * * *'All presumptions will be indulged in favor of the correctness of the court's action, and the burden in all cases is upon the appellant to make it appear that its discretion was abused in making the order.'* Moore v. Thompson, 138 Cal. 23, 26, 70 P. 930, 932." [Emphasis added.] The cases relied upon by the majority opinion disclose nothing at variance with the legal principles governing appeals of this character, nor is there such similarity of facts as to make the decisions controlling here.

As before stated, by reversing the order of the trial court in this case, the majority have usurped the function and power of the trial court. It has placed itself in the roll of the trial judge, and exercised its discretion the same as if it had been sitting in his place. In so doing, it has not performed its duty as a reviewing court by failing to pass on the only question presented, to-wit: Did the trial judge abuse his discretion in granting the relief prayed for? Had the majority performed its plain duty as a reviewing court, the order here under review would be affirmed.

Decisions such as this encourage appeals from every order of this character because the determination of the trial court is placed at naught, and the litigant feels he is justified in taking the chance that the discretion of the reviewing court will support his position. Thus, appeals are multiplied and our appellate courts are clogged with cases involving only procedural matters which do not involve the merits of the controversy. Nothing short of a clear and unmistakeable abuse of discretion amounting to arbitrary and capricious action on the part of the trial court should be considered as sufficient to justify a reversal in a case of this character, it is not even intimated in the majority opinion that anything like this occurred in the case at bar.

For the foregoing reasons I would affirm the order appealed from.

31 Cal.2d 537

## SACKS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 20409.

Supreme Court of California.

March 12, 1948.

1. Insane persons ⇐33(2)

An order appointing guardian of estate of alleged incompetent was appealable, and appeal therefrom stayed power of guardian except for specified purposes. Probate Code, §§ 1630, 1631.

2. Appeal and error ⇐436

A duly perfected appeal divests trial court of further jurisdiction in cause and of power to act other than with respect to specified excepted or collateral matters. Probate Code, § 1630; Code Civ.Proc. § 946.

3. Insane persons ⇐33(2)

Appeal from order appointing guardian of estate of alleged incompetent removed jurisdiction of entire matter from probate court to court of review, and hence citation on alleged incompetent issued by clerk of probate court on his own motion while appeal was pending was void. Probate Code, §§ 1461, 1630, 1631; Code Civ.Proc. § 946.

4. Insane persons ⇐33(2)

Where appeal from order appointing guardian of estate of alleged incompetent was pending when clerk of probate court on his own motion issued citation on alleged incompetent purporting to cover both the matter of guardianship of the estate and of the person, citation was void as to estate matter because appeal had removed jurisdiction thereof from probate court to court of review, and the jurisdictional defect as to estate matter rendered entire citation void. Probate Code, §§ 1461, 1630, 1631; Code Civ.Proc. § 946.

Original proceeding by Allie Walters Sacks for a writ of prohibition to restrain the Superior Court of the State of California, in and for the County of Los Angeles, and Honorable Newcomb Condee, a judge thereof, from taking any further proceedings to declare petitioner an incompetent person and appoint a guardian for her upon an assertedly void citation.

Peremptory writ issued.

Prior opinion 184 P.2d 28.

Bodkin, Breslin & Luddy and S. V. O. Prichard, all of Los Angeles, for petitioner.

Harold W. Kennedy, Co. Counsel, Wm. E. Lamoreaux, Deputy Co. Counsel, R. R. Sleeper, Wilbert C. Hamilton, and Harold A. Slane, all of Los Angeles, for respondents.

SHENK, Justice.

Petitioner, an alleged incompetent, seeks a writ of prohibition to restrain the superior court from taking any further proceedings against her based upon an assertedly void citation.

On July 16, 1946, Charles Bobst instituted the incompetency proceeding by applying to the superior court for the appointment of a guardian of the estate and person of petitioner. Pursuant to section 1461 of the Probate Code, the clerk immediately issued a citation. Later, on representation that the original citation had been lost, the court ordered the clerk to issue an alias citation. When the matter came on for hearing on August 12, 1946, petitioner did not appear in court because she had not been served with process, and the matter was continued to August 19th. On the latter date petitioner, although physically able to appear, still had not been served and was not present. Nevertheless the court conducted a hearing, adjudged petitioner incompetent, appointed a guardian of her estate, continued the matter of appointment of a guardian of her person to September 16, 1946, and directed the clerk to issue an alias citation. On September 16th there was no showing that the alias citation last issued had been served. The court therefore ordered that the matter of appointment of a guardian of the person of petitioner be marked "off calendar." It was never restored to the calendar nor was the clerk ever directed to issue a further citation or other process.

[1] On October 17, 1946, petitioner appealed from the order of August 19th appointing a guardian of her estate. The

order was appealable and stayed the power of the guardian except for certain specified purposes. Probate Code, sections 1630, 1631. The alleged incompetent was entitled to prosecute the appeal. Matter of Moss, 120 Cal. 695, 53 P. 357; 14 Cal.Jur. sec. 16, p. 359.

On March 31, 1947, during pendency of the appeal, petitioner sought a writ of prohibition to restrain further proceedings in the matter of the guardianship of her estate on the ground that she had not been personally served with citation.

On May 1, 1947, the clerk, acting solely upon his own motion and without any order of court, issued a new citation requiring petitioner to appear on May 15th to show cause why she should not be adjudged incompetent and why a guardian should not be appointed both of her person and of her estate. This is the citation which is under attack in the present proceeding. At the time of its issuance the appeal from the order appointing a guardian of petitioner's estate was pending, as was the prohibition proceeding instituted in March, 1947. On May 15, 1947, the date the citation was returnable, petitioner appeared in court in person and by counsel and, because of the pendency of the prior prohibition proceeding, objected to any proceedings based on the citation. The court thereupon continued the matter.

On May 21, 1947, a decision was rendered in the prohibition proceeding of March, 1947. Sacks v. Superior Court, 79 Cal.App. 2d 806, 180 P.2d 922. It was held that because of failure to make personal service of process upon petitioner, the proceedings for appointment of a guardian of her estate were void, and a peremptory writ of prohibition was directed to be issued as prayed. On June 13th a rehearing was denied and on July 17th a hearing in this court was denied. On July 25th the peremptory writ issued.

On July 17th the present proceeding was commenced to obtain a writ of prohibition to restrain the court from proceeding under the citation issued by the clerk of his own motion on May 1st, the hearing under that citation having been continued to July 18th.

On October 3, 1947, the appeal from the order appointing a guardian of petitioner's estate was decided. Guardianship of Walters, 81 Cal.App.2d —, 184 P.2d 684. The order was reversed on the ground that the decision in the prior prohibition proceeding established the invalidity of the order as the law of the case.

In the present proceeding it is asserted that the citation of May 1st issued by the clerk of his own motion was unauthorized and void and can not be made the basis of further proceedings for two reasons: First, because section 1461 of the Probate Code empowers the clerk of his own motion to issue only an original citation, and not subsequent citations; second, because at the time of issuance, the appeal from the order appointing a guardian of the estate was pending and jurisdiction of the cause had been thereby removed from the probate court. The first point will not be considered as the second point is well taken and is determinative of the cause.

[2, 3] A duly perfected appeal divests the trial court of further jurisdiction in the cause and of power to act other than with respect to specified excepted or collateral matters. Estate of Hanley, 23 Cal. 2d 120, 123, 142 P.2d 423, 149 A.L.R. 1250; People v. Sonoqui, 1 Cal.2d 364, 366, 35 P.2d 123; Estate of Waters, 181 Cal. 584, 185 P. 951; Linstead v. Superior Court, 17 Cal.App.2d 9, 12, 61 P.2d 355; Rosenberg v. Bullard, 2 Cal.App.2d 118, 37 P.2d 521; Bailey v. Superior Court, 125 Cal.App. 748, 14 P.2d 151; 2 Cal.Jur. p. 415, sec. 178; Probate Code, secs. 1630, 1631; Code of Civil Procedure, sec. 946. Here the appeal from the order appointing a guardian of petitioner's estate removed that entire matter from the probate court to the court of review. The probate court was therefore without jurisdiction of the cause when the clerk issued the purported citation of May 1st.

[4] The citation, it is true, purported to cover both the matter of guardianship of the estate and the matter of guardianship of the person which was "off calendar." But the citation cannot for that reason be said to have been void as to the estate mat-

ter and effective as to a separate or collateral matter, i. e., the personal guardianship. The clerk, by his issuance of process, could not thus split the proceeding. The jurisdictional defect as to the estate matter rendered the entire citation void.

It must be noted that the citation did not issue as a result of the filing of a new incompetency proceeding, nor did it summon petitioner to the trial of any new issue of fact, or to show cause with respect to any new matter occurring subsequent to the hearing of August 19, 1946. It issued as a citation to try the very issues which were or could be raised under the original citation, including the identical matter of guardianship of the estate which had been heard and determined by the probate court and was on appeal. It sought a complete retrial of issues already heard or matters which were "off calendar". A second trial could not be so instituted until disposition had been made of the appeal from the order on the first trial.

It cannot be successfully maintained that because the order appealed from was a void order, the probate court was free to treat it as a nullity and proceed with a trial de novo. The probate court had made the order as a valid order and was committed to that position. The correctness of its adjudication was the very issue left open during the pendency of the appeal and of the prior prohibition proceeding. By the appeal jurisdiction of the cause passed to the court of review, so that at the time the citation issued, the cause was no longer in the probate court and it had no jurisdiction to issue process therein.

In the case of State v. Kleckner, 116 Or. 371, 239 P. 817, 240 P. 1115, in an analogous situation the court said: "It is clear that the first judgment entered is null and void on account of failure to obtain jurisdiction over the persons affected thereby.

"Is the second judgment of any force or effect, based upon service of summons after appeal from the first judgment had been perfected? We think not. No doubt the second summons was issued in the hope of curing what was then recognized to be a fatal error. However, after the appeal was perfected, the lower court lost jurisdiction of the cause and could take no step to defeat appellants of the right to prosecute their appeal with effect. It is not a question of correcting the record so as truly to set forth the proceedings as they actually occurred (citing cases). A recognition of any other rule would lead to uncertainty and confusion in litigation, and in effect would enable the lower court to review its own proceedings (citing cases)."

Let the peremptory writ issue as prayed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.




31 Cal.2d 503

**PEOPLE v. PAIVA.**
**Application of CARR.**
**Sac. 5839.**

Supreme Court of California, In Bank.
March 1, 1948.

Dissenting Opinion March 12, 1948.
Rehearing Denied March 30, 1948.

**1. Criminal law ⇐1023(12)**

Judgment denying petition for writ of error coram nobis was appealable.

**2. Criminal law ⇐997**

A proceeding in the nature of a writ of error "coram nobis" is regarded as a motion in the case to which it relates rather than a new adversary suit.

See Words and Phrases, Permanent Edition, for all other definitions of "Coram Nobis".

**3. Criminal law ⇐1077**

A motion to vacate a judgment in a criminal case on grounds which make such motion the equivalent of a proceeding in the nature of a writ of error coram nobis, must be regarded as part of the proceedings in the criminal case, and not a civil proceeding and, on appeal from order disposing of such motion, defendant's right to be furnished a legal record on appeal, insofar as payment of costs is concerned, is the same

as on any other appeal allowed by law to a defendant in a criminal case. Pen.Code, §§ 1237, 1238.

EDMONDS, J., dissenting.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Proceeding in the matter of the application of Arthur De Beau Carr, on behalf of Cieverino Paiva for writ of error coram nobis and writ of habeas corpus. At conclusion of trial on petition for writ of error coram nobis, the writ was discharged and judgment of conviction was affirmed. The petitioner filed a written notice of appeal together with notice for preparation of the transcript of evidence. From an order refusing to direct payment for the transcript from the county treasury, the petitioner appeals.

Order modified and, as modified, affirmed and cause remanded for further proceedings.

Prior opinion, 176 P.2d 770.

Arthur De Beau Carr, of Sacramento, for appellant.

Robert W. Kenny and Fred N. Howser, Attys. Gen., James O. Reavis, Jess Hession, Chas. W. Johnson and Clarence A. Linn, Deputy Attys. Gen., and John Quincy Brown, Dist. Atty., and John B. Heinrich, Supervising Deputy Dist. Atty., both of Sacramento, for respondent.

SCHAUER, Justice.

In 1935 defendant, then sixteen years of age, was convicted of two counts of murder and one count of rape and was sentenced to imprisonment for life. (People v. Paiva (1935), 9 Cal.App.2d 10, 48 P.2d 174.) In December, 1945, seeking to vacate the judgment of conviction and obtain a new trial, he petitioned the trial court for relief in the nature of a writ of error coram nobis; the relief sought was denied on January 8, 1946, and defendant gave timely notice of appeal and filed notice to prepare the record on appeal. The county clerk, acting on a ruling of the district attorney that the order sought to be appealed from was a non-appealable order, declined to order the perparation of the record. Defendant thereupon sought and there was issued an order directing the county clerk and the phonographic reporter to show cause why the record should not be prepared and furnished as requested by defendant. After a hearing the court filed an order in the form of a formal judgment whereby it "ordered, adjudged and decreed: 1) That the proceeding in Coram Nobis is a Civil matter and not a criminal proceeding; 2) That the petitioner and/or applicant is entitled to have the testimony and other proceedings in the above-entitled matter prepared and transcribed * * *; 3) That the costs and expenses of said transcriptions of testimony and proceedings shall be at the sole expense of the Petitioner * * *." Defendant has likewise perfected an appeal from the above quoted order or judgment.

The advice of the district attorney, above referred to, was as follows: "I am of the opinion that there is no basis for such action (Appeal) upon the part of the defendant. Section 1237 of the Penal Code provides in what cases an appeal may be taken by the defendant in a criminal case. The instant matter obviously does not come within the purview of this section."

[1] The trial court was correct insofar as it held, contrary to the advice of the district attorney, that the order in question is appealable. (Appeals by plaintiff: People v. Gilbert (1944), 25 Cal.2d 422, 444, 154 P.2d 657; People v. Lumbley (1937), 8 Cal. 2d 752, 761, 68 P.2d 354; appeals by defendant: People v. Perez (1908), 9 Cal.App. 265, 266, 98 P. 870; People v. Reid (1924), 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435; People v. Schwarz (1927), 201 Cal. 309, 312, 257 P. 71; People v. Campos (1935), 3 Cal. 2d 15, 19, 43 P.2d 274; People v. Mendez (1946), 28 Cal.2d 686, 171 P.2d 425; see also People v. Superior Court (1938), 28 Cal. App.2d 442, 446, 82 P.2d 718.) We have concluded, however, for the reasons hereinafter stated, that the trial court erred in holding that on such appeal "the costs and expenses of said transcriptions of testimony and proceedings shall be at the sole expense of the Petitioner."

The respondent now concedes that (as is firmly established by the cases above cited)

the order denying the application for relief in the nature of coram nobis is an appealable order but contends that any application for relief of such nature, regardless of the type of action or form in which it is sought, is a civil proceeding and, hence, that the trial court was correct in holding that all expenses of preparing the record on appeal must be borne by defendant. That the writ, or the proceeding for it, has been traditionally regarded as civil in nature cannot be disputed. (See People v. Gilbert (1944), supra, 25 Cal.2d 422, 426, 154 P.2d 657; State v. Ray (1922), 111 Kan. 350, 351, 207 P. 192, 193.) It has been said in at least one jurisdiction (Texas) that the writ coram nobis "has not been recognized in this state as having application to criminal cases." (Hendricks v. State (1932), 122 Tex.Cr. 429, 433, 55 S.W.2d 839, 841.) But, by way of contrast, in California the proceeding has been applied, as far as our research discloses, only in criminal cases. (See, note, 27 Cal.L.Rev. 228, 230, 231.) The cases of People v. Green (1934), 355 Ill. 468, 189 N.E. 500; People v. Kemnetz (1938), 296 Ill.App. 119, 15 N.E.2d 883; State v. Gentry (1945), 223 Ind. 535, 62 N.E.2d 860, 161 A.L.R. 532; State v. Criminal Court (1942), 220 Ind. 4, 40 N.E.2d 971; and State v. Spencer (1941), 219 Ind. 148, 41 N.E.2d 601, have been cited as authority for the proposition that coram nobis proceedings are necessarily and exclusively civil in nature and that though invoked against a judgment of conviction in a criminal case the costs of a record on appeal therein must be borne by the defendant-petitioner. A perusal of those cases, however, discloses that they have little, if any, applicability to the problem in California.

[2] In the first place, in Illinois, a proceeding in the nature of a writ coram nobis is statutory. See section 72, Civil Practice Act, Ill.Rev.Stat.1937, c. 110, § 196. The construction placed upon that statute and proceedings thereunder appears to be the controlling factor in the Illinois decisions cited. In People v. Dabbs (1939), 372 Ill. 160, 23 N.E.2d 343, 345, the Supreme Court of Illinois said: "Section 72 of the Civil Practice Act, Ill.Rev.Stat.1937, chap. 110, § 196, abolishes the writ of error coram nobis and provides that: 'All errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years[1] after the rendition of final judgment in the case, upon reasonable notice.' * * * Such motion or petition is the filing of a new suit and is civil in its nature. People v. Green, 355 Ill. 468, 189 N.E. 500. It is not an attack upon the judgment * * * This proceeding is not unlike a bill of review to have reviewed a decree in chancery. A bill of review is in the nature of a writ of error and seeks the reconsideration of the decree. The original finding of the court is not disputed or contested but the bill proceeds on the theory that newly discovered facts would produce a different decree. * * * A motion in the nature of writ of error coram nobis is an appropriate remedy in criminal cases as well as civil and lies to set aside a conviction obtained by duress or fraud, or where, by some excusable mistake or ignorance of the accused and without negligence on his part, he has been deprived of a defense which he could have used on his trial, and which, if known to the court, would have prevented conviction." In California we have no equivalent statute and, as hereinafter shown, a proceeding in the nature of a writ of error coram nobis is regarded as a motion in the case to which it relates. Its civil character when regarded as an entity is, we think, inconclusive on the question as to the right of the defendant to have a record on appeal furnished by the state.

People v. Kemnetz (1938), supra, 296 Ill. App. 119, 15 N.E.2d 883, as above mentioned, is also relied upon by the respondent. In that case it is said (15 N.E.2d at page 886): "It has been repeatedly held that a motion or petition filed in the nature of a writ of error coram nobis stands as a declaration or complaint in a new suit, and *it is only because the proceeding so insti-*

[1] The constitutional validity of the limitation feature of this statute has been questioned. (Woods v. Nierstheimer (1946), 328 U.S. 211, 216, 66 S.Ct. 996, 90 L.Ed. 1177.)

*tuted is civil in character* that the right of the state to appeal from the judgment entered in such proceeding has been generally recognized by the authorities." (Italics added.) By contrast, in California, in such proceedings both the right of appeal by the People, and the right of appeal by the defendant, have been recognized as deriving from the Penal Code, sections 1237 and 1238.[2] (Appeals by the People: People v. Gilbert (1944), supra, 25 Cal.2d 422, 444, 154 P.2d 657; People v. Lumbley (1937), supra, 8 Cal.2d 752, 761, 68 P.2d 354; appeals by defendant: People v. Perez (1908), supra, 9 Cal.App. 265, 266, 98 P. 870; People v. Reid (1924), supra, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435; People v. Schwarz (1927), supra, 201 Cal. 309, 312, 257 P. 71; People v. Campos (1935), supra, 3 Cal.2d 15, 19, 43 P.2d 274; see also People v. Superior Court (1938), supra, 28 Cal.App. 2d 442, 446, 82 P.2d 718.)

State v. Spencer (1941), supra, 219 Ind. 148, 37 N.E.2d 88, 41 N.E.2d 601, 602, also relied upon by respondent, is not an appeal in a coram nobis proceeding; it is an original proceeding seeking mandate, not to procure a record on appeal, but to compel the state to furnish "a duly certified copy of the affidavit, Indictment, verdict of the Jury, judgment of sentence imposed, and all evidence and testimony introduced before the trial Jury," to be used "in connection with a petition for a writ of error coram nobis which he [petitioner] intends to file * * * seeking to have the judgment against him vacated." Seemingly, with the petition for the writ existing only in the asserted intent of the petitioner, the Indiana court would have been justified in denying such an application upon the ground that it appeared to be at most, a "fishing expedition." The court, however, cited, among other authorities, the Illinois case of People v. Dabbs (1939), supra, 372 Ill. 160, 165, 23 N.E.2d 343, 346, and 24 C.J.S., Criminal Law, § 1606, and declared the view that "The proceeding [in the nature of a writ coram nobis] concedes that the accused was accorded all the rights and privileges guaranteed him by the Constitution of Indiana and by the due process clause of the Federal Constitution in the prosecution which resulted in the judgment of conviction. No longer is the state seeking to deprive the judgment defendant of his life, liberty, or property. He is not now 'the accused' in a 'criminal prosecution.' It is he who is now seeking to deprive the State of Indiana of rights concerning his liberty which have vested in it by a judgment procured by due course of law. The petitioner is asking that the taxpayers, the state, be required to bear the expense of furnishing him with a certified record of the proceedings in the criminal case. We know of no constitutional provision that requires that the public shall bear any of the expense of the preparation or prosecution of the petitioner's action seeking to overthrow the judgment, nor of any statute requiring or authorizing the expenditure of public funds for such a purpose.

"The petition is denied." (See also State v. Criminal Court (1942), 220 Ind. 4, 40 N.E.2d 971, in which, upon the authority of the Spencer case, an application for a record at the expense of the state upon a showing that the defendant-petitioner "is a poor person, without means of paying for a record which he wishes to use in perfecting an appeal from the judgment of the respondent court denying his petition for a writ of error coram nobis," was denied. Such denial, it has been suggested, may amount to a deprival of due process. Ex parte Elmer Davis (1942), 318 U.S. 412, 63 S.Ct. 679, 87 L.Ed 868; Barton v. Smith (9 Cir., 1947), 162 F.2d 330.)

We are not disposed to follow or advance the philosophy of the Spencer case to the end of denying to a defendant who is given a right of appeal the right to the record which is necessary to implement that appeal. In this state a defendant who has

[2] Section 1237, Penal Code, provides: "An appeal may be taken by the defendant:

1. From a final judgment of conviction;
2. From an order denying a motion for a new trial;
3. From any order made after judgment, affecting the substantial rights of the party."

Section 1238, Penal Code, provides: "An appeal may be taken by the people: * * *

5. From an order made after judgment, affecting the substantial rights of the people."

been convicted in a criminal case has the right to seek to defeat the judgment of conviction either by direct appeal from the judgment or by a motion for a new trial or by motion (in the nature of coram nobis) to vacate the judgment. If his motion for new trial or to vacate the judgment is decided adversely he has the right to appeal from the order of denial. (Penal Code, § 1237.) The same statute which gives him the right to appeal from the judgment of conviction likewise gives him the right to appeal from an order denying a motion for new trial or from the order denying his motion to vacate the judgment. There is no question but that on appeal from the judgment or from the order denying a new trial the defendant is entitled, on timely application, to have the record on appeal furnished by the state. (See § 274, Code of Civil Procedure.) We find no persuasive reason for holding that his right to have the record furnished in the third case is legally any less than in the first two.

In 24 C.J.S., Criminal Law, § 1606, cited in the Spencer case, it is stated that "A proceeding for a writ of error coram nobis or its statutory equivalent is in the nature of a new, civil suit, not unlike a bill of review to have reviewed a decree in chancery, and has a function closely analogous to a motion for a new trial * * * The writ supplements, but does not supersede, the remedy provided in the statute for the granting of new trials or the correction of errors. It is generally held applicable in criminal as well as civil cases although there is authority to the contrary." American Jurisprudence (vol. 31, pages 321, 322, §§ 798, 799) states that "where a judgment is suffered by a party under circumstances under which at common law a writ of error coram nobis would lie, the practice now generally prevailing is to obtain relief by motion to open or vacate the judgment" and that "The proceeding under a writ of coram nobis or coram vobis is regarded as civil in nature, and *sometimes as a part of the proceedings in the case to which it refers,* and sometimes as in the nature of a new adversary suit." (Italics added; see also 1 Am.Jur. 432, § 40.)

Whatever may be the nature of the proceeding traditionally, or in those states which expressly recognize and govern it by statute, we are satisfied that in California a proceeding in the nature of a writ of coram nobis is properly regarded "as a part of the proceedings in the case to which it refers" rather than as "a new adversary suit." Supporting such conclusion are the following considerations: 1. We have no statutory provision expressly recognizing or governing coram nobis proceedings; such proceedings or the modern equivalent thereof are, however, recognized as being within the power of the trial court. 2. In People v. Vernon (1935), 9 Cal.App.2d 138, 141, 49 P.2d 326, 327, it is declared that "it is manifest that that which remains of the relief which ordinarily was available as part of the original common-law remedy of 'writ of error, coram nobis' is made equally available, not necessarily, as formerly, by the issuance of the *writ,* but simply by the legal machinery attendant upon a motion to vacate the judgment. It therefore results that although the relief sought be of the nature of that included within and formerly afforded by a writ of error, coram nobis, because of its comparatively ancient origin and its correspondingly relatively recent disuse, the mystery and the magic which now apparently attach to such an appellation as applied to the proposed remedy are completely dispelled and obliterated by designating such remedy by the more simple and appropriate name of a motion to vacate the judgment." Likewise, in People v. Butterfield (1940), 37 Cal.App.2d 140, 143, 99 P.2d 310, 311, it is declared that "In California the office of the writ of coram nobis is exercised by a mere motion to set aside a judgment after the time for appeal has expired and the judgment has become final." See also People v. Mooney (1918), 178 Cal. 525, 529, 174 P. 325; People v. Reid (1924), supra, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435; People v. Lyle (1937), 21 Cal.App. 2d 132, 136, 68 P.2d 378; Vernon v. Rappaport (1938), 25 Cal.App.2d 281, 283, 77 P. 2d 257; People v. Superior Court (1938), supra, 28 Cal.App.2d 442, 446, 82 P.2d 718. 3. It has been repeatedly held that an order made in a proceeding in the nature of a writ coram nobis is an order in the original case, after final judgment therein, which "affects the substantial rights" of the party (either the plaintiff or the defendant, as the case

may be) and gives him a right of appeal as provided for by sections 1237 and 1238 of the Penal Code. (Appeals by the People: People v. Gilbert (1944), supra, 25 Cal.2d 422, 444, 154 P.2d 657; People v. Lumbley (1937), supra, 8 Cal.2d 752, 761, 68 P.2d 354; appeals by the defendant: People v. Perez (1908), supra, 9 Cal.App. 265, 266, 98 P. 870; People v. Reid (1924), supra, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435; People v. Schwarz (1927), supra, 201 Cal. 309, 312, 257 P. 71; People v. Campos (1935), supra, 3 Cal.2d 15, 19, 43 P.2d 274; People v. Godfrey (1929), 100 Cal.App. 91, 92, 279 P. 1030; see also People v. Superior Court (1938), supra, 28 Cal.App.2d 442, 446, 82 P. 2d 718.)

[3] It follows that in California, whatever be the character of the proceeding when regarded as an entity in itself, and regardless of its character insofar as concerns the burden of proof and rules of procedure generally, a motion to vacate a judgment in a criminal case upon grounds which make such motion the equivalent of a proceeding in the nature of a writ of error coram nobis, must be regarded as a part of the proceedings in the criminal case; and upon appeal from the order disposing of such motion the right of the defendant to be furnished a legal record on appeal, insofar as the payment of costs is concerned, is the same as upon any other appeal allowed by law to a defendant in a criminal case.

The order appealed from (hereinabove quoted in material part) is modified by striking out all of the paragraphs 1 and 3 thereof and as so modified is affirmed and the cause is remanded for further proceedings in conformity with the views hereinabove expressed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concur.

EDMONDS, Justice (dissenting).

I find no sound legal basis for departing from the rule stated in the majority opinion "that the writ [of coram nobis], or the proceeding for it, has been traditionally regarded as civil in nature." The remedy is one which was contrived by the common law to review a judgment erroneous in fact, that is, a judgment based upon a misapprehension of fact such as the capacity of the defendant, as distinguished from one rendered by reason of an incorrect analysis of the evidence before the court. Pound, Appellate Procedure in Civil Cases (1941), 44, 120. In effect, the writ is like a motion to vacate the judgment (Note, 27 Calif.L. Rev. 228 [1939] 228, 229), and the right to relief in that form exists unless it has been expressly taken away by statute. See People v. Mooney, 1918, 178 Cal. 525, 529, 174 P. 325; Hogan v. Court of General Sessions, 1946, 296 N.Y. 1, 68 N.E.2d 849, 850 (referring to the "inherent power" of the court to grant this relief); Note 36 A.L.R. 1443, 1925.

But although coram nobis is similar to a motion to vacate judgment, it does not follow that the writ carries all of the procedural incidents of such a motion. Certainly if the remedies of a motion to vacate judgment and coram nobis were identical, a court would not have the power to issue a writ of coram nobis for "where remedies exist by statute which did not exist at common law, the office and function of the writ are abridged thereby, and in such cases the writ is unavailable." People v. Mooney, 178 Cal. 525, 529, 174 P. 325, 327; People v. Reid, 195 Cal. 249, 257, 232 P. 457, 36 A. L.R. 1435. It is merely "that the *relief* that may be administered by the one form of procedure is identical with that in the other" (People v. Vernon, 9 Cal.App.2d 138, 141, 49 P.2d 326, 327 [emphasis added]), rather than the proceedings itself.

In discussing coram nobis, this court, in People v. Superior Court, 4 Cal.2d 136, 151, 47 P.2d 724, 731, said: "This is a *distinct proceeding* and has no connection with any ruling made by the court during trial or any order since made by the court * * *. The record in this case * * * was not vulnerable to the *collateral attack* made upon it." [Emphasis added.] It is to be noted that implications of the language in that case to the effect that the order is not appealable were overruled in People v. Gilbert, 25 Cal.2d 422, 444, 154 P.2d 657, but the statement as to the nature of the proceedings stands as the conclusion of this court. Now, however, it is said that "an order made in a proceeding in the nature of a writ

coram nobis is an order in the original case. * * *" None of the cases cited immediately after the sentence in which this statement appears supports that determination.

Despite the fact that coram nobis or the motion to vacate, however characterized, may be used in connection with a criminal case, it has consistently been held to be a separate proceeding of a civil nature. 24 C.J.S., Criminal Law, § 1606. The reasons for this are not entirely clear, but they stem from fundamental principles. Like other proceedings in error, even those to directly review a judgment, anciently coram nobis was considered to be a separate suit in which the defendant and not the prosecution was the moving party. 1 Halsbury, Laws of England 62 (1931). Like habeas corpus, it is a collateral attack upon the judgment and, when used in a criminal action, it is analogous to habeas corpus (see In re Lindley, 1947, 29 Cal.2d 709, 177 P.2d 918), which frequently has been regarded as being a proceeding of a civil nature. 1 Bailey, Habeas Corpus 10 (1913).

The most common reasons assigned for regarding coram nobis as a civil proceeding are that it does not fit into the statutory provisions dealing with the definition of crimes and procedural requirements. Generally speaking, the remedy of coram nobis is not expressly provided for by statute, and there is no legislative recognition of it in this state.

By our codes, judicial remedies "are divided into two classes: 1. Actions; and, 2. Special proceedings." Code Civ.Proc. sec. 21. An action is "an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense" (Code Civ. Proc. sec. 22) and "every other remedy is a special proceeding." Code Civ.Proc. sec. 23. "Actions are of two kinds: 1. Civil; and, 2. Criminal." Code Civ.Proc. sec. 24. "A civil action is prosecuted by one party against another for the declaration, enforcement or protection of a right, or the redress or prevention of a wrong." Code Civ.Proc. sec. 30. A criminal action is defined in section 683 of the Penal Code as "the proceeding by which a party charged with a public offense is accused and brought to trial and punishment * * *." In view of these code provisions, a petition for a writ of coram nobis is neither in the nature of a criminal nor of a civil action and must be classified as a special proceeding. Code Civ.Proc. sec. 23.

The Code of Civil Procedure, Part III, section 1063 et seq., declares that certain special proceedings are of a civil nature. The writ of coram nobis is not mentioned. Special proceedings of a civil nature are included in the term "civil action" (sec. 363, Code Civ.Proc.) and the Penal Code, Part II, section 1473 et seq., specifies habeas corpus and others but not including coram nobis as being a special proceeding of a criminal nature.

Section 274 of the Code of Civil Procedure provides that in "criminal cases" the fee for reporting is to be paid out of the county treasury. There is nothing to indicate that special proceedings of a criminal nature are included in the term "criminal cases". On the other hand, not only is habeas corpus classified as a special proceeding of a criminal nature (Penal Code, sec. 1473 et seq.), but the legislature has specified that in such a proceeding no fees shall be charged. Sec. 6101, Government Code. Until similar action has been taken in regard to coram nobis, the use of the writ should be governed by rules of procedure applicable to civil actions.

There is nothing in the record to indicate that Paiva does not have ample funds to pay for a transcript, and he made no application to proceed in forma pauperis. In the absence of such a showing, he has not been deprived of due process of law. Ex parte Davis, 318 U.S. 412, 63 S.Ct. 679, 87 L.Ed. 868; Barton v. Smith, 9 Cir., 162 F.2d 330.

For these reasons, I would affirm the order denying the petitioner's application for a record at the expense of the county.

31 Cal.2d 514

## In re FLEMING'S ESTATE.

## KUCHEL, Controller, v. FIRST NAT. TRUST & SAVINGS BANK OF SAN DIEGO.

L. A. 20022.

Supreme Court of California, in Bank.

March 9, 1948.

**1. Taxation ⇐876(1)**

The statute providing for inheritance tax exemption as to property transferred for a charitable use within the state, was intended to apply only where the property or the income therefrom is marked for actual use and benefit of the people of the state, and the mere provision for management or administration within the state of the corpus of the trust does not satisfy the premise of the exemption. Revenue and Taxation Code, § 13842.

**2. Taxation ⇐876(1)**

Charitable trust fund to provide scholarships was not "limited for use within this state" within statute exempting transfers from inheritance tax where property transferred is "limited for use within this state," where recipients of scholarships were not limited to residents of the state and could attend schools outside the state, if approved by trustee, though trustee was a local corporation and property was invested by it in the state. Revenue and Taxation Code, § 13842.

See Words and Phrases, Permanent Edition, for all other definitions of "Limited For Use Within This State".

**3. Charities ⇐31**

Gifts for charitable purposes are highly favored.

**4. Taxation ⇐876(1)**

Tax exemptions in favor of charitable organizations are liberally construed so as not to diminish their available resources in the distribution of their ultimate benefits.

**5. Taxation ⇐876(1)**

Amendments extending the charitable exemption law do not indicate an intent of legislature to relax the restrictive significance of the words "limited for use within this state" appearing in statutory provisions that property transferred in trust for charitable uses shall be exempt from inheritance taxes if the property transferred is "limited for use within the state". Revenue and Taxation Code, § 13842.

**6. Taxation ⇐876(2)**

The statutory requirement that property transferred in trust for charitable purposes to a corporation not organized solely for charitable purposes, must be "limited for use within this state" to be exempt from inheritance taxes, must be expressed by the terms of the testamentary bequest, and is not complied with merely because the trustee has power to limit the property to use within the state. Revenue and Taxation Code, § 13842.

**7. Appeal and error ⇐1008(3)**

Where there was no dispute as to the facts, so that construction of charitable exemption provisions of the inheritance tax law became purely a question of law, Supreme Court was not bound by probate Court's construction, and was required to make a final determination in accordance with the applicable principles of law. Revenue and Taxation Code, § 13842.

---

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Proceeding in the matter of the estate of Harvey Fleming, deceased, wherein the First National Trust & Savings Bank of San Diego was executor. From a judgment declaring that no inheritance tax was payable in connection with a trust fund established by deceased's will, Thomas H. Kuchel, controller of the state of California, appeals.

Reversed.

Prior opinion, 183 P.2d 295.

James W. Hickey, Inheritance Tax Attorney, of Sacramento, Donald R. Peck and Morton L. Barker, both of Los Angeles, and Raymond G. LaNoue, Deputy Inheritance Tax Attorney, of Sacramento, for appellant.

Herney & Herney and Monroe & McInnis, all of San Deigo, for respondent.

SPENCE, Justice.

The State Controller has appealed from an order of the probate court declaring that no inheritance tax was payable in connection with a testamentary trust fund established for educational purposes. Appellant contests the propriety of the adjudication as a "charitable exemption," in pursuance of section 13842 of the Revenue and Taxation Code, upon two grounds: (1) the nature of the bequest and (2) the scope of its authorized use. Since an analysis of the section expressive of the legislative intent sustains appellant's position upon the second ground, it will be unnecessary to consider his arguments in relation to the first.

There is no dispute as to the facts. By his will the decedent left the residue of his estate in trust to the respondent bank, the income therefrom to be used for the purpose of aiding in the education of boys and girls of good character who are citizens of the United States. It was provided that as many awards for this purpose should be made each year as the income from the trust estate would permit; that each award should be for a sum not exceeding $200; that such awards should be used only for the purpose of paying all or a part of the tuition or other charges incurred by the recipient at any school, college or university approved by the trustee; and that payment of the certificates of award should be made by the trustee directly to the school, college or university attended or to be attended by the award holder, upon satisfactory proof that the money was to be used for that purpose. It was further provided that for the purpose of determining the young people to whom such awards were to be made, the trustee should conduct a golf tournament each year on golf courses situated in San Diego County to be selected by the trustee; that applicants must make written application for permission to enter such competition and be approved by the trustee; that awards to the number made possible by the available income each year should be made to those making the lowest scores in this tournament; and that any player making a score in excess of a certain maximum should be ineligible for such an award.

During the probate proceedings an inheritance tax report was filed fixing the inheritance tax in connection with the above residuary trust at $5,531.29. The trustee filed objections to the report on the ground that the transfer in trust was exempt under section 13842 of the Revenue and Taxation Code, as relating to property "to be devoted exclusively" to charitable and educational purposes and "limited for use within this State." After a hearing the court found [183 P.2d 295, 297], among other things, that "the trust [was] created for the purpose of awarding scholarships to young men and women found by the trustee to be of good moral character and to be citizens of the United States"; that "competition" therefor was "open" to all such persons; that the awards "may be [used] in any school or university approved by [the] trustee"; that the "trustee is a local banking institution," a institution operating for profit" and "located in the city of San Diego"; that "by the terms of [the] will" the "trust thus created is to be administered in" this state and persons seeking such an award "must personally compete in a tournament to be conducted in the county of San Diego"; and that "the property [so] transferred to this trust is to be used exclusively for [and devoted to] charitable and educational work and is limited for use within this state, as that term is used in section 13842 of the Revenue and Taxation Code." As a conclusion of law, it was declared that "the property so transferred in trust was exempt from the inheritance tax." Accordingly, an order was entered sustaining the trustee's objections to the inheritance tax report and adjudging that no inheritance tax was due on the residuary trust. This appeal followed.

Section 13842 of the Revenue and Taxation Code provides, so far as here pertinent, as follows: "Property transferred to any * * * corporation * * * in trust exclusively for or to be devoted exclusively to any charitable, educational, public, or other like work, is exempt from the [inheritance] tax" if "(a) the * * * corporation * * * is organized solely for charitable, educational, public, or other like work under the laws of this State or

of the United States"; or "(b) the property transferred is limited for use within this State." It is conceded that condition (a) has no application here since the trustee is a banking corporation, but the parties are in dispute with regard to the meaning to be ascribed to condition (b) as determinative of the exemption in question. In resolving the problem of statutory construction so presented, it will be assumed that the trust created in aid of education is sufficiently broad in scope of benefit as to classify it as "charitable" in character within the purport of said section 13842. Cf. In re Estate of Purington, 199 Cal. 661, 250 P. 657; In re Estate of Bartlett, 122 Cal.App. 375, 10 P.2d 126; In re Estate of Bailey, 19 Cal.App.2d 135, 65 P.2d 102.

[1, 2] Appellant maintains that the specification "limited for use within this State" connotes "a charitable use within this state, a 'use' which is calculated to alleviate some local condition which demands charitable action by the people of this state; and this would demand in turn that the ultimate destination of the trust funds must be here, and not elsewhere." It is agreed that the young people who may receive the scholarships contemplated by the bequest are not limited to residents of this state, and that the recipients of the awards may attend schools outside of this state, if those schools are approved by the trustee. The terms of the bequest thus authorize application of the benefits of the trust fund beyond the borders of this state. Respondent claims that this is an immaterial circumstance for the phrase "use within this State" relates to "the question of where, when, and how the trust is to be administered." Accordingly, reference is made to these prevailing factors under the operative design of the bequest—that the trustee is a local corporation doing business in this state, that it will retain and invest the property here, that it will here distribute the certificates of award to the beneficiaries, who must be personally present in this state and prove here, by their efforts in the yearly golf tournament, their eligibility to share in the scholarship benefits—as qualifying the trust transfer for the tax exemption. But a reasonable construction of the disputed statutory wording indicates that it was the legislative purpose that the exemption shall apply only where the property, or the income therefrom, is marked for actual use in benefit of the people of this state, and that the mere provision for the management or administration within this state of the corpus of the trust does not satisfy the premise of the exemption.

In considering the import of condition (b) in section 13842 of the Revenue and Taxation Code, the history of the tax exemption of property transferred to a corporation for charitable uses is significant. Formerly, our statute was so "broad and comprehensive" in its language that it could not be construed to limit such exemption to a domestic as distinguished from a foreign corporation, as was done in some states. Stats. 1915, ch. 189, p. 421; In re Estate of Fiske, 178 Cal. 116, 117, 118, 172 P. 390. Then in 1917 the statute was amended so as to provide that the exemption applied only if "such * * * corporation * * * be organized or existing under the laws of this state or that the property transferred be limited for use within this state." Stats. 1917, ch. 589, p. 886. In so changing the law either one, but not both, of these conditions was required to create the exemption. In re Estate of Irwin, 196 Cal. 366, 371, 372, 237 P. 1074. While such legislation continued to reflect the policy to encourage benevolence and charity it correlated such factors with promotion of the welfare of the state by decidedly narrowing the scope of the exemption. This theory of tax relief stems from the premise that the corporations or organizations so favored either directly lighten the burden of the state by rendering beneficences which the state would otherwise be obliged to furnish or indirectly further the interests of the state by the public benefit they promote. Kidder, State Inheritance Tax and Taxability of Trusts, ch. xv, pp. 425-426; Carter v. Whitcomb, 74 N.H. 482, 69 A. 779, 784, 17 L.R.A.,N.S., 733; People v. O'Donnell, 327 Ill. 474, 158 N.E. 727, 728. As so introduced into our law in 1917, the alternative grounds of the exemption have prevailed through the years to their pres-

ent form of expression in conditions (a) and (b) of section 13842 of the Revenue and Taxation Code, as above quoted.

[3, 4] It is true that it is "the character of the transferee" that is the "first consideration under the terms of the [exemption] proviso" and that "it is only in the event that the transferee does not so qualify in purpose and place of organization that the restriction as to 'use within this State' becomes material." In re Estate of Barter, 30 Cal.2d 549, 555, 184 P.2d 305, 308. Accordingly, if respondent as trustee were a local charitable or non-profit educational institution, beneficial as distinguished from administrative use of the trust property in this state would not be necessary in order to merit the exemption. In other words, then the distribution of the scholarship awards to persons regardless of their place of residence or of the ultimate use of the benefits would be of no consequence in qualifying respondent for the exemption. But reason for such variant treatment might be found in the policy of the law to encourage and aid locally organized corporations engaged in charitable or public work of a non-profit nature, most of which, as a matter of practical consideration, are undoubtedly so constituted in structure and purpose that they carry on their beneficent activities wholly within the state and so bestow their benefits to ultimate local advantage. However, in the case of a property transfer to a corporation organized for profit, and so operating on a wholly different plane, the legislature appears to have deemed it appropriate to add as a prerequisite for establishing eligibility for the tax exemption that the "property transferred" for charitable purposes "be limited for use within this state." The inheritance tax law is purely a revenue producing measure, and it is reasonable to assume that the legislature, in relieving a noncharitable corporation from payment of the tax on a charitable bequest, intended that the benefits from "use" of the property redound to the people within the state as a compensating factor. These were matters for the legislature to determine in the enactment of the "charitable exemption" provisions, and the interpretation of the "use" of property transferred to a non-charitable corporation as requiring the charity to be exercised or the education to be bestowed within the state appears to be not only consistent with the language used but also with the public purpose motivating the exemption. While gifts for charitable purposes are highly favored in this state (In re Estate of Yule, 57 Cal.App.2d 652, 654, 135 P.2d 386) and exemptions in favor of charitable organizations are liberally construed so as not to diminish their available resources in the distribution of their ultimate benefits (In re Estate of Barter, supra, 30 Cal.2d 549, 554, 555, 184 P.2d 305), the foregoing analysis of the legislative intent with respect to the exemption condition in question rests wholly upon the text and scope of the statute itself rather than upon the principle that exemptions from taxation must be strictly construed against those claiming the benefit of them. Cf. Helping Hand Home for Children v. County of San Diego, 26 Cal.App.2d 452, 459, 79 P.2d 778.

[5] Nor do the extensions of the "charitable exemption" law since the primary revision of the scope of the statute in 1917, as above noted, militate against these views as to the prevailing operative scheme of the legislation and the correlating factors motivating the tax relief in question. Thus in 1929 the inheritance tax statute was amended to add a reciprocal clause permitting such exemption in this state where similar treatment was accorded us by the laws of other states. Stats. 1929, ch. 844, p. 1840. Justification for such reciprocal provision lies in the fact that it may well serve to encourage other states to extend their laws exempting charities to include those located here (McLaughlin v. Poucher, 127 Conn. 441, 17 A.2d 767, 769) and so redound to mutual public benefit on a strictly quid pro quo basis. Then in 1939 came the further addition to the statute to allow the exemption in cases where the corporation in question was organized solely for charitable, educational, and like purposes under the laws of the United States. Stats. 1939, ch. 694, p. 2210. Outstanding example of such charitable corporation is the American Red Cross. Its funds are raised through a national effort

and expended not only to furnish national, but world-wide relief. Consistent with the broad policy of such charitable aid, it is entirely reasonable to assume that the legislature intended an exemption in favor of such corporation as an exception to the overall policy of limiting the tax relief to local charities, which normally would confine their activities within the state, and determine that gifts to such a nationally organized charitable corporation should not be diminished by exactions of this state. Moreover, it cannot be overlooked that in the case of such charitable organization as the American Red Cross, this state, participating as a sister state in the accomplishment of a national charitable purpose or aim, stands to share in the funds raised in the event of a sudden disaster or calamity. Such extentions of the "charitable exemption" law, supplementing the primary provisos enacted in 1917, which are now expressed in section 13842 of the Revenue and Taxation Code as above quoted, rest on independent considerations of public policy and cannot reasonably be regarded as indicating an intent on the part of the legislature to relax the restricted significance which the words "limited for use within this State" would ordinarily suggest as the measure for the exemption in connection with a charitable gift to a corporation organized for profit.

[6] Nor can it be assumed in aid of respondent that since it is a local, though non-charitable corporation, the bequest in promotion of education may be confined in application to residents of this state or to local schools, so as to establish "use" of the "property transferred" for the ultimate benefit of the people of this state. The language of the statute creating the exemption in question clearly evidences the legislative intent that the limitation as to "use within this State" must be expressed by the terms of the testamentary bequest. See In re Colman's Estate, 187 Wash. 312, 60 P.2d 113, 116; Presbyterian Church in United States v. Sheppard, Tex.Civ.App., 198 S.W.2d 282, 285. In resolving a like question of eligibility for a charitable exemption dependent on "use within this State," it was aptly said in Re Thomas' Estate, 185 Wash. 113, 53 P.2d 305, at page 307, that "what it would be in the power of the corporation to do rather than what it may be disposed to do" is the controlling factor.

Respondent finally urges as ground for the charitable exemption a further provision in the bequest directing that after the "corpus of the trust estate" is "built up to a [stated] value," the "trustee shall pay ten per cent (10%) of the net income thereof" per year "to Mercy Hospital of San Diego, a corporation to be used for its general eleemosynary purposes. * * *" But such ultimate distribution would not affect the condition of the exemption to be met by respondent. A similar argument was presented in the case of Tax Commission of Ohio v. Security Savings Bank & Trust Co., 117 Ohio St. 443, 159 N.E. 570. There the testator provided that his estate should be left in trust and that the income should accumulate for a period of not less than 50, nor more than 60, years after which it should be distributed to charity. In denying the charitable exemption sought by the trustee bank, the court said, 159 N.E. at page 572: "That it was the purpose of the testator that that portion of his estate here under consideration should ultimately be distributed as a charity, or at least substantially as a charity, cannot be controverted. Neither can it be controverted that it was the purpose of the testator that such portion of his estate was to be used for the period of not less than 50, nor more than 60, years exclusively in a commercial way and for profit. * * * The duty of the trustee during such period, instead of being a duty to dispense a charity, is a duty to take the estate as a nucleus, and, through the channels of commerce, to earn and accumulate, by such employment of the estate, an estate many times the value of the estate devised, * * * Does such exclusive employment of an estate for so long a period constitute a use of such estate 'for purposes only of public charity?' * * * It would seem that * * * the Legislature had in mind the exclusion from the exception of just such estates as this; that it did not purpose to exempt from the succession tax estates that were to be employed partially for charity and partially

for purposes other than charity." In like manner here the legislature has indicated its intent not to extend to a non-charitable corporation the exemption with respect to a charitable bequest unless it is "limited for use within this State" as above construed, and ultimate partial compliance with such condition will not suffice to bring respondent within the scope thereof.

[7] There being no dispute as to the facts in this case, the matter of the application and construction of the "charitable exemption" provisions of the inheritance tax law in relation to the terms of the bequest here involved becomes purely a question of law. Under such circumstances a reviewing court is not bound by the construction thereof by the probate court, but must "make the final determination in accordance with the applicable principles of law." In re Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825, 830.

The order insofar as it exempts respondent from payment of an inheritance tax upon the bequest in question is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.




84 Cal.App.2d 398

**PEOPLE v. HOFF.**

**Cr. 4187.**

District Court of Appeal, Second District, Division 3, California.

March 16, 1948.

**Poisons** ⇐9

Evidence sustained conviction of night club singer for possession of "marijuana" in violation of the Health and Safety Code. Health and Safety Code, § 11500.

See Words and Phrases, Permanent Edition, for all other definitions of "Marijuana".

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Anita Hoff was convicted of possession of maijuana in violation of the Health and Safety Code, and she appeals.

Judgment affirmed.

Ray L. Smith, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and John F. Hassler, Deputy Atty. Gen., for respondent.

SHINN, Acting Presiding Justice.

Carl August Hoff and Anita Hoff, husband and wife, were convicted in a court trial of the possession of marijuana (Indian Hemp) in violation of section 11500, Health and Safety Code, and Anita Hoff appeals from the judgment. The sole ground of appeal is that the evidence was insufficient in law to prove commission of the offense by appellant.

Appellant is a night club singer; her husband is her manager; they lived in an apartment in Hollywood, but they also had a home in the San Fernando Valley which they had owned for about two years and where they spent a part of their time. The house was furnished and had one bedroom in which they kept some of their clothing.

One Polcuch, an agent of the Federal Narcotics Bureau, and a police officer from the Los Angeles Police Narcotic Detail, contacted Carl Hoff in Hollywood, told him they wanted to question his wife concerning a report that she had marijuana in her possession, were taken by Hoff to the valley home of the parties and there interviewed Mr. and Mrs. Hoff. Officer Polcuch testified that he questioned appellant as to whether she had any marijuana on the premises, that she denied that there was any marijuana in the house and invited him to search the premises. He searched a bureau in which he found ladies garments and personal effects, among them a Toni permanent wave carton and in this carton a package of cigarette papers and a small paper sack that contained what was identified by another witness as marijuana. He further testified that he asked appellant why she had not told him that the marijuana was in the house and that she re-

plied: "I didn't think that was important enough," and further, "we got the stuff from a fellow last September and it has been in the house since that time"; that he asked the man's name and that both defendants said that they had purchased it from a man named Dave. The witness also testified that defendant Carl Hoff stated that he had tried smoking marijuana about a year before and that he had not touched it since; that he would have told the officers that the marijuana was in the house if he had thought it would involve only him, and that he told his wife that if there was any more of it around the house to give it to the officers. Another witness, J. A. Allen, a chemist attached to the Los Angeles Police Department, testified as an expert that the bag contained marijuana, or Indian Hemp. Another police officer, who was present when the premises were searched, testified that the bag and contents identified by Allen had been received by the witness from Officer Polcuch and delivered to Allen. Appellant and her husband denied having any knowledge that there was marijuana in the house, and appellant testified that while the box had been in the bureau drawer with some summer clothes she had put away she did not know that it contained marijuana, and that she had never used it. She denied having told the officer that they had purchased marijuana from a man named Dave. Carl Hoff testified that he asked Officer Polcuch if it would help any if he said that they had acquired the marijuana from a fellow named Dave, and his explanation of this question was that the officers said they were more interested in discovering the seller than in prosecuting Hoff and his wife. Certain other witnesses testified that many parties were given at the valley home of defendants, some of them while neither of the defendants was present. It was also in evidence that a young man named Freer was living in the house while he was looking for a job, and was doing some work about the house for the defendants. Carl Hoff testified that the doors of the house were never locked.

The defense consisted of denials by defendants that they had knowledge of the presence of the marijuana, together with evidence of circumstances which would have rendered it easy for some other person to place it in appellant's bureau drawer. It is insisted that there was no evidence that defendants had knowledge of the presence of marijuana but this argument disregards the testimony of Officer Polcuch that both defendants admitted having purchased it from "a fellow named Dave." Although defendants denied having made the statement, it must be presumed that the court believed the testimony of the officer. If believed, this testimony was sufficient to prove that defendants had knowledge of the nature of the material, as well as of the presence of it in the house. At least as to appellant, the presence of the marijuana in her bureau drawer, among her personal effects, was sufficient evidence of possession of it by her, and would have justified an inference that she had knowledge that it was there. People v. Gallagher, 12 Cal.App.2d 434, 55 P.2d 889; People v. Gibson, 64 Cal.App.2d 537, 149 P.2d 25; People v. Bassett, 68 Cal.App.2d 241, 156 P.2d 457.

The judgment is affirmed.

WOOD, J., and VALLEE, J., pro tem., concur.






84 Cal.App.2d 293

**GARBEDIAN v. GOGIAN AVOCADO CO. et al.**

**Civ. 16037.**

District Court of Appeal, Second District, Division 1, California.

March 9, 1948.

**1. Trial ⇦139(1)**

If there is any evidence offered by plaintiff which tends to support plaintiff's position, defendant's motion for nonsuit at conclusion of plaintiff's case must be denied.

**2. Trial ⇦165**

If there is evidence fairly susceptible of two constructions or if either of sever-

al inferences may be made, trial court must take the view most favorable to plaintiff on defendant's motion for nonsuit at conclusion of plaintiff's case.

**3. Partnership ⚷329**

In action for an accounting and dissolution of a partnership, granting defendant's motion for nonsuit at close of plaintiff's case, was error, where there was substantial evidence to support plaintiff's allegations.

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action by Charles Garbedian against Gogian Avocado Company and others for an accounting and dissolution of a partnership. From an adverse judgment, plaintiff appeals.

Reversed and cause remanded.

David S. Smith, of Los Angeles, for appellant.

Joseph Duchowny, of Los Angeles, for respondents.

DORAN, Justice.

The action herein sought an accounting and dissolution of a partnership. At the conclusion of plaintiff's case, a motion for nonsuit was granted. From the judgment that followed, plaintiff appeals.

Appellant contends that "a prima facie case as to the formation and existence of the partnership was adduced through testimony and documentary evidence"; that, "the right to the relief prayed for was established by ample evidence".

Respondent takes the position that "It is necessary, in order to determine whether or not the court properly made its judgment of nonsuit, to determine,

"(1) Did the appellant prove the existence of a copartnership?

"(2) If the appellant proved the existence of a copartnership, was the copartnership dissolved and a final accounting rendered?

"(3) If the appellant failed to make out a prima facie case of the existence a copartnership, or, if he did make out a prima facie case of the existence of a copartnership but failed to make out a prima facie case to the effect that there had not been a dissolution and final accounting of the copartnership, was the court justified in granting the motion for nonsuit?"

[1-3] Actually the only question on appeal is whether there was substantial evidence to support the plaintiff's allegations and in that connection it is well settled if there is any evidence offered which tends to support plaintiff's position the motion must be denied. And if there is evidence fairly susceptible of two constructions or if either of several inferences may be made, the trial court must take the view most favorable to plaintiff. In connection with the within action, the plaintiff's testimony alone was sufficient to require a denial of the motion. Six or seven pages of appellant's brief are devoted to references to the reporter's transcript relating not only to the plaintiff's testimony but to the testimony of other witnesses that tend to support plaintiff's contention.

The motion should have been denied.

The judgment is reversed and the cause remanded.

YORK, P. J., and WHITE, J., concur.

## In re KEMP'S ESTATE.

Civ. 7389.

District Court of Appeal, Third District, California.

March 11, 1948.

Hearing Granted May 6, 1948.*

1. Wills ⇐341

Where contestant did not sustain burden of proving that will was result of undue influence on testator by proponents, order granting proponents' motion for judgment notwithstanding verdict for contestant's on issue of undue influence was sustained.

2. Wills ⇐324(3)

Before question of undue influence in execution of will becomes one of fact for determination of trier of facts, there must be evidence, the probative force of which establishes relations between one charged with exercising undue influence, and testator, affording former an opportunity to control testamentary act, that testator's condition was such as to permit of subversion of his freedom of will, that there was activity on part of person of exercising undue influence, and that such person unduly profited as beneficiary under the will.

3. Wills ⇐166(8)

The mere evidence of testator's forgetfulness and his weakened physical condition immediately preceding his death was not conclusive of a condition which would permit a subversion of his will by undue influence, particularly where uncontradicted testimony disclosed that he was an independent and strong willed person at time of his death.

4. Wills ⇐166(5)

The mere fact that a stranger to blood of testator has profited from testator's will does not establish that he has unduly profited therefrom so as to establish undue influence, where it is shown that beneficiaries of testator's bounty had been for many years recipients of like treatment from both testator and his wife and that beneficiaries had no knowledge concerning execution of will or its provisions until after execution thereof.

5. Wills ⇐166(7)

Mere proof of opportunity to influence mind of testator, even though shown to be coupled with an interest or motive to do so, does not sustain finding of undue influence, in absence of testimony showing that there was pressure operating directly upon the testamentary act.

6. Wills ⇐157

The fact that beneficiary under will occupies confidential relation to testator, standing alone, is not sufficient to invalidate will for undue influence, but such confidential relation must be coupled with activity by beneficiary in preparation or procurement of will.

7. Wills ⇐163(1)

To establish that will was procured by undue influence, evidence must be produced showing that pressure was brought to bear directly on the testamentary act.

8. Wills ⇐166(1)

Where uncontradicted evidence showed that beneficiaries of will knew nothing of will until after it had been executed and there was no evidence indicating any activity by beneficiaries in procuring execution of will, verdict of jury that will was procured by undue influence was, as matter of law, not supported by evidence.

THOMPSON, J., dissenting.

---

Appeal from Superior Court, Placer County; Lowell L. Sparks, Judge.

Proceeding in the matter of the estate of William C. Kemp, deceased, wherein Minnie A. Riebe instituted a will contest against John A. Boyd and wife, who were named as sole legatees and devisees by decedent's will. From a judgment notwithstanding verdict for contestant on issue of undue influence granted on motion of proponents, after denial of proponents' motions for a nonsuit and for a directed verdict, contestant appeals.

Affirmed.

F. H. Bowers, of Roseville, and R. M. Switzler, of San Diego, for appellant.

* Dismissed per stipulation. No opinion July 11, 1949.

Russell A. Harris, of Sacramento, and L. C. Anderson, of Roseville, for respondents.

PEEK, Justice.

William C. Kemp died on October 18, 1945, at the age of approximately seventy years. By the terms of his will John A. Boyd and his wife Irene were named as the sole legatees and devisees. On November 5, 1945, the will was regularly admitted to probate and letters testamentary were granted to Boyd, who was named therein as the executor and who qualified and ever since has acted as executor thereof. On January 25, 1946, Minnie A. Riebe, a sister of decedent, filed her contest to the will upon two grounds, (1) mental incapacity, and (2) undue influence of the Boyds. The cause was tried before a jury. At the conclusion of contestant's case proponents' motion for a nonsuit was denied. Their motion for a directed verdict at the conclusion of the entire hearing likewise was denied. The jury failed to agree on the issue of mental capacity, and was discharged as to that issue, but returned a verdict in favor of contestant on the remaining issue of undue influence. Proponents thereupon moved for judgment notwithstanding the verdict, which motion was granted by the trial court against the contestant solely on the issue of undue influence. This appeal is from the judgment which was entered accordingly upon that issue alone.

As stated in her opening brief, appellant's sole contention on appeal is that the trial court erred in granting proponents' motion as to the issue of undue influence in that the verdict of the jury on that question is sustained by substantial evidence. In support of such contention particular attention is called to the evidence of the testator's extraordinarily strong independent will and his refusal to make a will for many years, yet, after he had become weakened, both physically and mentally, he did execute a will devising his entire estate to strangers of the blood and failed to make any provision for the natural object of his bounty, his sole surviving sister. From this appellant concludes that therefore the will was the result of the undue influence of the Boyds.

[1] In line with the question thus posed by both parties we have disregarded the failure of the jury to return a verdict on the issue of the mental capacity of the testator, as have the parties, and have examined the rather lengthy transcript solely with regard to the issue upon which the jury found in favor of the contestant—that of undue influence. From our examination of the evidence we conclude that nothing is disclosed therein which would warrant a retrial on that issue. Contestant has not sustained the burden of proof cast upon her, and therefore the order of the trial court granting proponents' motion for judgment notwithstanding the verdict upon the issue of undue influence should be sustained.

[2] On such issue it may be said preliminarily that:

"Before there is imposed upon the proponent of a will the obligation of presenting evidence of volition, and before the question as to undue influence becomes one of fact for determination by a jury or the court sitting without a jury, there must be evidence, the probative force of which establishes (1) the relations between the one charged with exercising the undue influence and the decedent, affording the former an opportunity to control the testamentary act; (2) that the decedent's condition was such as to permit of a subversion of her freedom of will; (3) that there was activity on the part of the person charged with exercising undue influence, and (4) that such person unduly profited as beneficiary under the will. Estate of Graves, supra [202 Cal. 258, 262, 259 P. 935]; Estate of Hampton, supra [39 Cal.App.2d 488, 103 P.2d 611]. And a presumption against the validity of the will is not created by the existence of any one of the circumstances just narrated, standing alone. It is only when a combination of all these circumstances is present in the evidence that their probative force is sufficient to justify the denial of a non-suit, and place upon the proponent of a will the burden of submitting evidence that the

testamentary document was executed free from the taint of undue influence." Estate of Hull, 63 Cal.App.2d 135, at page 142, 146 P.2d 242, 245 at page 245.

The record shows that when decedent was approximately sixteen years of age he went to live with the contestant herein in her home, where he remained for the following four years. During that period she furnished him with food, clothing and shelter and administered to him during his illness. At the end of that period he left, and at no time thereafter did they again live together. On various occasions, during the time of his residence with her and in later years, he told her he was indebted to her for what she had done for him and that some day he would make it right with her. Several years later she moved to Southern California and he moved to Roseville where he secured employment in railroad work. From that time until his death twenty-eight years later, she visited him only four times and he visited her on only two or three occasions. However, throughout their lives they remained on friendly terms, communicating with each other, and immediately prior to his death he was contemplating a visit to her home at Dana Point.

One Miles F. Curran, who had known the decedent and worked with him for more than twenty years, testified, as did all of the witnesses, that the decedent was a very determined man, strong minded and one who could not be easily swayed, that he was one of the founders of the Fort Sutter Building & Loan Association of North Sacramento, of which he was a director up to the time of his death; that approximately ten days or two weeks before his death he stated to Curran that Mr. and Mrs. Boyd and one Ferris (a witness for proponents) wanted him to make a will; that shortly before Kemp died he became quite forgetful and failed to notice or recognize acquaintances and relatives when he met them on the street; that decedent recognized this fact and mentioned it to Curran, stating that he did not think or feel as he had previously and that he was all "mixed up." Curran also suggested to decedent that he make a will leaving a particular ring to him but Kemp stated he had all he wanted of wills and refused the witness's suggestion. A neighbor testified to the weakened physical condition of decedent shortly before his death, as did his housekeeper. The latter characterized him as being too weak to argue. There also was testimony that for some time prior to his death the decedent knew of the financial condition of the contestant and that she lived off of her old age pension but he took no affirmative steps to alleviate it.

On the day the will was executed decedent requested his neighbor Ferris to ask L. C. Anderson, the attorney who had prepared wills for Kemp and his wife in 1927, to come to his home for the purpose of drafting a will for him. He informed the attorney he desired to give everything he had to Mr. and Mrs. Boyd. He also informed Anderson concerning his sister, the contestant, that she was suffering from a malignant ailment and could not live for more than two years; that he wanted her to have $50 or $75 per month but that he did not want to complicate the will with a trust provision to that effect. After the will was drafted Anderson returned to the Kemp home and handed the document to decedent who, after reading it, stated it was just as he wanted it. Neither of the Boyds were present at the time Kemp discussed the will with Anderson nor at the time it was executed. Anderson had heard Kemp speak of the Boyds prior to and at the time of the probate of Mrs. Kemp's estate as well as when decedent's will was discussed, and therefore knew of the close relationship between them; however he did not meet either of proponents until after the will had been drafted. The original will was found in Kemp's safety deposit box after his death. Following Kemp's death Boyd conferred with Anderson regarding decedent's wishes concerning his sister.

The respondents first became acquainted with the decedent in 1934 when they moved into an apartment house in Sacramento, then owned by the Kemps, and thereafter the two families became close friends. In 1937 the Boyds purchased the building from the Kemps, giving a note and trust deed for the entire purchase price of $6500. When approximately $3700 had been paid,

decedent arranged for a reconveyance of the trust deed, and although decedent informed the Boyds he wanted no further payment on the balance, that he didn't need the money and that it would be theirs anyway, they paid in full the balance of approximately $2800. The Kemps at all times had a key to the Boyd apartment. During the time Boyd was in the armed service Kemp corresponded with him every week or so, usually enclosing $5. After Mrs. Kemp's death their visits with one another became more frequent and decedent named Mrs. Boyd beneficiary of a life insurance policy in the sum of $1000. Although the Boyds refused an automobile from Kemp they did accept a check of $1400 for certain repairs to the apartment building. On the day the decedent went to the hospital he gave Boyd a copy of his will stating that was the way he and his wife wanted their property to go; that he appreciated what the Boyds had done for him and his wife; that the only way he would provide for his sister, the contestant, was for Boyd to set up a trust fund of about $5000 from which she was to be paid $50 to $75 per month. The first time Boyd ever saw attorney Anderson was when he went to Roseville after Kemp's death to ask what he should do with some of decedent's personal effects.

[3, 4] Paraphrasing the rule approved in the Hull case, 63 Cal.App.2d at page 142, 146 P.2d at page 245, the evidence here establishes (1) a close friendly relationship—if not a confidential relationship—which undoubtedly afforded the Boyds an opportunity to control the testamentary act, but (2) the record discloses no activity on the part of the Boyds with respect to the drafting or execution of the will. (3) The mere evidence of his forgetfulness and his weakened physical condition immediately preceding his death is not conclusive of a condition such as to permit a subversion of his will, particularly is this true in view of the uncontradicted testimony that he was an independent and exceedingly strong willed person up to the time of his death. (4) Lastly it cannot be said that merely because a stranger to the blood has profited from the will of another he has, therefore, profited unduly, when as in the present case it is shown that the beneficiaries of the decedent's bounty had been for many years the recipients of like treatment from both the testator and his wife, and in addition the beneficiaries had no knowledge concerning the execution of the will or its provisions until after the execution thereof.

[5-7] In other words, the most that can be said of the evidence is that it shows opportunity was afforded the Boyds to influence the testator. However, it is the well established rule that proof of opportunity to influence the mind of the testator, even though shown to be coupled with an interest or motive to do so, will not sustain a finding of undue influence in the absence of testimony from which it may be inferred that there was pressure brought to bear directly on his testamentary act; that is, the confidential relation must be coupled with activity on the part of the beneficiary in the preparation or procurement of the will. Estate of Graves, 202 Cal. 258, 259 P. 935; Estate of Arnold, 16 Cal.2d 573, 107 P.2d 25; Estate of Hull, supra.

[8] Here there is a complete absence of testimony or other evidence to indicate any activity on the part of the beneficiaries in procuring the will here attacked. To the contrary, the uncontradicted evidence shows that the Boyds knew nothing of the will until after it had been executed. It follows that the evidence is insufficient as a matter of law to support the verdict of the jury on the question of undue influence. Estate of Shay, 196 Cal. 355, 237 P. 1079; Estate of Presho, 196 Cal. 639, 238 P. 944; Estate of Holloway, 195 Cal. 711, 235 P. 1012; Estate of Easton, 140 Cal.App. 367, 35 P.2d 614.

Therefore under the facts and circumstances herein disclosed the judgment, in so far as it denies revocation of probate upon the ground that the will was executed by and under the undue influence of the proponents, is affirmed.

ADAMS, P. J., concurs.

THOMPSON, Justice (dissenting).

I dissent.

I am convinced the judgment which was rendered in this contest of will is pre-

mature and unauthorized by law. It should be reversed and the trial court directed to submit the undetermined issue of lack of testamentary capacity to a jury for decision. The motion for judgment notwithstanding the verdict on the issue of undue influence should not have been decided until all issues pleaded, presented to the jury and relied upon by the contestant were first determined by a jury. The law contemplates but one final judgment in a contest of will by one individual. Otherwise there might be as many judgments and separate appeals therefrom as there are issues presented in a contest of the validity of the instrument. That would result in piecemeal trials and a multiplicity of actions, which the law forbids. The entry of judgment to conform to a verdict is automatically stayed when a motion for judgment notwithstanding the verdict is made, until that motion is decided. C.C.P., sec. 664. I assume that motion should not be decided until all the issues have first been determined for the reason that such procedure would lead to piecemeal judgments and numerous appeals not authorized by law.

This contest under Section 380 of the Probate Code, after the will was admitted to probate, was filed by an elderly sister, who is the only blood relative of the decedent. Two issues were alleged, presented to the jury and relied upon by the contestant, namely, (1) lack of testamentary capacity, and (2) undue influence. The jury returned a verdict in favor of the contestant on the issue of undue influence. The jury failed to agree upon the other issue of lack of testamentary capacity, and was discharged on the court's own initiative. The last-mentioned issue was not waived by the contestant. It was not submitted to another jury, and has not been determined by any jury, as required by Section 1230 of the Probate Code. The proponents moved for judgment notwithstanding the verdict, in spite of the fact that one material issue had not been determined. The contestants opposed that motion. The court erroneously took that issue from the jury by failure to submit it to another jury for determination. In prematurely passing on the motion for judgment notwithstanding the verdict, on the single issue of undue influence, the court said in its written opinion:

"In view of the jury's failure to agree on the question of soundness of mind, *the court* for the purpose of this motion *must accept the presumption of law that at the time the testator made the will in question he was mentally competent to do so.*" (Italics added.)

The court thereupon granted the motion and rendered a judgment in favor of the proponents, over the protest of the contestant, on the issue of undue influence. Clearly that judgment is premature and unauthorized. If the court determined the issue of lack of testamentary capacity against the contestant, as the previously-quoted language indicates that it did, that decision was erroneous and reversible. The contestant had an absolute right to have that issue determined by a jury. Section 382 of the Probate Code declares that a trial of *all material issues* "must be had" by a jury. If the court did not intend to decide the entire validity of the will on that motion, then its partial judgment is unauthorized by law, and therefore void. Provided this judgment was authorized, it is apparent that if a trial of the undetermined issue of lack of testamentary capacity should subsequently be submitted to another jury and determined favorably to the contestant, it would be subject to another motion for judgment notwithstanding the verdict, and another appeal. This demonstrates to my mind that the procedure which was followed in this case is not authorized by law.

The majority opinion in this case specifically disregards the fact that the issue of lack of testamentary capacity, which was alleged, submitted to the jury and relied upon by the contestant, has not been decided by a jury. It has been held that it is not necessary to retry the issue which was determined by the jury. But there was a mistrial as to the other issue, which must be decided by a jury, or waived by the contestant, before a valid judgment on the merits of the contest may be rendered.

All issues of fact joined in a contest of will proceeding must be tried in conformity with the requirements of the rules of prac-

tice in civil actions. Prob.Code, Sec. 1230. A court has no authority to render judgment until the issues have all been determined. A failure to first decide the material issues is reversible error. 2 Cal.Jur. 1032, sec. 614; 24 Cal.Jur. 940, sec. 186. It has been uniformily held that all issues must be determined in proceedings of contests of wills, and that a judgment may not properly be rendered until all issues are first decided. Estate of Tomlinson, 35 Cal. 509; Estate of Gould, 188 Cal. 353, 365, 205 P. 457; Estate of Hewitt, 63 Cal.App. 440, 444, 218 P. 778; Estate of Webster, 43 Cal.App.2d 6, 18, 110 P.2d 81, 111 P.2d 355; 26 Cal.Jur. 1107, sec. 360. In the Tomlinson case, supra, the court said:

"The contestants in this case, among others, directly raised the issue by their pleadings, that deceased at the time of making the will in question, was not of a sound and disposing mind, and a special issue presenting the question was framed, certified to the District Court for trial and submitted to the jury, *but this issue with several others was not found, one way or the other, and the question was certified back unanswered. The issue was material, and no decree could properly be rendered after such issue had been made, until it should be determined.* * * * The judge, however, assumed to determine the several issues thus returned upon the evidence certified from the District Court, and to render a decree according to its own findings. *This was clearly error.*" (Italics added.)

In the Webster case, supra, the question of undue influence was found by the jury in favor of the contestant. One other issue was undetermined by the jury. A motion for judgment notwithstanding the verdict was denied. In spite of the undetermined issue the court rendered judgment admitting the will to probate, but denying probate of the codicil. On appeal it was held that the court erroneously admitted the will to probate, and reversed that judgment. It was there held that the contestant had a right to have the undetermined issue decided by a jury. On principle, that case appears to support my conclusion that the trial court erroneously granted the motion for judgment notwithstanding the verdict in this proceeding, and rendered judgment in favor of the proponents.

It is doubtful whether the court was justified in determining, contrary to the finding of the jury, that the will was not procured by the undue influence of the proponents. The burden was on the proponents to show that fact. The evidence clearly shows a confidential relationship between the proponents and the testator, and that the proponents, who were not related to the testator, were given the entire estate which was appraised at $47,357.76. It certainly infers activity on their part. Mr. Boyd was named executor. Mrs. Reibe, the sister, and the only blood relative of the testator, was not mentioned in the will. She is a widow, elderly, ill and in need of financial aid. The testator, who was seventy years of age, and afflicted with an incurable cancer of the stomach, was fond of his sister, to whom he was under obligations, and often expressed his desire to care for her. The testator was a retired railroad man who lived in Roseville. He had been on intimate terms of friendship with the Boyds for several years, and had contributed substantial sums of money toward their purchase of a home, and for other purposes. The testator was also friendly with Mr. G. F. Ferris, another retired railroad man who lived across the street from him, and who cut his lawn and looked after his place when Mr. Kemp became physically unable to perform manual labor. Ferris was friendly with the Boyds and associated with them. There is evidence of activity of Mr. Ferris and the Boyds in procuring the testator to make his will, against his protest. Mr. Miles T. Curran, a railroad conductor, who was a friend and neighbor of Mr. Kemp, and who knew all parties interested, testified that he had a conversation with the testator ten days or a week before the will was made, in which Mr. Kemp said that he was seriously ill and suffering from the cancer; that he was worried and "all mixed up," and that Ferris and the Boyds were urging him to make a will which he did not want to do, saying, "My sister will take care of all that." Curran testified that Mr. Kemp then stated: "I am not myself, I don't think like I used to. I don't feel too good,

I am all mixed up." Curran inquired, "What is the matter with you, anyway, have you been going to the doctor regularly?" to which Mr. Kemp replied, "Yes, I have been going over to the doctor's, still taking treatment for that trouble in my side. * * * But I am just all mixed up." Mr. Curran then inquired, "What do you mean, in what way?" to which Mr. Kemp replied, "Well * * * they are after me to make a will * * * Ferris and the kids. Well the kids (he always referred to Mr. and Mrs. Boyd as the kids) * * * They want me to make a will." Mr. Curran inquired, "Who?" to which Mr. Kemp replied, "Oh, the kids and Ferris." Mr. Curran then asked him, "What's Ferris got to do with it? Ain't you got a will made?" to which Mr. Kemp replied, "No, and I don't want to make a will. Furthermore, I don't want to make a will. My sister will take care of all that."

A few days after that conversation, while the testator was suffering acute pain from the cancer of the stomach, Mr. Ferris went to the office of an attorney in Roseville, Mr. L. C. Anderson, who had probated the estate of Mr. Kemp's wife five years previously, and asked him to go to Kemp's home and prepare a will for him. Mr. Anderson did so on October 15, 1945. Neither of the Boyds was then present. There is nothing in the testimony of the attorney to indicate that the will was the product of either unsound mind or undue influence. Mrs. Ferris was then present and signed the will as a witness. The following day Mr. Boyd arranged to and personally took Mr. Kemp to the hospital. He visited Mr. Kemp in the hospital the next day. Mr. Kemp was in constant pain, and he was kept under opiates much of the time. He died October 18th, three days after executing his will.

This case appears to squarely present the question as to whether the proponents of the will, who were in confidential relationship with the testator and who received his entire estate, to the exclusion of the testator's sister and only blood relative, toward whom he was on close friendly relations, have so conclusively and affirmatively proved that the will was not procured by undue influence as to warrant the court in setting aside the express finding of the jury that it was the product of undue influence.

The proponents assert that the foregoing testimony of Mr. Curran, regarding the declarations of the testator that Ferris and the Boyds were urging him to make the will against his wish, is merely hearsay and incompetent. But that evidence was received without objection. I think it was competent, and that it comes within the exception to the general rule with regard to the declarations of a deceased testator. The contestant was entitled to the benefit of every legitimate inference which may be drawn from the evidence. Estate of Lances, 216 Cal. 397, 400, 14 P.2d 768; Card v. Boms, 210 Cal. 200, 291, P. 190; Neel v. Mannings, Inc., 19 Cal.2d 647, 122 P.2d 576; Megee v. Fasulis, 57 Cal.App.2d 275, 278, 134 P.2d 815. It is the uniform rule that beneficiaries of a will who are active in procuring its execution, who unduly profit thereby, and who occupy a confidential relationship toward the testator, have the burden of affimatively proving that the will was not procured by their undue influence. Estate of Lances, supra; Estate of Yale, 214 Cal. 115, 123, 4 P.2d 153; Estate of Easton, 140 Cal.App. 367, 376, 35 P.2d 614; Estate of Ehle, 115 Cal. App. 656, 663, 2 P.2d 398; Estate of Gallo, 61 Cal.App. 163, 175, 214 P. 496. While it is true that the declarations of a deceased testator in conflict with the validity of his will are ordinarily incompetent, as an exception to that rule such statements are competent upon the issues of testamentary capacity or undue influence. Estate of Arnold, 147 Cal. 583, 593, 82 P. 252; 1 Bancroft's Prob.Pr., 388, sec. 213; 10 Cal.Jur. 1102, sec. 332. Under the exception to the last mentioned rule, the evidence of Mr. Curran was competent. Moreover, it was adduced without objection. The contestant was entitled to the benefit of that evidence and of all reasonable inferences to be drawn therefrom.

I conclude that the judgment notwithstanding the verdict in this case was unauthorized and void, for the chief reason that the undetermined issue of lack of testamentary capacity was not decided by a jury. The judgment should be reversed.

## WEAVER et al. v. PASADENA TOURNAMENT OF ROSES ASS'N et al.*

Civ. 15967.

District Court of Appeal, Second District, Division 1, California.

Feb. 27, 1948.

Hearing Granted April 27, 1948.

1. Parties ⇐10

The doctrine of "virtual representation" under which one or more may sue or defend for benefit of all who have a common or general interest rests upon considerations of necessity and paramount convenience, and was adopted to prevent failure of justice. Code Civ.Proc. § 382.

See Words and Phrases, Permanent Edition, for all other definitions of "Virtual Representation".

2. Parties ⇐10

A "representative suit" is proper only to conserve common fund or property in which all of those represented have an interest. Code Civ.Proc. § 382.

See Words and Phrases, Permanent Edition, for all other definitions of "Representative Suit".

3. Courts ⇐121(4)
Parties ⇐11

An action by four plaintiffs "on behalf of themselves and all others similarly situated", each seeking to recover $100 damages under statute upon ground that they were wrongfully refused admission to Rose Bowl football game was not a "representative suit" because question as to whether any of the plaintiffs was wrongfully denied admission could not determine rights of unnamed parties whom plaintiffs claimed to represent, and, hence, total amount of money demand was less than the $1,000 jurisdictional amount for Superior Court, so that cause was required to be transferred to Justice's Court. Civ. Code, § 53; Code Civ.Proc. § 382.

4. Parties ⇐11

Generally, a "representative suit" is proper because it is in behalf of a common interest of an ascertained class in the subject matter of the litigation. Code Civ. Proc. § 382.

* Subsequent opinion 198 P.2d 514.

5. Judgment ⇐677

In a truly representative action, judgment would be res judicata for or against class sought to be represented. Code Civ. Proc. § 382.

---

Appeal from Superior Court, Los Angeles County; A. W. Asburn, Judge.

Action by Claude Weaver and others, on behalf of themselves and all others similarly situated, against Pasadena Tournament of Roses Association and others to recover damages under section 53 of the Civil Code upon ground that they were wrongfully refused admission to the Rose Bowl football game at Pasadena on New Year's Day, 1947. From order transferring cause to Justice's Court for Pasadena Township, the plaintiffs appeal.

Affirmed.

Hahn, Ross & Goldstone and Nathan Kline, all of Los Angeles, for appellants.

O'Melveny & Myers, Pierce Works and Deane F. Johnson, all of Los Angeles, for respondents Associated Students University of California at Los Angeles and William C. Ackerman.

Hahn & Hahn, Edwin F. Hahn and Louis R. Vincenti, all of Pasadena, for respondent Pasadena Tournament of Roses Ass'n.

WHITE, Justice.

Plaintiffs and appellants, four in number, brought an action in the Superior Court of Los Angeles County, "on behalf of themselves and all others similarly situated", each seeking to recover $100 damages under section 53 of the Civil Code upon the ground that they were wrongfully refused admission to the Rose Bowl game at Pasadena on New Year's Day, 1947. The defendants Pasadena Tournament of Roses Association, Associated Students University of California at Los Angeles and William C. Ackerman, appeared by demurrer and motion to strike. At the hearing of the demurrers and motions, the court made the following order:

"It appearing upon argument of demurrer that this is not and cannot be a representative action, that it involves a money demand

for less than $1,000.00, to-wit, statutory penalties in the aggregate amount of $400.-00, and that this court is without jurisdiction, this cause is transferred to the Justice's Court for Pasadena Township, and demurrers and motions are placed off calendar."

Plaintiffs have appealed from the foregoing order.

Plaintiffs alleged that in November, 1946, University of California at Los Angeles was selected to represent the Pacific Coast Conference in the annual Rose Bowl football game on January 1, 1947; that defendants advertised by newspapers and radio a public sale of approximately 7,500 tickets of admission to the game; that on December 23, 1946, plaintiffs "and others" presented themselves at the box office of the Rose Bowl, and while waiting in line were issued (by whom it is not stated) numbered identification stubs assuring them their places in line and an opportunity to purchase two tickets; that approximately 3,350 of such stubs were issued, but that after only 1,500 tickets had been sold the box office was closed and it was announced that all available tickets had been sold. On New Year's Day plaintiffs "and others" who held stubs, but who had been denied tickets, presented themselves at the Rose Bowl, demanded admission and tendered the admission price, but were refused admittance. Plaintiffs charged that although defendants had ample accommodations, admission was denied to plaintiffs because there had been a "fraudulent and unauthorized" disposition of approximately 6,000 of the 7,500 tickets advertised as available. Judgment was prayed on behalf of plaintiffs "and all others similarly situated" for $100 each.

The sole question presented by the appeal from the order of transfer is whether this is a proper representative suit. If it is not, then the maximum recovery can be only that prayed for on behalf of the four plaintiffs, or $400 and the cause was properly transferred to the justice court.

Plaintiffs alleged that they brought the action "on behalf of themselves and all others similarly situated who may come in and seek relief and contribute to the expenses of this action". They further alleged:

"That the issues stated in this action and the questions herein to be litigated are of common and general interest to all other persons similarly situated and affect all the other persons in exactly the same manner as these plaintiffs are affected and that such other persons are so numerous, amounting to several hundred individuals, that it is impracticable to bring all of said persons before the court as individual plaintiffs and that, therefore, these plaintiffs sue for themselves and for the benefit of all the other persons similarly affected."

[1] Section 382 of the Code of Civil Procedure provides: "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; * * * and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

"Like most of the other exceptions to the general rule, the doctrine of virtual representation rests upon considerations of necessity and paramount convenience, and was adopted to prevent a failure of justice." Bernhard v. Wall, 184 Cal. 612, 629, 194 P. 1040, 1048; 20 Cal.Jur. 483.

Appellants' contentions are that all the individuals who waited in line but were denied tickets to the game have the same interest in the subject matter and the recovery; that the facts necessary to prove the cause of action of any one of them are the same as those necessary to prove the cause of action of any one or all the others; and that the number of interested individuals, "amounting to several hundred", renders it impracticable to bring them all into court. "The trend of recent decisions" urge appellants, "seems to stress the question of whether there is a unity of interest, or in the alternative, whether it is impracticable to bring into one case numerous plaintiffs." Citing Goes v. Perry, 18 Cal. 2d 373, 115 P.2d 441; Moore v. Bowes, 8 Cal.2d 162, 64 P.2d 423.

[2] The present case, it seems to us, cannot properly be a representative suit, but falls within the category of such cases as Carey v. Brown, 58 Cal. 180, and Wat-

son v. Santa Carmelita Co., 58 Cal.App. 2d 709, 137 P.2d 757, 762. In the last-cited case, injunctive relief was sought against the collection of assessments by a mutual water company, based on alleged fraudulent representations made separately to plaintiffs and 1,500 other investors. In holding that a representative suit was not proper, the court said: "There is no allegation of a common ground on which plaintiffs and their unnamed group may stand. There is no fund in which plaintiffs and the unnamed persons have a common interest; no property is mentioned in which the unnamed have an interest in common with plaintiffs; nothing to show that the 1500 are necessary parties to the action. [A representative suit is warranted] only in those cases where the represented group is so united in interest with the actual plaintiff in the action as to make them necessary parties under the statute. Section 382, Code Civ.Proc. A representative suit is proper only where the action is for the purpose of conserving a common fund of property in which all of those represented have an interest. It may not be used to reinforce the claim of one who merely seeks relief against promoters who alleged to have deceived plaintiff and his fellow stockholders in the sales of corporate shares. By no principle of legalistic logic does it appear that the unnamed 1500 are necessary to the prosecution by plaintiffs of their action. Plaintiffs allege that they were defrauded by deceitful representations made to them by defendants. Such representations do not necessarily affect the rights of their unnamed companions. Plaintiffs may proceed without let or hindrance against the defendants upon whatsoever grievances they deem themselves to have suffered. In the event of their recovery, the judgment would not transfer any advantages to those unnamed. If they lose in the contest, the 1500 uncomplaining shareholders are still possessed of any claims they may have had against defendants. Plaintiff's causes of action, if any, against defendants are several and distinct from the rights of the 1500. There is no privity of estate between plaintiffs and the unnamed group. * * *"

[3] So in the present case, the causes of action of the several plaintiffs and the other unnamed aggrieved individuals are several. The question, as to each individual plaintiff, is whether *he* presented himself and demanded admission, whether *he* tendered the price of admission, and whether, as to *him,* the denial of admission was wrongful under section 53 of the Civil Code. A decision favorable or adverse to these plaintiffs or any one of them, could not determine the rights of any of the unnamed parties whom plaintiffs claim to represent. True, the plaintiffs, and perhaps others who stood in line and were denied tickets, have an interest in a common question of law, to-wit, whether a recovery under section 53 of the Civil Code is authorized when an operator of a place of public amusement advertises 7,500 tickets for sale to the general public and subsequently announces that only 1,500 of such tickets are available. But the determination of this question in the instant case would still leave to be litigated the right of any other person to recover, that is, whether such person, in reliance upon the advertised sale, stood in line, received a stub, was denied tickets before the advertised 7,500 had been sold, presented himself at the Bowl, demanded admission, tendered the price, and was refused.

[4] In general, a representative suit is proper because it is in behalf of a common interest of an *ascertained class* in the subject matter of the litigation. Moore v. Bowes, 8 Cal.2d 163, 64 P.2d 423; Goes v. Perry, 18 Cal.2d 373, 115 P.2d 441; Baumann v. Harrison, 46 Cal.App.2d 84, 115 P.2d 530; Farmers' & Merchants' National Bank v. Peterson, 5 Cal.2d 601, 55 P.2d 867; Peterson v. Donelley, 33 Cal.App.2d 133, 91 P.2d 123; Mitchell v. Pacific Greyhound Lines, 33 Cal.App.2d 53, 91 P.2d 176. In the present case there is no ascertained class, such as the stockholders, bondholders, or creditors of an organization. There is only a large number of individuals, each of whom may or may not have, or care to assert, a claim against the operators of the 1947 Rose Bowl Game for wrongful denial of admission to such game. Each of such claimants must prove, separately,

that he was denied admission, and that such denial was wrongful under section 53 of the Civil Code.

The situation here presented parallels that in Ballin v. L. A. County Fair, 43 Cal. App.Supp.2d 884, 111 P.2d 753, 755, in which the plaintiff, a patron of a licensed race-track, sought to recover a nominal amount on the ground that the operators of the track had erroneously computed the "breakage" under the pari-mutual system of wagering. The Appellate Department of the Superior Court there said: "In addition to stating his cause of action as above set forth, plaintiff claims by his complaint to represent and sue for numerous other persons who have made wagers at defendant's track and against whom defendant has made the same error in figuring "breakage", and he demands in their behalf an accounting of all these transactions and seeks to recover for them sums aggregating more than $200,000. We have carefully considered these allegations and find them entirely insufficient to show a case in which the law would authorize the bringing of such a representative suit by plaintiff or entitle him to an accounting. * * * Our conclusions that he cannot maintain this as a representative action is based on the principles declared in Carey v. Brown, 1881, 58 Cal. 180, 183, 184, construing section 382 of the Code of Civil Procedure, and in cases construing like statutes of other states * * *. (Citing cases.)"

[5] We are confronted with a situation in which four aggrieved parties, each seeking to recover upon his own individual cause of action, purport to represent several hundred individuals, who are not named, who may or may not care to press their claims, if any, and who are, so far as the complaint shows, unknown and unascertainable. These unknown parties are ascertainable only so far as each may come forward and individually present proof of all the facts necessary to authorize a recovery. A judgment in a proper class suit is binding on those "who accept the representation, and who connect themselves with the litigation, either by coming into the suit or seeking to share in the fruits of the judgment, or by acquiescing in it." In other words, in a truly representative action, the judgment would be res judicata for or against the class sought to be represented. Haese v. Heitzeg, 159 Cal. 569, 573, 574, 114 P. 816, 817. In an ordinary class suit the members of the class are reasonably ascertainable, such as shareholders, creditors, beneficiaries and the like. In the present cause the members of the class are, so far as the complaint shows, entirely unknown. The plaintiffs do not claim to represent an association or protective committee, but have by their complaint merely issued invitations to such persons as may be interested to join with them in the action.

The order appealed from is affirmed.

YORK, P. J., and DORAN, J., concur.




84 Cal.App.2d 394

**In re GARDENER'S ESTATE.**
**FOSTER v. MATHEWS et al.**
**Civ. 16212.**

District Court of Appeal, Second District, Division 1, California.
March 16, 1948.

1. Wills ⇐133

Where signature does not appear at the end of a holographic will, it must appear from the face of the instrument itself that decedent had done everything she intended to do.

2. Wills ⇐111(2)

If signature is placed elsewhere than at end of an instrument purporting to be a will, it is for court to say from an inspection of the whole document, its language as well as its form, and the relative position of its parts, whether or not there is a positive and satisfactory inference in the document itself that the signature was so placed with the intent that it should there serve as a token of execution, and if such inference appears, the execution may be considered as proven by such signature.

3. Wills ⇐386

It is for the probate court in the first instance to say whether a document purporting to be a will was "signed" by the decedent, and its determination will not be disturbed unless it is without support in the evidence.

4. Wills ⇐133

Whenever it has appeared that a holographic testamentary instrument was a completed declaration of a decedent's desires, such an instrument has been admitted to probate, although the decedent wrote his name only in the beginning of the declaration, even where there was no expression by the testator affirmatively adopting the name so placed as his signature to the will.

5. Wills ⇐111(2)

Completeness of an instrument alone is sufficient evidence of the adoption of a name placed other than at one end of an instrument purporting to be a will as the authenticating signature of the testator and as a compliance with statute which requires the will to be signed.

6. Wills ⇐133

Where holographic instrument, written with care and showing that it was a complete declaration of the desires of testatrix, was signed only in the exordium, but left no space for a signature between the body of the instrument and the concluding words, "signed", and the date and address of testatrix, finding that instrument was "signed" as a valid will was proper.

See Words and Phrases, Permanent Edition, for all other definitions of "Signed".

---

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Proceeding in the matter of the estate of Estella Gardener, also known as Estella Gardiner, by Dorothy Mathews and Eleatra Hyatt, opposed by Minnie M. Foster, for probate of a will. From an order admitting the instrument to probate, opponent appeals.

Order affirmed.

Guthrie, Lonergan & Jordan and John B. Lonergan, all of San Bernardino, for appellant.

Geo. W. Rochester and Joseph L. Fainer, both of Los Angeles, for respondents.

BARTLETT, Justice pro tem.

This is an appeal from an order of the Superior Court admitting an instrument dated March 10, 1947, to probate as the last will of Estella Gardener, deceased. The record on appeal is presented in an agreed statement on appeal to which is attached a photostatic copy of the document. From that agreed statement we quote the following:

"The decedent, a woman of seventy-seven years of age, was struck and knocked to the pavement by a motor vehicle on Saturday, March 8, 1947. She suffered a broken hip and was taken to her home, where someone stayed with her Saturday night. Dorothy Mathews, one of the respondents, stayed with the decedent on Sunday night. Mrs. Gardener was awake most of the night so that Mrs. Mathews had a total of one hour of sleep during the night. Mrs. Gardener was never out of bed after being brought to her home, and at 7:30 a. m. on Monday morning, March 10, she wrote in her own hand the document admitted to probate by the Superior Court, * * *. Dorothy Mathews saw Mrs. Gardener write the document and put it in the envelope. Eleatra Hyatt, one of the respondents, arrived after Mrs. Gardener had written the document and saw the envelope after Mrs. Gardener had sealed it and written her name on the envelope. It was not until Eleatra Hyatt was talking to the bank officer and he inquired if it was a will did Mrs. Gardener tell Eleatra Hyatt it was her will in the envelope. Mrs. Gardener died April 20, 1947, apparently as the result of the injuries sustained in the accident. After her death, her safe deposit box at a bank was opened and the document dated March 10, 1947, was found sealed in the envelope in which the decedent had had it placed prior to her death. The bank officers delivered the

envelope and document to the County Clerk for filing."

The document itself reads as follows:

"Compton Calif March 10th 1947

"I Mrs. Estelle Gardener 433 West Laurel Street do give devise and bequeth Mrs. Dorothy Mathews and Mrs. Eleatra Hyatt of Compton all of belongs should they outlive me conststing of House Lot all Household Furnishings Trunk and Clothing now situated of 433 West Laurel Stret Compton Calif I hold possession and Life Tenancy of the Property during my Life My only Last will and Testament

Signed this 10th Day of March 1947

"Compton Calif 433 West Laurel St."

[1] The court found that the document was entirely written, dated and signed by the testatrix. Appellant contends that the instrument was not signed by the testatrix and therefore was not a valid holographic will. She bases her entire argument on the authority of In re Estate of Manchester, 174 Cal. 417, 163 P. 358, L.R.A.1917D, 629, Ann.Cas.1918B, 227, and the rule stated in that case and the later case of In re Estate of Kinney, 16 Cal.2d 50, 104 P.2d 782, that where the signature does not appear at the end then it must appear from the face of the instrument itself the decedent had done everything she intended to do.

[2] The decedent in the Estate of Manchester, supra, placed his name at the beginning of the first sentence, but the court held that the instrument offered for probate showed on its face that he had intended to sign at the end and failed to do so. For that reason the court reversed an order admitting the will to probate. In its opinion, the court, referring to cases where the signature did not appear at the end, stated [174 Cal. 417, 163 P. 360]:

"If placed elsewhere, it is for the court to say, from an inspection of the whole document, its language as well as the form, and the relative position of its parts, whether or not there is a positive and satisfactory inference from the document itself that the signature was so placed with the intent that it should there serve as a token of execution. If such inference thus appears, the execution may be considered as proven by such signature."

This rule has been followed ever since.

In Re Estate of Kinney, supra, the document in question started with the words, "July 19—1934 I, Anna Leona Graves Kinney, do bequeath all my possessions to my four sisters who were living in 1923"; then followed the names of the four sisters. The only place where the decedent wrote her name was in the exordium. The decision upheld the order of the trial court admitting the writing to probate as a holographic will. In its opinion, the court states, at page 54 of 16 Cal.2d, at page 784 of 104 P.2d:

[3-5] "It is for the probate court in the first instance to say whether the document was 'signed' by the decedent, and its determination will not be disturbed unless it is without support in the evidence. In re Estate of Manchester, supra; In re Estate of Streeton, supra [183 Cal. 284, 191 P. 16]; In re Estate of Brooks, supra [214 Cal. 138, 4 P.2d 148]; In re Estate of Bernard, supra, 197 Cal. [36], at page 42, 239 P. 404, citing additional cases. Whenever it has appeared that a holographic testamentary instrument was a completed declaration of the decedent's desires, such an instrument has been admitted to probate although the decedent wrote his name only in the beginning of the declaration. This has been so even where there was no expression by the testator affirmatively adopting the name so placed as his signature to the will. Completeness alone has been held sufficient evidence of the adoption of the name so placed as the authenticating signature of the testator and as a compliance with the statute which requires the will to be 'signed'."

In Re Estate of Kaminski, 45 Cal.App. 2d 779, 115 P.2d 21, the only place in which the decedent's name occurs is in the opening words of the document as follows: "Last will and testament of Belle Kaminski, December 8, 1937 of Los Angeles, Calif." She then sets forth various bequests. An order admitting the instrument to probate as an holographic will was upheld, the court stating, "The writing here involved

was written with studied care, and appears to be a complete testamentary expression of testatrix's desires. It was so found by the trial court."

[6] In the instant case, a probate court has found that the document was "signed" by the decedent and it cannot be said that the determination is without support in the evidence. There is no space left for a signature between the body of the instrument and the concluding words "signed" and the date and the address of the decedent. Additional space, however, did remain on the paper sufficient to include additional writing, if the decedent intended any further declaration. As held in Re Estate of Kinney, supra, this is some evidence of finality. Furthermore an inspection of the document shows it to have been written with care and that it is a complete declaration of the desires of the testatrix.

The order admitting the will to probate is affirmed.

DORAN, Acting P. J., and WHITE, J., concur.




84 Cal.App.2d 257

## RALPH v. POLICE COURT OF CITY OF EL CERRITO, CONTRA COSTA COUNTY.

Civ. 13652.

District Court of Appeal, First District, Division 1, California.

March 8, 1948.

**1. Criminal law ⇐252(1)**

Jurisdiction of the police court to put a person on trial for a public offense, requires that there should be on file therein a complaint charging such person with the commission of such offense, unless the requirement is waived as provided by statute. Vehicle Code, §§ 505(b), 737, 738, 739, 739.1; Pen.Code, § 1426.

**2. Criminal law ⇐209, 252(1)**

A "complaint" is the preliminary charge or accusation against an offender made by a private person or an informer to a justice of the peace or other proper officer charging that the accused has violated the law, or is a preliminary charge before a committing magistrate.

See Words and Phrases, Permanent Edition, for all other definitions of "Complaint".

**3. Criminal law ⇐252(1)**

The complaint is the foundation of the jurisdiction of the magistrate and performs the same office that an indictment or information does in superior courts. Pen. Code, § 1426.

**4. Criminal law ⇐252(1)**

That provision of the Vehicle Code dispensing with a formal complaint where accused pleads guilty or pleads not guilty and waives complaint in writing, does not otherwise than as enumerated, make inapplicable the provisions of the Penal Code requiring that all proceedings before a justice or police court be commenced by complaint under oath setting forth the offense charged with particulars. Vehicle Code, §§ 505(b), 737, 738, 739, 739.1; Pen.Code, § 1426.

**5. Prohibition ⇐10(3)**

Prohibition would lie to restrain police court from further prosecution of a defendant on charge of reckless driving causing bodily injury, where no complaint was filed as required by statute and defendant entered a plea of not guilty without waiving the requirement of a complaint in writing. Vehicle Code, §§ 505(b), 737, 738, 739, 739.1; Pen.Code, § 1426.

**6. Criminal law ⇐83**

"Jurisdiction" is the power to hear and determine, and is the primary question for determination by a court.

See Words and Phrases, Permanent Edition, for all other definitions of "Jurisdiction".

**7. Criminal law ⇐979(1)**

If a judgment is rendered by a court which did not have jurisdiction to hear a cause, such judgment is void ab initio.

**8. Criminal law ⇐1182**

Even though a void judgment is affirmed on appeal, it is not thereby rendered valid.

---

Proceeding for a writ of prohibition by Donald Ralph against Police Court of the City of El Cerrito, County of Contra Costa, State of California, to restrain further proceeding in a prosecution for reckless driving.

Writ issued as prayed.

Fabian D. Brown and Kenneth C. Zwerin, both of San Francisco, for petitioner.

No appearance for respondent.

PETERS, Presiding Justice.

This is a petition for a writ of prohibition to restrain the respondent police court from further proceeding to prosecute petitioner on a charge of reckless driving, causing bodily injury in alleged violation of § 505(b) of the Vehicle Code.

The petition avers that the alleged offense occurred on April 22, 1947; that petitioner pleaded not guilty to the charge on June 7, 1947; that no written complaint was ever filed; that petitioner did not at any time waive, in writing, the filing of such a verified complaint; that, although no complaint was filed or waiver given, petitioner was placed on trial and found guilty by respondent court; that he moved in arrest of judgment and for a new trial; that both motions were denied; that petitioner appealed to the Superior Court from the judgment of conviction and from the order denying the motion for a new trial; that the judgment and order were affirmed on September 25, 1947; that thereafter a rehearing was denied by the Superior Court and that court issued its remittitur to the respondent court; that that court is about to pronounce sentence upon petitioner; that respondent court is without jurisdiction over the proceeding in the absence of a written complaint or a written waiver thereof.

These facts stand uncontradicted. Respondent court, and the District Attorney of Contra Costa County, although properly served, have not responded by filing a return to the alternative writ, nor did they appear through counsel or otherwise at the oral argument. Under the admitted facts, in our opinion, the writ must issue.

Under the provisions of the Vehicle Code a person arrested for the misdemeanor defined in § 505(b) may be immediately taken by the arresting officer before a magistrate, or, at the option of the arresting officer, may be given a written notice to appear before the magistrate within five days (§ 737). If the arrested person is immediately taken before a magistrate "the arresting officer shall file with said magistrate a complaint stating the offense with which such person is charged" (§ 738). The procedure where written notice is given, the contents of such notice, and the proceedings to be had thereunder are prescribed by § 739.

Section 739.1 reads as follows:

"Whenever written notice to appear has been prepared, delivered and filed with the court, as provided in Section 739 hereof, * * * an exact and legible duplicate copy of said notice when filed with the magistrate specified herein, in lieu of a verified complaint, shall notwithstanding the provisions of Section 1426 of the Penal Code, constitute a complaint to which the defendant may plead 'Guilty.'

"If, however, the defendant shall violate his promise to appear in court or shall not deposit lawful bail, or shall plead other than 'Guilty' of the offense charged, a complaint shall be filed which shall conform to the provisions of said Section 1426, Penal Code, and which shall be deemed to be an original complaint, and thereafter proceeding[s] shall be had as provided by law; provided, that a defendant may, by an agreement in writing, subscribed by him and filed with the court, waive the filing of a verified complaint and elect that the prosecution may proceed upon the written notice mentioned in Section 739 hereof."

Penal Code, § 1426, provides as follows: "All proceedings and actions before a justice's or police court, or a municipal court, for a public offense of which such courts have jurisdiction, *must be commenced by complaint* under oath, setting

forth the offense charged, with such particulars of time, place, person, and property as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint. * * *" (Italics added.)

[1-3] Thus it is quite apparent that whether the arrested person is taken immediately before a magistrate, or is given a five-day notice to appear and pleads not guilty and does not waive the requirement, a complaint under § 1426 of the Penal Code "must" be filed. Unless waived, as provided by statute, the filing of such complaint is essential to the jurisdiction of the police court. That has been the law of this state for many years. It was stated as follows in the case of In re Williams, 183 Cal. 11, 12, 190 P. 163, "It goes without saying that it is essential to the jurisdiction of a police court to put a person upon trial for a public offense that there should be on file therein a complaint charging such person with the commission of such offense." See, also, People v. Brussel, 122 Cal.App.Supp. 785, 17 P.2d 403. It is also the law in other jurisdictions. The rule, supported by many authorities, is stated as follows in 22 C.J.S., Criminal Law, § 303: "The term 'complaint' is a technical one, descriptive of proceedings before magistrates. It is and has been defined to be the preliminary charge or accusation against an offender, made by a private person or an informer to a justice of the peace or other proper officer, charging that accused has violated the law. It has also been defined as a preliminary charge before a committing magistrate; * * * The complaint is the foundation of the jurisdiction of the magistrate, and it performs the same office that an indictment or information does in superior courts." See, also, cases collected 16 C.J. p. 286, § 492.

[4] Section 739.1 of the Vehicle Code, above quoted, dispenses with a formal complaint when the accused pleads guilty, or where he pleads not guilty and waives in writing the filing of such a complaint. Otherwise, the provisions of § 1426 of the Penal Code apply.

[5-8] The petition here involved does not disclose whether petitioner upon his arrest was immediately taken before a magistrate or given a five-day notice. It does disclose, however, a plea of not guilty and it does aver that no waiver was made. Under such circumstances the filing of a complaint was mandatory, and essential to the jurisdiction of the court. "Jurisdiction is fundamental. It is the primary question for determination by a court in any case for jurisdiction is the power to hear and determine. [Citing cases.] If a judgment is rendered by a court which did not have jurisdiction to hear a cause, such judgment is void ab initio. [Citing cases.] Even though a void judgment is affirmed on appeal, it is not thereby rendered valid." In re Wyatt, 114 Cal.App. 557, 559, 300 P. 132, 133.

Let the peremptory writ issue as prayed.

WARD and BRAY, JJ., concur.




84 Cal.App.2d 260

**LEBOIRE et al. v. BLACK et al.**

Civ. 13484.

District Court of Appeal, First District, Division 2, California.

March 8, 1948.

**1. Brokers ⇐53**

When a binding contract is procured between a seller and buyer by a broker, his right to commission agreed upon is complete.

**2. Brokers ⇐58**

Brokers were not barred from recovering commissions for procuring an agreement of sale of a hotel notwithstanding alleged material alterations in the agreement after the vendor signed it, where purchaser's assignment of his interest therein to the assignee was a recognition in writing of the validity of the contract as altered.

**3. Intoxicating liquors ⇐103**

Agreement for sale of hotel including transfer of liquor license was legal where

transfer of liquor license was intended to be subject to approval of Board of Equalization in accordance with statute. Gen. Laws Act 3796, § 7.

---

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Action by Leon N. Leboire and another against David Black and others, to recover brokerage commission. From an adverse judgment, defendants appeal.

Affirmed.

Sherman & Peters, of San Francisco, for appellants.

Jerome L. Schiller, of San Francisco, for respondents.

DOOLING, Justice.

Plaintiffs, who are licensed real estate brokers, secured the signature of one Morrow to a uniform agreement of sale whereby Morrow offered to purchase for a total price of $45,000 of which $12,000 was to be paid in cash

"The Almardel (sic) Hotel, swimming pools, complete equipment, including nine acres, and liquor license * * *.

"Subject to seller obtaining a liquor license for buyer."

This agreement was presented to defendant David Black by plaintiff Leboire for signature. Black signed an approval of the sale and an agreement to pay a $2,500 commission to plaintiffs but before doing so added the following language to the agreement: "The Club Almaden and equipment except personal belongings, and including about 8 acres of land. Also the rights in the liquor license renewal when obtained by us."

Over the word "Almardel" in the document as signed by Morrow was written the word "Almaden" and opposite the words "nine acres" was written the figure in parentheses "(8)".

A copy of the altered agreement was given to Morrow by the plaintiff Shaffer but he did not again sign it. Thereafter Morrow executed an assignment of his agreement with David Black for the purchase of this property to one McGoldrick. McGoldrick deposited this assignment and $14,000 in escrow with a title insurance company in San Francisco with a copy of Morrow's agreement with Black. No instructions were given the title company by McGoldrick and he later withdrew his money from the title company. Shortly thereafter McGoldrick purchased the same property from defendants for $42,500 the escrow being handled by a San Jose title company.

The plaintiffs had judgment for their commission of $2,500 and defendants appeal.

[1] Plaintiffs rely on the settled rule that when a binding contract is procured between a seller and buyer by a broker his right to the commission agreed upon is complete. 4 Cal.Jur. 582; Grove v. Lewis, 125 Cal.App. 357, 13 P.2d 847; Wood & Tatum Co. v. Basler, 37 Cal.App. 381, 173 P. 1109.

Appellants reply that the contract was modified in material particulars by David Black before he signed it, and that this was in fact not an acceptance but a counter offer, that this counter offer was never accepted by Morrow and hence no binding contract arose.

[2] As we view the case we need not decide this question for the reason that even if the alterations made by Black in the contract were material alterations Morrow must be held to have bound himself to them by subsequent ratification. His assignment to McGoldrick of "All his right, title and interest in and to that certain Uniform Agreement * * * between the undersigned, Barney Morrow, and David Black" was a recognition in writing of the validity of the contract as altered. This amounted to a ratification by Morrow of the altered agreement (Houk v. Williams Bros., Ltd., 58 Cal.App.2d 573, 578, 579, 137 P.2d 737; American Trust Co. v. Greuner, 13 Cal. App.2d 279, 283, 56 P.2d 967) and thereby bound him to its terms.

[3] We are satisfied that the agreement with regard to transfer of a liquor license should be construed in connection with sec. 7 of the Alcoholic Beverage Control Act, Deering's Gen.L., 1944, Act 3796, as

intended to be subject to the approval of the Board of Equalization as therein provided. So construed the agreement is a legal one.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.




**SJOBERG et al. v. HASTORF et al.***

**Civ. 13649.**

**District Court of Appeal, First District, Division 1, California.**

**March 12, 1948.**

**Hearing Granted May 10, 1948.**

**1. Contracts ⇐292½**

A proceeding under statute providing preliminary procedure for relief of a party aggrieved by failure of another to perform under an agreement for arbitration, although in form a special proceeding, is in substance, a suit in equity for specific performance of a contract to arbitrate. Code Civ.Proc. § 1282.

**2. Contracts ⇐292½**

On purported appeal from an amended finding and order staying an action for breach of contract and directing that arbitration proceed, District Court of Appeal would consider the complaint as stating the truth unless it was inconsistent or invalid on its face.

**3. Contracts ⇐292½**

An order made under section 1284 staying an action for breach of contract for construction of a building and directing that arbitration of the dispute proceed under section 1282, providing the preliminary procedure under a written contract permitting arbitration, is not appealable under section 1293, specifically providing appeal in arbitration cases only from orders confirming, modifying, correcting, or vacating an award. Code Civ.Proc. §§ 1284, 1293.

**4. Contracts ⇐292½**

In arbitration proceeding if defendants or plaintiffs present admissible evidence to the trial court, an appeal is available from the judgment therein entered, and all rulings and orders theretofore made by the court as to whether the controversy itself was subject to arbitration are reviewable on the same appeal. Code Civ.Proc. §§ 1280–1293.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Carl Sjoberg and Dick Sjoberg, doing business as Sjoberg & Sjoberg, a partnership, against H. C. Hastorf and Rose Ann Hastorf for breach of contract, wherein defendants petitioned to stay the trial and refer the matter to arbitration. From an amended finding and order staying the action and directing that arbitration proceed, defendants appeal.

Appeal dismissed.

Hadsell, Sweet & Ingalls and Sydney P. Murman, all of San Francisco, for appellants.

Cosgriff, Carr, McClellan & Ingersoll, of Burlingame (Luther M. Carr, of Burlingame, of counsel), for respondent.

WARD, Justice.

This is an appeal from "Amended Finding and Order on Petition for Order Staying the Above-Entitled Action and Directing that Arbitration Proceed."

Several distinct contentions are urged on appeal. The first point is the appealability of the order. If the "Amended Finding and Order" is not appealable, the other points need not be considered.

Plaintiffs' contractors filed an action against defendants for breach of a contract. Defendants did not demur or answer but filed the above entitled petition to stay the trial and refer the matter to arbitration.

[1] Reviewing courts have determined that certain orders found in Code of Civil Procedure, Pt. 3, Tit. 10, sections 1280 to and including 1293, are appealable under the designated code sections and certain

* Subsequent opinion 199 P.2d 668.

provisions that have been assumed to be appealable. In Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 182 P.2d 182, 190, it was stated the "proceeding [arbitration] under section 1282 * * *, although in form a special proceeding, is in substance a suit in equity for specific performance of a contract to arbitrate." The arbitration proceeding in that case was under the provisions of section 1282. No mention was made because the question was not raised of the appealability of the order contained in that section or in section 1284.

[2] In this case plaintiffs agreed to construct a building as a home. Defendants, according to the complaint, which should be considered on this purported appeal to state the truth unless it is inconsistent or invalid on its face, agreed to pay the cost of the building in four installments. Two have not been paid. By consent of the parties, the cost of the building was changed by addenda to their agreement. Approximately fifty per cent of the agreed cost is still due plaintiffs. The defendants took possession of the premises July 20, 1946. The action for breach of contract was filed June 17, 1947. The notice of the hearing of the petition from which the appeal was taken was filed August 1, 1947. It lists a certain statement which "illustrates the kind of matters which are in dispute." It does not purport to be definite in listing alleged defects; this after eleven months occupancy of the building. The trial court was presented by the contractor with a verified complaint for breach of contract involving appraisement of the amount due and an unverified petition to stay proceedings and refer to arbitration the question whether certain work had been properly performed. See 3 Am.Jur., p. 830, sec. 2; Glesby v. Balfour, Guthrie & Co., Ltd., 63 Cal.App.2d 414, 147 P.2d 60; Jordan v. Friedman, 72 Cal.App.2d 726, 165 P.2d 728; Pneucrete Corporation v. United States Fidelity & Guaranty Co., 7 Cal.App.2d 733, 46 P.2d 1000.

The particular section involved herein, sec. 1284, provides: "If any suit or proceeding be brought upon any issue arising out of an agreement providing for the arbitration thereof, the court in which such suit or proceeding is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration, shall stay the action until an arbitration has been had in accordance with the terms of the agreement; provided, that the applicant for the stay is not in default in proceeding with such arbitration."

Section 1282 sets forth the procedure for arbitration to settle disputed provisions of a written contract. Section 1284 permits the trial court, in a proper case, to stay the proceedings pending the termination of arbitration. Section 1293 provides: "An appeal may be taken from an order confirming, modifying, correcting or vacating an award, or from a judgment entered upon an award, as from an order or judgment in an action."

Justice Knight, formerly a member of this court, considered Pt. 3, Tit. 10, secs. 1280–1293, inclusive, in Jardine Matheson & Co., Ltd. v. Pacific Orient Co., 100 Cal. App. 572, 575-577, 280 P. 697, 698, and wrote his views on each section in a thorough analysis thereof. The following portions of the opinion answer the question of the appealability of the "Amended Finding and Order" in this case: "In the present case the record discloses that appellant entered into a written contract with respondent to sell and deliver to the latter a certain quantity of wood oil, which contract provided, among other things, that any dispute arising thereunder should be submitted to arbitration immediately in the manner therein set forth. Thereafter and under the authority of section 1282 of said Code respondent petitioned the superior court in and for the city and county of San Francisco for an order for the enforcement of the arbitration agreement, alleging that appellant had breached the contract to deliver said oil. Appellant demurred to the petition and moved for its dismissal, and the demurrer being overruled and the motion being denied, appellant answered, and afterwards amended its answer; and later certain portions of the answer were stricken out on motion of the respondent. A hearing was then had before the court sitting without a jury, and as a result thereof the court entered writ-

ten findings, and in conformity with the findings granted an order directing the parties 'to proceed with the arbitration of the controversy or dispute set out in said application, in accordance with the terms of said agreement. * * *' Thereupon appellant appealed from said order.

"Respondent contends that section 1293 was intended by the Legislature to be all-embracing and restrictive in its effect, and that consequently, since the order from which the appeal herein was taken is not one of those enumerated in said section, the appeal based thereon should be dismissed. We are of the opinion that this contention must be sustained.

"Upon reading the text of the foregoing sections it becomes evident that the purpose of adding them to the Code was to adopt for this state a complete scheme for the expeditious and summary enforcement of agreements to arbitrate, and to provide a judicial review of the proceedings taken pursuant thereto, after the matter of arbitration has been completed and the award has been made, and the fact that the Legislature saw fit to specify in one code section the different orders and judgment from which appeals may be taken clearly indicates, in our opinion, an intention to restrict the appeals in such proceeding to the orders and judgment therein specified, and the obvious reason for not including among such appealable orders the one which directs the parties to proceed with the arbitration was that if at the very threshold of the proceeding the defaulting party could appeal and thereby indefinitely delay the matter of arbitration, the object of the law and the purpose of the written agreement of the parties would be entirely defeated.

"Appellant contends that regardless of the right of appeal given by section 1293, the legal proceeding authorized by said Code sections constitutes a special proceeding of a civil nature, and that therefore under section 963 of the Code of Civil Procedure an appeal may be taken from any final order made therein, and in this connection it is claimed that the order complained of, directing the parties to proceed with the arbitration, is in its nature final. * * * In the present situation, however, adequate remedy by appeal is afforded; two appeals being allowed from orders in their nature interlocutory, namely, the order confirming the award and the order modifying or correcting the award, and two from orders in their nature final, namely, the order vacating the award, and the judgment. Therefore it is not unreasonable to believe that the Legislature intended to restrict the right of appeal to such orders and judgment."

[3] If the order referred to in the last cited case is not appealable, then a "Finding and Order" to stay the trial and direct arbitration is not appealable. It is not an appeal "from an order confirming, modifying, correcting or vacating an award * * *." Sec. 1293.

[4] If defendants or plaintiffs present admissible evidence to the trial court an appeal is available from the judgment therein entered and all rulings and orders heretofore made by the court as to whether this controversy is subject to arbitration are reviewable on the same appeal. "We believe the application for the writ of prohibition should be denied for the further reason that the respondent court has jurisdiction of the subject-matter of the action, and the jurisdiction to determine the question whether the issue involved in the pending suit is referable to arbitration is vested in the trial court by the provisions of sections 1283 and 1284 of the Code of Civil Procedure. The trial court had the right and power to decide this question, and, if it was not satisfied that the issue was referable, to so decide and to proceed thereupon to try the action. If the trial court decided erroneously, it was error committed in the exercise of its jurisdiction, to be reviewed upon appeal from the judgment." Fischer v. Superior Court, 105 Cal. App. 466, 470, 287 P. 556, 557.

The proceeding herein is not appealable and is therefore ordered dismissed.

PETERS, P. J., and BRAY, J., concur.

## GREGORY v. STATE.

Civ. 3816.

District Court of Appeal, Fourth District, California.

March 9, 1948.

Rehearing Denied April 6, 1948.

Hearing Granted May 6, 1948.

1. Taxation ⇐862

Where plaintiff paid gift tax under protest and while action was pending, statute was amended so as to require allowance of interest on amount of overpayment where a judgment for overpayment is rendered, plaintiff was entitled upon rendition of judgment for amount of overpayment to interest from date amendment went into effect and such payment was not the giving of a retroactive effect to a prospective amendment. St. 1939, p. 2079 et seq., p. 2093, § 74; St. 1939, p. 2086, §§ 46, 47; St. 1945, p. 838, § 74.

2. Interest ⇐3

A statutory interest right, as distinguished from a contractual one, covering a particular period, depends upon the law in effect during the period in question.

3. States ⇐119
Taxation ⇐543(8)

Where plaintiff paid gift tax under protest and while action was pending to recover overpayment, statute was amended so as to require allowance of interest on amount of overpayment where a judgment for overpayment was rendered, plaintiff was entitled upon a judgment rendered after amendment, to interest on overpayment from date amendment went into effect, and such payment was not unconstitutional as a gift of public money for private purpose but was merely compensation for use the state had of money to which it was not entitled. St. 1939, p. 2079 et seq., p. 2093, § 74; St. 1939, p. 2086, §§ 46, 47; St. 1945, p. 838, § 74; Const. art. 4, § 31.

---

Appeal from Superior Court, San Bernardino County; Stanley Mussell, Judge.

Action by A. Gregory, against the State of California to recover the amount plaintiff paid under protest as a gift tax. From an adverse judgment, the defendant appeals.

Judgment affirmed.

James W. Hickey, Inheritance Tax Atty., and J. Gould, Assistant Inheritance Tax Atty., both of Sacramento, for appellant.

Surr & Hellyer, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

On November 17, 1943, the plaintiff paid under protest $11,295.41 as a gift tax demanded of him, in connection with the transfer of a certain building, under the provisions of the Gift Tax Act of 1939, Stats. 1939, p. 2079. On November 20, 1943, he brought this action for the recovery of the amount paid. At that time sec. 74 of the act provided that no interest should be allowed on any refund made, and that no judgment for a refund should bear interest until and unless payment was refused after the judgment became final.

While this action was pending sec. 74 was amended, Stats. 1945, p. 838, so as to provide (1) that interest should be paid upon any overpayment made without the taxpayer's fault, and that (2) "In any judgment of any court rendered for any overpayment, interest shall be allowed at the rate of 6 per cent per annum upon the amount of the overpayment, from the date of the payment or collection thereof * * *."

On September 11, 1945, a judgment was entered awarding the plaintiff a refund of the $11,295.41 paid, together with interest thereon from November 17, 1943, the date on which it was paid. On appeal, this court held that only a part of the conveyance in question was not taxable as a gift and, with respect to other portions, that the plaintiff was entitled to certain exclusions or exemptions. The judgment was reversed with instructions that the amount recoverable be computed and that the question of interest thereon, if any, be determined. (Gregory v. State of California, 77 Cal.App.2d 26, 174 P.2d 863, 175 P.2d 542.)

Thereafter, the matter was submitted to the trial court on a stipulation providing that the total gift tax payable by the plaintiff in respect to this transfer is $692.88;

that the overpayment was not made through any fault of the plaintiff and he is entitled to a refund of $10,602.53; that the plaintiff claims he is also entitled to interest at 6% on the amount of this refund; that the only remaining issue for the court to decide is whether or not the plaintiff is entitled to recover such interest; that the amount of the refund will forthwith be refunded and paid to the plaintiff but without prejudice as to his claim for interest, except that no interest shall be payable after the $10,602.53 has been refunded; that judgment may be entered for the $10,602.53 and also for interest in the event the court decides that interest is allowable; and that the parties waived all right to appeal except with respect to the matter of interest.

On March 17, 1947, the defendant refunded and paid the $10,602.53 to the plaintiff. On April 28, 1947, the court entered its judgment awarding the plaintiff a refund of $10,602,53, which part of the judgment was already satisfied in accordance with the stipulation, and further awarding the plaintiff interest from May 18, 1945, the date of the amendment to sec. 74, until the earlier of the two dates mentioned in subd. (2) of that amendment.

The defendant's appeal is presented on an agreed statement. The sole controversy here is as to whether or not the interest allowed by the court may be recovered by the respondent. The appellant contends that the portion of the judgment allowing interest constitutes an application of the 1945 amendment to this act which is inconsistent with the State Constitution and with other law. It is argued that this amendment allowing interest cannot properly be applied retroactively and that, if so construed and applied here, it violates sec. 31 of art. IV of the State Constitution, which prohibits a gift of public money for private purposes.

In support of the contention that the judgment allowing interest gives an improper retroactive application to the 1945 amendment it is argued that that statute does not disclose an intention that it shall operate retroactively; that the Legislature obviously had in mind solely overpayments which might be made after May 18, 1945, "since only by so construing the amendments can they be deemed to operate prospectively"; that by virtue of the decision on the former appeal the appellant became obligated on November 17, 1943, to refund $10,602.53 to the respondent; that appellant would not have been liable for any interest had it refunded this amount prior to May 18, 1945, since the law at that time forbade the payment of interest; and that the statutory change of May 18, 1945, could not apply to the refund here in question since this refund has its inception in this preexisting obligation which originated in 1943. It is argued that the facts of this case bring it squarely within the rule followed in Ætna Casualty & Surety Co. v. Ind. Acc. Comm., 30 Cal.2d 388, 182 P.2d 159, where it was held that a subsequent increase in compensation could not affect existing rights which had become established, since the amending statute expressed no intention to make the change retroactive.

It is further contended that, in any event, the 1945 amendments allowing interest on such a refund cannot be given a retroactive effect without violating the constitutional provision prohibiting the gift of public money to an individual. In this regard appellant relies on Molineux v. California, 109 Cal. 378, 42 P. 34, 50 Am.St.Rep. 49, as being exactly in point and decisive of this case. That case involved certain interest coupons on bonds issued in 1851, which coupons had matured between 1854 and 1856, but had never been paid. The action was filed nearly 40 years later, pursuant to a general statute adopted in 1893, St. 1893, p. 57, permitting the state to be sued on claims disallowed by the board of examiners and providing that any judgment in such an action shall be for the amount actually due from the state "with legal interest" from the time the obligation accrued. The main ground of the decision in that case, as confirmed by the decision in Davis v. State, 121 Cal. 210, 53 P. 555, was that no statute existed under which the plaintiff was entitled to the interest there claimed, that there was therefore no "legal interest" which was authorized by any statute, that the 1893 amendment contained no admission that the state was liable for such

interest, and that that amendment was not intended to increase the state's liability on the coupons in question, or to give any additional right other than the right to bring an action which, if brought, must be based upon preexisting rights. As an additional ground, the decision in the Molineux case stated that any retroactive effect to the 1893 amendment, if there given, would violate the gift provision of the constitution. Whether or not this portion of the decision, upon which appellant relies, was dicta, it was applicable only to the facts of that case, where a definite contractual obligation and liability had been created and had existed for many years before the 1893 statute was adopted. In that case, as in the Ætna case above referred to, preexisting rights and obligations had become thoroughly established before any change in the law was made. The appellant contends that the facts of the instant case are similar to those in the Molineux case; that in each there was a preexisting obligation of the state to make a payment, in the Molineux case since 1856 and in this case since 1943, the date of the overpayment; that in neither was there any statutory provision for interest when the obligation arose; and that in each there was an attempt to provide for interest after the obligation had been created.

Both of appellant's contentions are based on the premise that there was here a preexisting obligation and liability on the part of the state to make this refund, which arose and was created when the overpayment was made on November 17, 1943, and that no subsequent change in the law could affect the obligation thus created, for the reasons thus given. In our opinion, a different situation existed here and we are unable to see that an obligation to return the amount of this overpayment was created or arose at the time this tax was paid, or that any definite obligation or liability has existed since that time. The decision on the former appeal, 77 Cal.App.2d 26, 174 P.2d 863, 175 P.2d 542, if it may be said to have fixed the obligation in any way, was not rendered until long after the 1945 amendment went into effect.

The Gift Tax Act provides that the controller shall make his determination as to the amount of tax due and shall give notice thereof. Penalties are provided for the failure to pay the amount of tax demanded. Section 46 provides that the taxpayer may pay the tax under protest; that he may then bring a suit to recover back the amount thus paid; and that in such action the court shall review the determination of the tax and give judgment in accordance with what it finds to be the correct amount of the tax. Sec. 47 provides, in effect, that where such a suit is brought the judgment determines the amount of tax which is due. This necessarily establishes any right to a refund and for the first time imposes an obligation or creates a liability upon the state to refund any overpayment. Sec. 74 merely has covered one element, interest, which may or may not, at different times, enter into the amount or extent of the liability when an obligation is determined or comes into existence in accordance with the provisions of the act. The amendment of that section in 1945 did not increase any liability which already existed.

The Gift Tax Act is one provided for the imposition and collection of a certain tax. This interest provision is a part of a plan provided for reimbursing a taxpayer in the event an overpayment is demanded and collected. It cannot be told when a tax is paid whether or not there is an overpayment and there is no obligation or liability on the part of the state to return anything to the taxpayer which arises at the date of payment, or which can arise until the correct amount of the tax is determined. In such a case as this, where the payment was made under protest and an action brought, the correct amount due and the resulting amount of any refund is determined by the judgment, and an obligation or liability for the return of the overpayment then comes into existence. The extent of that liability and the amount to be paid to the taxpayer is fixed by the judgment and, by the 1945 amendment to sec. 74, the Legislature has expressly directed the court to allow interest as one element of that liability. In other words, before any liability has been fixed the state has directed that interest shall be included in the event a possible liability becomes an established one. The right to

change the statute, relating to the payment of interest, continued until the obligation became fixed and the liability was created. Before that time, the obligation was unknown and any liability in doubt, and there was no vested right to the continued use of the money without compensation therefor. The freedom from interest which was provided by statute for a time was not a vested right but was a possible privilege which might accrue if and when liability was established, and was one which was subject to change or withdrawal at any time before such liability was fixed in accordance with the provisions of the act.

[1] In a real sense, the application here of sec. 74, as amended, is not to give that amendment a retroactive effect because it involves and applies to future judgments which create an obligation and determine the amount of any refund, and merely provides that a certain element, interest, shall be taken into consideration and allowed in fixing and determining the amount and extent of the liability or obligation. Moreover, if such an application of this amendment be considered retroactive, with respect to the allowance of interest, the statute clearly shows an intention that this shall be done, at least from the effective date of the amendment.

[2] We are here concerned only with the allowance of interest after the amendment went into effect. This was what the court allowed and the respondent has in no way complained of the failure to allow interest from the date the tax was paid. The allowance of interest from the effective date of the amendment is in accord with the usual rule that a statutory interest right, as distinguished from a contractual one, covering a particular period, depends upon the law in effect during the period in question. (Dunne v. Mastick, 50 Cal. 244; Cummings v. Howard, 63 Cal. 503; White v. Lyons, 42 Cal. 279.)

[3] The allowance of such interest under these circumstances was within the discretion of the state, and was not a gift within the meaning of the constitutional prohibition relied on. It is compensation for the use the state has had of money to which it was not legally entitled, as subsequently developed, but which fact was not and could not be known at the time the taxpayer was required to pay it to the state.

The allowance of interest, at least from the date of the amendment as was here done, was in accordance with existing law, the statute in question was a proper exercise of the legislative power, and the judgment as rendered is not subject to the objections here raised.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.




84 Cal.App.2d 320

**VILLAFUERTE v. STRUNZ et al.**

**Civ. 13600.**

District Court of Appeal, First District, Division 2, California.

March 11, 1948.

**1. Appeal and error ⇐1008(1)**

In action for injuries sustained by pedestrian who looked for approaching traffic before leaving curb to cross street but who then walked into the street about 10 or 12 feet without looking again to right or left and was struck by automobile, whether pedestrian was contributorily negligent in not looking again after leaving curb was question of fact for trial court sitting without a jury.

**2. Appeal and error ⇐996**
**Automobiles ⇐245(72)**

Where there is room for honest difference of opinion between men of average intelligence, whether plaintiff was negligent in failing to look again in direction from which automobile was approaching is question of fact and findings of triers of fact is conclusive.

Appeal from Superior Court, San Francisco County; Thomas M. Foley, Judge.

Action by Luis Villafuerte against Raymond Strunz and another for injuries sustained when struck by an automobile. Judgment for plaintiff and defendants appeal.

Affirmed.

Jack Flinn, of San Francisco, for appellants.

Elmer P. Delany and Wm. A. Sullivan, both of San Francisco, for respondent.

DOOLING, Justice.

Plaintiff while crossing Fell Street in San Francisco from the northwesterly corner to the southwesterly corner of Fell and Webster Streets was struck by an automobile owned and operated by defendants. For his injuries thereby caused the court sitting without a jury gave plaintiff a judgment and defendants appeal.

Appellants' sole point is that plaintiff's evidence proved him guilty of contributory negligence as a matter of law. The evidence most favorable to plaintiff on this question may be summarized as follows: At about 7:30 p. m. on October 11, 1942, plaintiff with a woman companion was about to cross Fell Street at the point indicated above. He stood at the curb and looked westerly, saw two automobiles approaching and waited for them to pass. He then looked easterly, saw no vehicle approaching and walked into the street about 10 or 12 feet, without looking again to his right or left, when he was struck by appellants' car coming from the east. From east to west Fell Street at that point rises rather sharply and the view to the east is for that reason somewhat obstructed from the westerly side of Webster Street but plaintiff testified that he could see clearly everything to his left and right.

[1, 2] Under these circumstances the question whether plaintiff was guilty of contributory negligence in not looking again easterly down Fell Street after leaving the curb was one of fact for the trial court. This court recently reviewed the cases on this question in Goodwin v. Foley, 75 Cal.App.2d 195, 170 P.2d 503. The applicable rule is there quoted from Salomon v. Meyer, 1 Cal.2d 11, 15, 32 P.2d 631, 633: "Whenever there is room for an honest difference of opinion between men of average intelligence, the question of whether the plaintiff was negligent in failing to look again in the direction from which the defendant's car was approaching is a question of fact for the jury and the finding of the triers of fact is conclusive."

This case falls fairly into that category.

Judgment affirmed.

NOURSE, P. J., and GOODELL, JJ., concur.




## PEOPLE v. KLOR.*

Cr. 4149.

District Court of Appeal, Second District, Division 3, California.

March 9, 1948.

Rehearing Denied March 19, 1948.

Hearing Granted April 1, 1948.

**1. Assault and battery ⇐95**

In prosecution for assault with a deadly weapon, whether accused shot victim in an attempt to apprehend a thief, or did it out of rage because he felt that victim had caused him to lose business, was for jury.

**2. Assault and battery ⇐92**

Evidence sustained conviction of assault with a deadly weapon.

**3. Witnesses ⇐5, 8, 52(7)**

A defendant may object to his wife's testifying either for or against him and she may refuse to testify, and if prosecution wishes to make something out of her failure to testify, truth of situation should be brought out, and proper procedure is for prosecutor to subpoena the wife and call her to the stand and thus invite an objection. Pen.Code, §§ 1322, 1323.

**4. Criminal law ⇐721½(1)**

Where prosecutor did not call defendant's wife to the stand, prosecutor's com-

* Subsequent opinion 197 P.2d 705.

ment upon fact that she was not called by defendant was improper. Pen.Code, §§ 1322, 1323.

**5. Criminal law ⇐700**

Function of district attorney is largely judicial and he owes defendant solemn duty of fairness and must bear himself in discharge of his duties as a minister of justice.

**6. Criminal law ⇐1156(1)**

Where motion for a new trial is grounded on prejudicial misconduct of district attorney, denial of motion will not be disturbed by appellate court unless in circumstances it is plainly wrong.

**7. Criminal law ⇐1163(1)**

Injury is not presumed from error and prejudice must appear affirmatively to reviewing court after an examination of entire cause, including evidence, burden of showing prejudice being on appellant. Const. art. 6, § 4½.

**8. Criminal law ⇐1186(4)**

Conviction may be reversed only when reviewing court can say from entire record, including evidence, that miscarriage of justice has resulted. Const. art. 6, § 4½.

**9. Criminal law ⇐1171(1)**

Where evidence sustained conviction of assault with a deadly weapon and upon that evidence accused might well have been convicted of assault with intent to commit murder, misconduct of district attorney in calling out name of defendant's wife when directed to call his next witness, though wife had not been subpoenaed, and further misconduct in commenting upon failure of defendant to call her, was not prejudicial.

**10. Criminal law ⇐824(1)**

Court on its own motion must give instructions on general principles of law pertinent to case, but need not give such instructions upon specific points developed through evidence introduced at the trial, in absence of request.

**11. Criminal law ⇐824(4)**

An instruction that if defendant acted under an honest mistake of facts no offense had been committed was an instruction upon a specific point developed through evidence introduced at trial, and failure to give such an instruction, in absence of request therefor, was not error.

---

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

David Klor was convicted of assault with a deadly weapon, and he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

VALLEE, Justice pro tem.

Appellant was accused of the crime of assault with a deadly weapon with intent to commit murder on one Kenneth Temple. He was convicted by a jury of assault with a deadly weapon. He appealed from the judgment and from the order denying his motion for a new trial.

Appellant contends: (1) that the evidence is insufficient to support the verdict, (2) that the district attorney was guilty of prejudicial misconduct, and (3) that the court erred in failing to instruct the jury on a specific point.

[1, 2] A brief résumé of the evidence will demonstrate the complete lack of merit in appellant's first contention. Appellant was engaged in the jewelry business at 317 West Fifth Street, Los Angeles, which is about three-quarters of a block west of Broadway. Kenneth Temple was employed by a shoe company at 451 South Broadway, around the corner from the jewelry store. Virginia Lazo was also employed at the store of the shoe company. On June 12, 1946, at about 10:15 a. m., Miss Lazo went to the jewelry store to look at a wrist watch. At that time there were present in the store the appellant's wife, Howard Sogg, a Mr. Goldman, and Miss Lazo. Appellant was outside on the sidewalk. Shortly after Miss Lazo entered the store, Kenneth Temple came in and spoke to Miss Lazo and she and Temple left the store. Immediately thereafter, appellant entered the store and had the following conversation with Gold-

man: "He asked me what happened, he was standing right by the doorway and he came in and said, 'What happened?' And I told him that Miss Lazo, who was buying a watch from me, just about had bought the watch, and this man came in and said something to her, and I was repairing a band, or changing a band on the watch, and when I heard this other party come in, when I heard him speak, that is the first I knew of him being in there, I didn't see him come in. I lifted my face up, and he said, 'Is that the watch you are buying?' And I said— * * * I told him that he picked up this watch, he looked at it, compared it with his own watch, more or less threw it back at me, and he said, 'Come with me,' and took her by the arm and they walked out. I also told him that she had been a satisfied customer prior to this, that she had said she bought a watch or two there before, a clock or two, but she had been a satisfied customer."

Appellant and Mrs. Klor knew Miss Lazo and where she worked. Appellant asked Mrs. Klor for the telephone number of the shoe company. She looked up the number and appellant called it and talked over the telephone. After this telephone conversation, appellant asked his wife for the telephone number of the 451 South Broadway branch of the same shoe store. He went to the telephone, called the 451 South Broadway store, talked to Temple and said: "I told him that it's unfair and unethical of dragging customers out of the store, and he started to use vile names against me and I hung up."

After the second call appellant went to a showcase and obtained a 32 Smith and Wesson revolver. He became very, very excited. Goldman told him to keep his temper. He told Goldman to keep quiet. Mrs. Klor asked Klor not to get excited. He began waving the revolver back and forth, up and down, and aiming it at the door. Goldman then observed Temple at the doorway of the store. Appellant raised the gun again, waved it around and pointed it toward the doorway. Temple turned around and ran toward Broadway. Appellant pursued him Temple ran from the jewelry store to the 451 South Broadway branch of the shoe store. He was pursued the entire way by appellant, who fired four or five shots at him. One shot went through the left lung, the bullet entering the back and coming out the front. He was shot three times in the left arm and one time in the right arm. A police officer disarmed appellant and searched Temple for a weapon but did not find one. Appellant told the police officer that Temple had stolen a watch from him. Later the same day, another officer went to appellant's jewelry store and obtained from Goldman the watch which he had displayed to Miss Lazo. Appellant readily admitted the shooting to this officer but claimed that he was justified in doing it.

Appellant testified that he was in the store, behind a showcase, putting watch bands on watches on a tray; that he first noticed Temple when he, Temple, was close up to the tray where appellant was working; that he heard a sound, looked up to the ceiling, saw Temple approach, swing at him, and heard him say, "I will take this watch for nothing"; that he, appellant, backed out of the way; that his wife, Goldman and Sogg, an employee, were in the store at the time; that Temple began to run and said, "What are you going to do about it?" whereupon appellant shouted "Stop thief," and reached for a gun, which was under the showcase in a holster; that he ran out of the store, pursuing Temple, shouting, "Stop Thief"; that he fired one shot in the air to frighten Temple but he did not stop, and so he continued to shoot at him and pursue him; that Temple had the watch in his hand while he was running. Appellant admitted the conversation with Goldman about Miss Lazo and that he had telephoned the main office of the shoe company. He testified that when he made the second call he asked for the manager of the store and was given the name of Temple; that he talked to the manager and made the statement we have quoted. Appellant also testified that at the time Temple came into the store, after the telephone conversation, he did not know that he was the same person with whom he had talked on the telephone.

Whether appellant shot Temple in an attempt to apprehend a thief, or did it out

of a rage because he felt that Temple had caused him to lose business, was a question of fact for the jury to decide. There is no merit in appellant's claim that he acted under a mistake of fact. The only support for this claim is his testimony. If, as he claims, he acted under a mistake of fact his testimony was false, as he testified that Temple took the watch and had it in his hand as he was running. His story was contrary to the other evidence and to inferences reasonably drawn therefrom. The jury did not believe him. It is significant that the watch which appellant claimed had been taken from his tray and stolen from him, had never left the premises of the jewelry store and was recovered by the police at the jewelry store immediately after the shooting. The evidence abundantly supports the verdict.

[3, 4] The first basis for appellant's claim that the district attorney was guilty of prejudicial misconduct is this: During the course of the trial and immediately after the conclusion of the examination of a witness, the court said to the district attorney, "Call your next witness." The following colloquy then ensued: "Mr. Loucks [Deputy District Attorney]: Mrs. Klor. (No response) Is Mrs. Klor here? (No response)

"Mr. Rose [Defendant's counsel]: Mrs. Klor?

"Mr. Loucks: Yes.

"The Court: The defendant's wife?

"Mr. Loucks: Yes, your Honor.

"The Court: Do you want her as a witness?

"Mr. Rose: Have they abolished 1881, your Honor?

"Mr. Loucks: That is a privilege that must be claimed.

"The Court: Has Mrs. Klor been subpenaed as a witness?

"Mr. Rose: I have never heard of it.

"The Court: Was she subpenaed as a witness?

"Mr. Loucks: Officer Schmidt."

Appellant says that the district attorney was guilty of prejudicial misconduct in thus calling for Mrs. Klor. Appellant's counsel did not make any objection or motion with respect to this conduct of the district attorney.

Appellant also says that the district attorney was guilty of prejudicial misconduct in his argument to the jury. During the course of the argument the following occurred: On one occasion Mr. Loucks said: "There are only five persons that you may say were closely associated with that problem. That is the defendant, his wife, his brother-in-law, Mr. Goldman, Miss Lazo—I should have said six—and Mr. Temple. The defendant has told what he has to say in this matter, and everything that the defendant told us in regard to his belief that Mr. Temple was a thief and a robber transpired in the presence of his wife." On another occasion, Mr. Loucks said: "The wife did not testify, so we only have Mr. Goldman's testimony and the defendant's testimony. * * * The defendant immediately goes to the back of the store where his wife is and there is some confusion, and who does he tell us?" At another time Mr. Loucks said:

"Now, in conclusion, remember the shooting is admitted, there is no controversy over the shooting. The only question is whether Temple is a thief and a robber, and I have gone over in detail the evidence to show how that is fiction, and even what the defendant tells us corroborates Goldman. And I think it is fair to say that we are entitled to know why the only other witness who is in this State did not come to tell us what—

"Mr. Rose: I assign that as misconduct. The process of this court is available to the prosecution. If there is any witness that they claim there was a burden on us to produce, it is a misstatement of the law and contrary to law. We are not called upon to produce any witness.

"The Court: I know that, and neither is the State, and the Court will so instruct the jury later. Now, ladies and gentlemen of the jury, remember—again let me admonish you what counsel says with respect to this case is simply their own viewpoint. And let us stay to the record, just comment on

what the record in this case shows. That is for both sides. Just stay right within the record.

"Mr. Loucks: Now, that person did not testify. Now, as his Honor has just said, all I have done is tell you how I view the evidence. I haven't tried to tell you what the evidence is, but I have given you my honest interpretation of the facts and pointed out what I consider is very essential, and that is that Mrs. Klor did not choose to testify.

"Mr. Rose: I assign that statement as misconduct and ask you to instruct the jury, your Honor, that that remark was grossly improper.

"The Court: Well, the Court has instructed this jury, and I want both counsel on both sides to confine themselves to the record in this case. Now, you ladies and gentlemen of the jury know what the witnesses testified. Now, Mr. Loucks, let us proceed with the facts in the case. I want no further comment on that matter."

Penal Code section 1322 provides: "Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except with the consent of both, or * * * [in instances not pertinent here]."

In 8 California Jurisprudence 270, sec. 331, cited by appellant, it is said: "While the code contains no provision prohibiting any comment upon the failure of the wife of a defendant to testify, the reason underlying the provisions of section 1323 of the Penal Code applies with much force, as the wife is made incompetent to testify for or against her husband in a criminal action, except by the consent of both," citing People v. Heacock, 10 Cal.App. 450, 102 P. 543, and People v. Terramorse, 30 Cal.App. 267, 157 P. 1134. Other cases involving charges of similar misconduct are People v. Tufts, 167 Cal. 266, 139 P. 78, People v. Moore, 111 Cal.App. 632, 295 P. 1039, People v. Hodges, 116 Cal.App. 61, 2 P.2d 174, and People v. Briggs, 20 Cal.2d 42, 123 P.2d 433.

In People v. Heacock, supra, the reviewing court quoted Penal Code section 1323, as it then read, to the effect that the neglect or refusal of a defendant to be a witness could not in any manner prejudice him or be used against him on the trial, and, by way of dicta, made the statement quoted above from 8 California Jurisprudence 270, section 331, and continued (p. 457): "The wife may be willing to testify, but the husband may not consent and to put him in the position of refusing and subjecting his defense to comments for availing himself of a statutory right might be very prejudicial." In view of the fact that the judgment had to be reversed on other grounds, the court said at page 456 of 10 Cal.App., page 545 of 102 P.: "* * * it is perhaps unnecessary to go further than to advise that the district attorney refrain from such comment hereafter."

In People v. Terramorse, 30 Cal.App. 267, 157 P. 1134, the judgment was reversed because of misconduct of the prosecutor. The court indicated that if the comment about the failure of the defendant to consent to his wife's testifying were the only ground for reversal, that it would not have been considered sufficiently prejudicial to have compelled a reversal.

In People v. Tufts, 167 Cal. 266, 139 P. 78, the district attorney commented upon the action of the defendant in objecting to his wife's testifying against him. Because of this and other misconduct of the district attorney, the judgment was reversed.

People v. Moore, 111 Cal.App. 632, 295 P. 1039, held that the misconduct fell short of constituting that serious and prejudicial misconduct which would justify a reversal of the judgment. Counsel for appellant at the oral argument read at length from the record on appeal in the Moore case. It appears therefrom that the trial judge, in that case, admonished each individual juror to disregard the misconduct and each juror stated that he would do so.

People v. Hodges, 116 Cal.App. 61, 2 P.2d 174, held that the comment was not sufficiently prejudicial to require a new trial.

People v. Briggs, 20 Cal.2d 42, 123 P.2d 433, was a case in which sentence of death was imposed. The district attorney, in his argument to the jury, had commented on the fact that the defendant's testimony was uncorroborated, that he had not called his

wife as a witness, and stated that the People could not present her testimony. The court held at page 46 of 20 Cal.2d, page 435 of 123 P.2d: "The appellant made no objection to these remarks, nor did he request the trial judge to admonish the jury concerning them. Ordinarily, without timely objection, an objection of misconduct will not be considered by an appellate court. And the most that may be said in reasonable criticism of the prosecutor's statement is that it is incomplete. Obviously, he meant that he could not compel the appellant's wife to testify against her husband. Sec. 1322, Pen.Code. Considering all of the evidence shown in the record, there is no doubt of the appellant's guilt nor any basis for concluding that the remarks complained of contributed materially to the verdict. Certainly it does not amount to prejudicial error."

A defendant may object to his wife's testifying either for or against him and she may refuse to testify. If the prosecution wishes to make something out of her failure to testify the truth of the situation should be brought out. The proper procedure for the prosecutor to pursue is to subpoena the wife and call her to the stand and thus invite an objection. People v. Briggs, 20 Cal.2d 42, 47, 123 P.2d 433. If no objection is made the wife will testify in a manner favorable to one side or the other. The procedure that was followed here, namely, for the prosecutor not to call the wife to the stand but to comment upon the fact that she was not called by the defendant was highly improper. In this manner he placed the defendant under the disadvantage, such as it may have been, of appearing to refuse to allow the wife to testify, when he had not done so, and at the same time he (the prosecutor) avoided the risk that her testimony as a witness for the prosecution might have been favorable to the defendant. The first mentioned procedure is honest and straightforward and is the legal procedure. We seriously question the good faith of a prosecutor who, without any intention of using the defendant's wife as a witness, calls out her name in the courtroom, thereby intentionally conveying to the jury his belief that her testimony would have been favorable to the prosecution, and then follows up with comment upon the failure of the defendant to call her. This procedure carries the further implication that the wife's testimony would have been adverse to the defendant under the presumption that attends the failure of a party to produce evidence that is available to him. Thus, the possibility that the refusal is on the part of the wife alone is ignored, and her failure to testify is attributed to the husband's refusal to allow her to testify because her testimony would be adverse to him, although both the husband and the wife may object to her testifying for any reason that appeals to either of them, or for no reason at all.

[5] The conduct of the district attorney was deceptive and unfair. "While he may strike hard blows, he is not at liberty to strike foul ones." He deliberately ignored the fact that his function is largely judicial and that he owes the defendant a solemn duty of fairness, and that he must bear himself in the discharge of his duties as a minister of justice.

The court instructed the jury that: "But while you are the sole and exclusive judges of the facts and of the weight of evidence, you are to judge of the facts upon the testimony and other evidence produced here in court. If any evidence has been admitted and afterwards stricken out, you must disregard the matter so stricken out, entirely, and if any counsel has intimated by questions, which the court has not permitted to be answered, that certain things are, or are not, true, you must disregard such questions and refrain from any inferences based upon them. If counsel, upon either side, have made any statements in your presence concerning the facts in the case, you must be careful not to regard such statements as evidence, and must look entirely to the proof in ascertaining what the facts are."

[6] One ground of appellant's motion for a new trial was claimed prejudicial misconduct of the district attorney. The trial judge denied the motion. As stated in People v. Sarazzawski, 27 Cal.2d 7, 15, 161 P.2d 934, 938: "One ground of defendant's motion was asserted prejudicial misconduct of the district attorney. A trial judge is in a better position than is an appellate court to

determine the probable effect of misconduct of counsel and his conclusion on that question will not be disturbed by an appellate court unless in the circumstances it is plainly wrong. Walling v. Kimball, 17 Cal.2d 364, 369, 110 P.2d 58, and cases there cited."

[7, 8] Injury is not presumed from error. Prejudice must appear affirmatively to the reviewing court after an examination of the entire cause, including the evidence. The burden of showing prejudice is on appellant. Const., Art. VI, sec. 4½; People v. Horowitz, 70 Cal.App.2d 675, 704, 161 P.2d 833; People v. Hermes, 73 Cal.App.2d 947, 958, 168 P.2d 44. A judgment of conviction may only be reversed when the reviewing court can say from the entire record, including the evidence, that a miscarriage of justice has resulted. People v. Baskins, 72 Cal.App.2d 728, 733, 165 P.2d 510.

[9] The case is not a close one. The evidence was without conflict that appellant's wife was in the jewelry store, which was a very small one, during the incidents which occurred there, as narrated in the evidence. It was obvious to any juror that if appellant's story were true, he could materially aid his cause by calling his wife as a witness. The situation is like that in People v. Moore, 111 Cal.App. 632, 295 P. 1039, People v. Hodges, 116 Cal.App. 61, 2 P.2d 174, and People v. Briggs, 20 Cal.2d 42, 123 P.2d 433. It appears without doubt from an examination of the entire record, including the evidence, that appellant was guilty of assault with a deadly weapon. Upon the evidence he could well have been convicted of assault with intent to commit murder. We are of the opinion that the misconduct of the district attorney, even if prejudicial, did not result in a miscarriage of justice.

[10, 11] Appellant's third contention is that "The court erred, in failing to instruct the jury that an act done under an honest mistake of facts so that if the facts had been as the accused believed no crime would have been committed, is not a crime." Appellant did not present or request an instruction on this point. We recently had occasion to state the rule in this regard. In People v. Malone, Cal.App., 185 P.2d 870, 879: "The rule is that it is the duty of the court in criminal cases to give, sua sponte, instructions on the general principles of law pertinent to such cases where they are not proposed or presented in writing by the parties themselves. It is not the duty of the court to give such instructions upon specific points developed through the evidence introduced at the trial, unless such instructions are requested by the party desiring them. People v. Warren, 16 Cal.2d 103, 116, 104 P.2d 1024; People v. Bender, 27 Cal.2d 164, 175, 163 P.2d 8." Any instruction to the effect that if appellant acted under an honest mistake of facts no offense had been committed, would have been an instruction upon a specific point developed through the evidence introduced at the trial. There was no duty upon the trial court to give such an instruction in the absence of a request therefor.

We find no error in the record. The judgment and the order denying appellant's motion for a new trial are, and each is, affirmed.

SHINN, Acting P. J., and WOOD, J., concur.






84 Cal.App.2d 333

**ALVES et ux. v. RODRIGUES et ux.**

**Civ. 7382.**

**Sac. 5833.**

District Court of Appeal, Third District, California.

March 13, 1948.

Hearing Denied May 10, 1948.

**1. Landlord and tenant ⇐120(1)**

Lessors of store building under oral lease for term of one year had right to terminate tenancy on giving of notice to lessee as required by statute. Civ.Code, §§ 789, 791; Code Civ.Proc. § 1161.

**2. Landlord and tenant ⇐76(3)**

Owners of store building were not estopped from denying validity of five year

lease containing provision that lease could not be assigned without written consent of owners when in hands of assignees because owners induced assignees to purchase lessees' stock of goods by promising that they would agree in writing to assignment of lease if assignees purchased lessees' goods.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Suit by Joe Alves and Amelia Alves, husband and wife against Joe A. Rodrigues and Viola Rodrigues, husband and wife for unlawful detention of store building leased to defendants by oral agreement for term of one year. From judgment awarding plaintiffs possession of the property, and rental of $200, for each month property was detained after lease was terminated by statutory notices and from order denying motion to set aside judgment, the defendants appeal.

Affirmed.

Harold V. Daley, of San Francisco, for appellants.

L. A. MacNicol, of Merced, for respondents.

THOMPSON, Justice.

This is a suit for unlawful detention of a store building at Merced, leased to defendants by an oral agreement for a term of one year, for $200 rental per month. After service on defendants of an alleged 30-day notice to terminate the lease, under Section 789 of the Civil Code, and a three-day notice pursuant to Section 791 of the Civil Code, this suit was commenced for possession of the property and to recover $200 rental per month while it was unlawfully withheld from the owners after the tenancy was terminated. A general demurrer to the complaint was overruled. The court adopted findings favorable to plaintiffs in every essential respect. Judgment was rendered awarding plaintiffs possession of the property, and for $200 rental for each month the property was detained from the owners after the lease was terminated by said notices. A motion for new trial was denied. A motion to set aside the judgment under Section 473 of the Code of Civil Procedure was also denied. From the judgment and order this appeal was perfected.

The appellants contend that the demurrer was erroneously overruled, because the complaint fails to state a cause of action on account of defective and ineffectual notices to terminate the lease; that the findings and judgment are not supported by the evidence; that the court erred in refusing to set aside the judgment, and that plaintiffs are estopped from terminating the lease because defendants were induced to purchase the stock of goods and lease of the previous lessees, Mr. and Mrs. Stellmon, by promising defendants that if they bought the goods and lease plaintiffs would consent to an assignment of that lease.

The court found that plaintiffs leased the store building to defendants May 1, 1945, by verbal agreement "for a term of one year, commencing on the 1st day of May, 1945, at a rental of $200.00 per month, payable in advance on the 1st day of each month;" that defendants took possession of the premises on April 30, 1945, and still remain in possession; that notices to terminate the lease under Section 1161 of the Code of Civil Procedure, and for possession of the property under Section 791 of the Civil Code, as alleged in paragraphs VI and VII of the complaint, were served; that defendants purchased the stock of goods and store fixtures from Mr. and Mrs. Stellmon, the former lessees, for $5,500; that defendants did not purchase said stock of goods, or take possession of said premises, in reliance on any inducement or promise on the part of plaintiffs to consent to the Stellmons' assignment of their lease; that said consent was not given as required by the terms of the lease, and that said lease was not assigned; that plaintiffs were entitled to possession of the premises from and after September 1, 1946, and to damages in the sum of $200 per month "since the termination of defendants' verbal lease on May 1, 1946." Judgment was rendered accordingly.

Plaintiffs own the store building and certain fixtures and equipment contained therein, located at Merced. June 22, 1944,

they leased the property to Mr. and Mrs. Stellmon, for a term of five years, at $200 rental per month, payable in advance. That instrument provided that the property should not be sublet, or the lease assigned, without the written consent of the lessors. No written consent to the assignment of the lease or to the subletting of the store property was ever made by plaintiffs. In the spring of 1945, Stellmon decided to give up the store business and to move out. The defendants then owned and operated a store at El Nido. Mr. Alves and Mr. Rodrigues are half brothers. Mr. Alves told defendants that when the Stellmons moved out, they could have the store if they bought the lessees' stock of goods. There is a conflict of evidence regarding the terms upon which Alves orally told defendants they could rent the store property. He testified that he first told the defendants he wanted $250 rental per month, but that he later agreed to accept $200 per month. No written lease, however, was executed, although Mr. Alves prepared and delivered a proposed written lease "on a strict month to month basis, commencing on May 1st, 1945" at the rental of $200 per month, which was rejected by defendants, and was never signed. Nor was the assignment of the Stellmons' lease consented to in writing by plaintiffs. It was returned to plaintiffs for that purpose when the Stellmons sold out their business, and it was destroyed by plaintiffs on May 2, 1945, at the store, in the presence of Mr. Stellmon and the defendant, Joe Rodrigues. Rodrigues saw them burn the lease and protested against that act. That was the day after defendants took possession.

Defendants bought the stock of goods and fixtures from the Stellmons for $5,500 on April 30, 1945. The receipt for that payment recites that it was "as full payment for all merchandise on premises plus a four year lease." Defendants received a bill of sale of the stock of goods. They contend that they were induced to purchase the stock of goods and lease from the Stellmons for $5,500 on plaintiffs' promise that, if they did so, plaintiffs would consent to the assignment and accept them as lessees for the balance of the unexpired term of the lease, which plaintiffs subsequently failed and refused to do. Mr. Alves was in the store when defendants took possession on the first day of May, 1945. He remained and worked in the store for the defendants, cutting meat for a brief period of time. The defendants took charge of the store with plaintiffs' consent. We assume, as the trial court determined, that plaintiffs orally leased the store property to defendants for the period of one year, commencing on May 1, 1945, at the rental of $200 per month, payable in advance. Mr. Alves testified that he told Mr. Rodrigues that "for one year [commencing with May 1, 1945] he could stay." It satisfactorily appears that the oral lease for a year was made. Trouble soon arose between the parties over the terms of the lease. Defendants insisted on a five year lease at $200 per month. At the request of plaintiffs they paid their rent monthly by depositing their checks for said sum to the credit of plaintiffs' account in their bank. It is not disputed that said rent was paid for each month to and including May, 1946.

May 1, 1946, plaintiffs served the defendants with a written 30-day notice, pursuant to Section 789 of the Civil Code, to terminate the lease. Plaintiffs concede they were paid by the defendants, and accepted, $200 per month as rental, to and including the month of May, 1946. The notice to terminate the lease is attached to the complaint as Exhibit A, and reads, in part:

"You * * * are hereby notified and required to remove from, and deliver up to the undersigned the possession of the premises, * * * at the expiration of the thirty day period commencing on the 1st day of May, 1946, and ending on the 31st day of May, 1946.

"This is a notice to quit and remove from the above described premises for the purpose of terminating your tenancy on the last mentioned date."

Section 789 of the Civil Code provides that: "A tenancy or other estate at will, however created, may be terminated by the landlord's giving notice in writing to the tenant, in the manner prescribed by section 1162 of the Code of Civil Procedure, to remove from the premises within a period of

not less than thirty days to be specified in the notice."

June 1, 1946, plaintiffs served the defendants with a written three-day notice under Section 791 of the Civil Code of intention to re-enter the property. That notice reads in part:

"You and each of you are hereby required and notified to quit and vacate the hereinafter described premises * * * within three (3) days after the service of this Notice upon you, under penalty of law.

"This Notice is intended to supplement the Thirty Day Notice Terminating your tenancy, which was served upon you on May 1st, 1946, and pursuant to the terms of which your tenancy terminated on May 31st, 1946."

Subdivision 3 of Section 1161 of the Code of Civil Procedure provides in part that a tenant of real property is guilty of unlawful detainer, "When he continues in possession, * * * after a neglect or failure to perform other conditions or covenants of the lease or agreement under which property is held, including any covenant not to assign or sublet, than one for the payment of rent, and three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him * * *."

[1] We conclude that foregoing 30-day notice for the defendants to surrender possession of the premises "at the expiration of the thirty day period * * * ending on the 31st day of May, 1946," was adequate to confer jurisdiction on the court to terminate the oral lease. The trial court determined that the notice was adequate. We may concede that the subsequent three day notice which was served under Section 791 of the Civil Code was merely supplemental to the 30-day notice, as it states, and that it added nothing of value thereto. That notice was unnecessary. The action was not commenced until the 6th day of June, 1946. The giving of the statutory notice to terminate the one year lease was, of course, a necessary prerequisite to the right to maintain this action. No rental was accepted by plaintiffs after the month of May. The defendants deposited in a bank their checks for rental for the following months of June, July and August, but those payments were rejected by plaintiffs. The plaintiffs had a right to terminate the tenancy upon the giving of notice as required by Section 789 of the Civil Code, which they did.

[2] The appellants contend they took possession of the store property for the unexpired term of the written five year lease to the Stellmons, acquired with the purchase of the stock of goods, and that plaintiffs are estopped from denying the validity of that lease because they induced the defendants to buy the stock of goods by promising them they would agree in writing to the Stellmons' assignment of their lease if the defendants would purchase their goods, which defendants did, relying on that promise. The Stellmon lease contained the provision that it could not be sold or assigned without the written consent of the owners. Plaintiffs' consent to that assignment was never given in writing or otherwise. The Stellmon lease was burned and destroyed by Mr. Alves, in the presence of Joe Rodrigues. Mr. Rodrigues admitted that fact. The court adopted findings to the effect that plaintiffs did not induce the defendants to purchase the Stellmon stock of goods by promising them they would consent to an assignment of the former tenants' written lease, that the defendants did not purchase the stock of goods in reliance upon any such alleged promise, and that written consent to the assignment of the lease was not made. There is a conflict of evidence regarding the alleged inducement for defendants to purchase the goods. It is not contended on appeal that the assignment of the lease was ever actually made, or that the plaintiffs consented thereto in writing. In fact, the written lease was destroyed in the presence of Mr. Rodrigues, as he admitted at the trial. Mr. Alves testified that he never consented orally or in writing to lease the property to the defendants upon any terms other than a month to month tenancy. In view of the conflict of evidence, we are bound by the foregoing findings.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

## HOUSMAN v. BOARD OF MEDICAL EXAMINERS et al.

No. 13432.

District Court of Appeal, First District, Division 1, California.

March 11, 1948.

Rehearing Denied April 10, 1948.

See 192 P.2d 45.

**1. Administrative law and procedure ⇐511 Mandamus ⇐15**

An applicant for restoration of license to practice medicine waived issues involved by making a second application after denial of the first, so that court properly sustained demurrer to cause of action in proceeding for writ of mandate based on the first application.

**2. Mandamus ⇐172**

In mandamus proceeding to review Board of Medical Examiners' denial of application for restoration of license to practice medicine and surgery, court could consider entire record of board on hearing of order to show cause.

**3. Mandamus ⇐173**

In mandamus proceeding to review Board of Medical Examiners' denial of application for restoration of license to practice medicine and surgery, applicant is not entitled to trial de novo.

**4. Mandamus ⇐173**

In reviewing action of state-wide administrative board on application of issuance of license or for restoration of revoked license, court will not grant trial de novo, but in reviewing action revoking license, court will grant trial de novo.

**5. Mandamus ⇐173**

In mandamus proceeding to review Board of Medical Examiners' denial of application for restoration of license to practice medicine and surgery, applicant is entitled to formal hearing on Board's record filed in court pursuant to demand in order to show cause, and to examination of record by court although not to a reading of entire record in open court, and applicant must be given opportunity to point out in record the matters showing Board's arbitrary action, but applicant cannot introduce evidence or submit to court anything not before Board. Code Civ. Proc. § 1094.5, and (c).

**6. Mandamus ⇐170**

In mandamus proceeding to review order of Board of Medical Examiners denying application for restoration of license to practice medicine and surgery, answer to petition need not be filed by Board on hearing of order to show cause to enable court to determine matters presented by order. Code Civ.Proc. § 1094.5.

**7. Mandamus ⇐176**

In mandamus proceeding to review order of Board of Medical Examiners denying application for restoration of license to practice medicine and surgery, case must be returned to Board to consider evidence necessary to complete determination by Board of application and improperly excluded by Board. Code Civ.Proc. § 1094.5.

**8. Mandamus ⇐173**

In mandamus proceeding to review order of Board of Medical Examiners denying application for restoration of license to practice medicine and surgery, applicant received fair hearing on order to show cause, where trial judge considered and passed upon all the points presented to him by applicant in oral argument and in briefs and trial judge studied Board's record in light of contentions made by applicant.

**9. Mandamus ⇐168(4)**

Board of Medical Examiners' denial of application for restoration of license to practice medicine and surgery cannot be set aside by court in mandamus proceeding if Board's findings are supported by substantial evidence in light of whole record, notwithstanding that denial is not supported by weight of evidence. Code Civ. Proc. § 1094.5, and (c).

**10. Mandamus ⇐172**

In mandamus proceeding to review order of Board of Medical Examiners' denying application for restoration of license to practice medicine and surgery, all testimony before Board must be reviewed to determine whether Board's findings are

supported by substantial evidence in the light of the whole record. Code Civ.Proc. § 1094.5, and (c).

**11. Physicians and surgeons ⇐11(3)**

In proceeding before Board of Medical Examiners for restoration of license to practice medicine and surgery, applicant must prove that he has rehabilitated himself and is entitled to have his license restored.

**12. Physicians and surgeons ⇐11(3)**

Evidence that applicant since his discharge from prison had devoted himself exclusively to looking after family affairs and had not worked or contributed to war effort was insufficient to show such rehabilitation as warranted restoration of his license to practice medicine and surgery by Board of Medical Examiners, notwithstanding that applicant had Superior Court certificate of rehabilitation. Business and Professions Code, § 2376.5.

**13. Mandamus ⇐187(9)**

On review of judgment in mandamus proceeding sustaining order of Board of Medical Examiners denying application for restoration of license to practice medicine and surgery, District Court of Appeal could grant applicant the relief sought only if such court could find from the record that as a matter of law the finding and decision of the Board was without support in the evidence.

**14. Physician and surgeon ⇐11(3)**

Board of Medical Examiners is vested with discretion in determining whether license to practice medicine and surgery should be restored.

---

Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

On rehearing.

Judgment and order affirmed.

Prior opinion, 186 P.2d 187.

Booth B. Goodman, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for respondents.

BRAY, Justice.

Subsequent to the filing of our opinion a rehearing was granted and respondents were permitted to augment the record. As an examination of the augmented record discloses that, as shown hereafter, the trial court did not err in denying the amended petition for writ of mandate, we do not deem it necessary to discuss the matters raised concerning the action of the court in sustaining the demurrer without leave to amend, other than as to the first alleged cause of action.

[1] The amended petition contained two causes of action. The first alleges that on October 18, 1943, the respondent Board of Medical Examiners denied arbitrarily, in abuse of their discretion and without any evidence contrary to that produced by petitioner as to his good moral character and his ability in medicine and surgery, except some newspaper reports allegedly considered by the board after submission, an application theretofore made by petitioner for the restoration of his license. The court was right in sustaining the demurrer to the first cause of action, which dealt with a prior application for and denial of restoration of license, as the issues therein involved are moot and waived by petitioner's failure to litgate them before, and by making a second application.

The second cause of action referred to a second application to the Board of Medical Examiners for restoration of petitioner's license to practice medicine and surgery which had been revoked in 1941 because of his conviction of "a felony, to-wit: perjury; preparing false evidence; and presenting false evidence." It alleged his incarceration at San Quentin, his release in December, 1942, his claimed rehabilitation, and then alleged that on October 18, 1943, the board had arbitrarily and in abuse of its discretion denied his application for restoration of his license, and asked the court to issue a writ of mandate to compel the board to restore it.

[2] The original petition was filed in December, 1945. Based on this petition, on October 30, 1946, an order to show cause was issued, commanding respondents immediately after its receipt to restore the

right of petitioner to practice medicine and surgery, or to show cause before the court on November 14 why they had not done so, and that they "certify at said time and place, petitioner's application, written communications, minutes of the Board, the record, motions, votings and proceedings of said case and that the same will be inquired into by this Court." On November 27 a demurrer was sustained to this petition. On December 4 the amended petition above mentioned was filed. The case came on to be heard on December 18, and respondents, answering the order to show cause, filed a demurrer to the amended petition. While respondents contend that the court had the right to consider, in passing on the demurrer, the entire board record (a matter upon which, as before stated, we do not deem it necessary to pass), the court did have the right, in determining whether the respondents had shown cause why they had not restored petitioner's license, to consider the entire record of the board, which had been brought before it in response to the order to show cause drawn and obtained by the petitioner.

The main contention made by petitioner at the hearing, so far as the proceedings outside the consideration of the demurrer were concerned, was that in a judicial review of the board's refusal to restore his license, the petitioner was entitled to a trial de novo, or at least to introduce additional evidence, rather than be limited to an examination by the court of the board's proceedings as shown by the full record. In view of this, it becomes necessary to determine, first, if in this type of judicial review a trial de novo is proper, and secondly, if it is not, what is the proper type of procedure.

No Trial de Novo.

[3, 4] Whether on the hearing of an order to show cause or on a hearing after answer filed, the petitioner asking for judicial review of the action of the medical board in refusing to restore a revoked medical license is not entitled to a trial de novo. The following cases, McDonough v. Goodcell, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205; McDonough v. Garrison, 68 Cal. App.2d 318, 156 P.2d 983; Hansen v. State Board of Equalization, 43 Cal.App.2d 176, 110 P.2d 453; San Diego Cotton Club v. State Board of Equalization, 139 Cal.App. 655, 34 P.2d 749; Glick v. Scudder, 69 Cal.App.2d 717, 160 P.2d 90, have established the rule that the court in reviewing the action of a statewide administrative board under an application for issuance of a license is not entitled to grant a trial de novo, as is the rule in cases of revocation of license. It is elementary that a person seeking restoration of a revoked license has no greater rights than a person seeking an original license. In re Mash, 39 Cal.App. 548, 179 P. 897. The rule of Laisne v. California St. Bd. of Optometry, 19 Cal.2d 831, 123 P.2d 457; Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304; Wyatt v. Cerf, 64 Cal.App.2d 732, 149 P.2d 309, concerning revocation of licenses, does not apply.

Proper Procedure.

[5-7] While petitioner was not entitled to a trial de novo, he was entitled to a formal hearing on the record of the administrative board. The record was in court, brought and filed there pursuant to the demand in the order to show cause as authorized by section 1094.5 of the Code of Civil Procedure. On the hearing of the order to show cause it was not necessary, as claimed by petitioner, that an answer to the petition be filed, in order for the court to determine the matters presented by the order. Brown v. Superior Court, 70 Cal.App. 732, 234 P. 409. Under subdivision (c) of section 1094.5, the court is limited to a determination of whether the board's findings are "supported by substantial evidence in the light of the whole record." The court must then, if the record is present, on the hearing of the order to show cause, examine the record. This does not mean that the entire board record must necessarily be read in open court; but a fair and full opportunity must be given petitioner to point out in the record the matters that he claims show the arbitrary action of the board. The petitioner, however, is not entitled to offer evidence, nor submit to the court anything which was not before the board. If the board improperly

excluded evidence, and the court, having in mind that the petitioner must affirmatively prove rehabilitation, determines that such evidence was necessary to a complete determination by the board of the application, then the case would have to be returned to the board to consider that evidence.

Section 1094.5 of the Code of Civil Procedure provides that in mandate proceedings of this character "all or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, may be filed with the respondent's points and authorities or may be ordered to be filed by the court. * * * (b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. (c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record."

Did Petitioner Receive a Fair Hearing?

[8] An examination of the proceedings in the court below shows that petitioner did receive a fair hearing. There was an oral argument, at which petitioner was given an opportunity to, and did, present his objections to the court proceeding and his contentions as to the alleged abuse of discretion by the administrative board. Petitioner also presented to the court a "Memorandum on Law Applicable to Petitioner's Case." Moreover, petitioner was permitted at the hearing, over the objection of the respondents, to file an affidavit by a person whom the board had refused to allow to testify concerning the alleged insanity of one of the witnesses against petitioner. The affidavit contained the testimony she would have given had the board permitted her to testify. Moreover, when the case was submitted for decision, the court allowed "10 days to file points and authorities, affidavits and offer of proof." No limitation was placed on the amount or nature of the questions to be considered in the briefs. Petitioner submitted with his final points and authorities the affidavit of one Dr. Cerf, in support of his claim that the board, as to the first application, had considered certain newspaper clippings. As pointed out before, in this type of proceeding, evidence other than that received by the board cannot be considered. Yet, the petitioner had the benefit of such evidence here. Of course, the court should determine whether the board improperly refused to admit relative evidence offered. If it did, the court cannot receive such evidence in this type of proceeding, as there is no trial de novo, but must send the case back to the board with instructions to receive such evidence.

The memorandum opinion of the judge shows that he considered and passed upon all the points presented to him by petitioner in his oral argument and in his briefs, and that he studied the board's record in the light of the contentions made by petitioner.

Petitioner cannot now contend that he was denied an opportunity to question the sufficiency of the record before the board. At the time of the hearing, petitioner's main contention was that he was entitled to a trial de novo. Although petitioner did not confine himself entirely to that contention, he is somewhat in the position of the petitioner in Dare v. Board of Medical Examiners, supra, 21 Cal.2d 790, 794, 136 P.2d 304, 306: "The petitioner may not now contend that he was not accorded the right to question the sufficiency of the record before the board, if it had been produced. * * * The record shows that the court offered him such an opportunity but he declined to so proceed on the ground that he was entitled to a trial anew with-

out the introduction of the record before the board."

Were the Board's Finding Supported?

[9-11] This brings us to the merits of the proceeding. Both this and the trial court are limited to a determination of whether the board's findings are "supported by substantial evidence in the light of the whole record." (Sec. 1094.5(c), Code Civ.Proc.) If there was such substantial evidence the court has no power to set aside the judgment of the board even though such judgment was not supported by the weight of the evidence. McDonough v. Goodcell, supra, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205. In determining this question, which requires an examination of all the testimony before the board, it is important to bear in mind that in a proceeding for the restoration of a revoked license, the burden at all times rests on the petitioner to prove that he has rehabilitated himself and is entitled to have his license restored, and not on the board to prove to the contrary.

"In a proceeding for reinstatement 'The burden of proof is upon the one who seeks, after disbarment, to accomplish a restoration to the ranks of the legal profession, and, before the court may grant the petition for reinstatement, it must be satisfied and fully convinced by positive evidence that the effort he has made toward rehabilitation of his character has been successful. In re Cate, 77 Cal.App. 495, 247 P. 231; In re Nisbet, 77 Cal.App. 260, 262, 246 P. 120. It is only reasonable that the person seeking reinstatement, after disbarment, should be required to present stronger proof of his present honesty and integrity than one seeking admission for the first time whose character has never been in question. In other words, in an application for reinstatement, although treated by the court as a proceeding for admission, the proof presented must be sufficient to overcome the court's former adverse judgment of applicant's character.' [Citing cases.]" Maggart v. State Bar, 29 Cal.2d 439, 443, 444, 175 P.2d 505, 507.

" 'One who has been disbarred for acts involving a high degree of moral turpitude --and those committed by petitioner were of that character—"should not be reinstated in the ranks of the legal profession except upon the most clear and convincing, may, we will say upon overwhelming, proof of reform," proof which we could with confidence lay before the world in justification of a judgment again installing him in the profession. * * *' [Citing cases.]" Wettlin v. State Bar, 24 Cal.2d 862, 869, 151 P.2d 255, 259. It goes without saying that the same rule would apply to a person seeking reinstatement in the medical profession.

As said in the Maggart case, supra at page 443, of 29 Cal.2d, at page 507 of 175 P.2d: "The only issues which may now be presented by [petitioner] concern his activities since his disbarment and his present moral qualifications, ability and learning * * *."

Assuming, but not deciding, that, as contended by petitioner, there was no showing contrary to the evidence produced by petitioner, and that the board erred in admitting and refusing to admit certain evidence the record still fails to disclose that "clear and convincing * * * proof of reform" (Wettlin v. State Bar, supra), which petitioner undertook the burden of producing. The evidence which the board refused to admit was not in proof of petitioner's case, but to overcome certain evidence against petitioner, so its non-admission does not affect this question.

In addition to a superior court certificate of rehabilitation, letters and testimony of a number of doctors, former patients and acquaintances of petitioner, were admitted to the effect that in their opinion petitioner was honest, conscientious, skillful, competent and ethical in his profession. All recommended his reinstatement. These witnesses, for the most part, showed a very limited knowledge of his activities and associates since his release from prison, their contacts being confined to infrequent meetings of a casual nature. We may assume that for the purposes of this opinion the showing was sufficient to establish petitioner's ability and learning in medicine, and the belief of these persons, from their limited contacts with him, that he was morally qualified. However, petitioner's own actions since his release from prison are the essential criterion to judge whether

he has so rehabilitated himself as to compel his readmission to the medical profession. "While letters of recommendation are admissible in proceedings of this character, neither such letters nor the testimony of witnesses as to the good character of petitioner, however numerous or laudatory, can overcome the direct and positive evidence as to petitioner's character." Wettlin v. State Bar, supra, at page 869, of 24 Cal.2d, at page 259 of 151 P.2d.

Section 2376.5 of the Business and Professions Code provides that among other matters the board are to consider on a hearing of this kind are "all activities of the petitioner since the disciplinary action was taken against him." Since his release in December, 1942, petitioner's activities have been definitely negative. According to his own testimony, he has had no employment of any kind. When asked, "And how would you characterize your activities as far as business is concerned during this interval since you left San Quentin?" he replied, "I have been attending to my own business, if that is what you mean." He spent considerable time in the study of medicine, devoted himself primarily to taking care of his own financial affairs, such as mining interests, his father's estate and income tax adjustments, requiring trips away from San Francisco, to Texas, Los Angeles and Sacramento.

[12] Considering petitioner's evidence as a whole, it would not appear to warrant or compel a determination that there was an abuse of discretion by the board in finding that he had not affirmatively shown rehabilitation. The recommendations in his favor were general in nature and presented no evidence of particular activities indicating a rehabilitation since his release from prison. A number of the authors were summoned as witnesses by the respondents and on cross-examination nearly all indicated that they did not base their recommendations on any relationship or knowledge of petitioner's conduct since the revocation of his license, tending affirmatively to show rehabilitation.

While petitioner lays stress upon the fact that he had obtained a superior court certificate of rehabilitation, that certificate in itself does not satisfy the burden resting on him, any more than proof of a pardon does. A pardon "does not restore his character and cannot reinvest a person with those qualities which are absolutely essential for an attorney at law to possess or rehabilitate him in the trust and confidence of the court." In re Lavine, 2 Cal.2d 324, at page 329, 41 P.2d 161, 163, 42 P.2d 311; to the same effect, Wettlin v. State Bar, supra, 24 Cal.2d 862, 869, 151 P.2d 255.

During the war period, when there was a tremendous shortage of manpower in war work, in industry, in business and in all lines of endeavor, petitioner contended himself with looking after his own financial interests, in enjoying himself at his club and the race track. While, in view of the cloud over him, it may not have been advisable for him to engage in work allied to the practice of medicine, and even though unskilled in any other line, petitioner could have found employment, as did thousands of others of his age and lack of skill, in war or other work. There is no evidence that in any way petitioner contributed to the war effort. Other than employment, there were any number of volunteer agencies, such as War Chest, Salvation Army, Red Cross, and agencies of a commercial, educational, and charitable type, etc., that would have welcomed his services. While petitioner stated to the board that he desired his license restored so that he could offer his services as a physician to the armed forces, it was necessary for him first to demonstrate his real desire to help his country and to prove his own moral qualification to accept such a position by engaging in some work or voluntary service, while awaiting the time when his license might be restored to him.

Petitioner testified that since October, 1944, his mother was ill and that he cared for her. This might partially explain his inactivity. However, he stated that his personal affairs consumed "some times three or four hours a day" and he appears to have had time to "fool around," play cards, go to the beach and the races and make several trips requiring as long as three or four weeks on business involving his mining and other interests. Viewing the evi-

dence in a light most favorable to petitioner, it would seem that, at most, it can only be said that since his release he has committed no further offenses and has been involved in no trouble. Rehabilitation would appear to require some positive action.

Contrast petitioner's life with that shown by the petitioner in Re Andreani, 14 Cal. 2d 736, 97 P.2d 456. "* * * upon occasion, throughout the past six years, he has accepted very humble employment, at modest wages—at times as low as $12 per week; * * * for a considerable portion of that period he has given largely of his services, gratuitously, to divers civic and public projects which have had for their aim the solution of problems relating to 'unemployment relief' and other 'rehabilitation' programs." page 748 of 14 Cal.2d, page 462 of 97 P.2d.

[13, 14] A man who has had his medical license revoked for the commission of a felony cannot stand idly by when his country is in dire peril, contribute nothing in the way of services, and then successfully contend that he has so rehabilitated himself as to compel the restoration to him of his license. For this court to grant petitioner the relief sought, we must find from the record that as a matter of law the finding and decision of the board is without support in the evidence. Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 P. 35. The board is vested with discretion in determining the question presented to it. Dare Board of Medical Examiners, supra, 21 Cal.2d 790, 796, 136 P.2d 304. "The petitioner is not entitled to the [issuance of an alternative] writ [of mandate] as a matter of right, but its issuance involves consideration of its effect in promoting justice." Sipper v. Urban, 22 Cal. 2d 138, 137 P.2d 425, 426. In view of the completely negative type of activity followed by petitioner since his release, we cannot say that the board abused its discretion in refusing to restore his license.

We adopt the following language of the trial court: "While the Court looks with favor on the rehabilitation of an individual, and feels that one in Petitioner's status should be given every encouragement in effecting a rehabilitation and securing a reinstatement of his medical license, yet the burden is always on the Petitioner to show such a reformation and rehabilitation. It may be helpful to Petitioner, with an eye to the future, to point out that he must build a case of rehabilitation in a positive fashion. * * * His contacts and course of conduct should be such as to leave no doubt of his sincerity to again become a useful member of the medical profession. The Court does not feel that his past record and conviction of a felony should in and of itself bar him from securing a reinstatement of his license at some future time when he is able to make a fair and complete showing of rehabilitation."

The judgment and order appealed from is affirmed.

PETERS, P. J., and WARD, J., concur.




84 Cal.App.2d 323

**In re ERSKINE'S ESTATE.**

**ERSKINE v. ERSKINE.**

**Civ. 3587.**

District Court of Appeal, Fourth District, California.

March 12, 1948.

Hearing Denied May 10, 1948.

**1. Descent and distribution ⇐75**

Where deed to property to be sold is placed in escrow and vendor dies before the happening of the event or performance of the escrow conditions the legal title descends to heirs of vendors subject to the purchaser's equitable interest.

**2. Wills ⇐77**

Will takes effect as of the date of death of the deceased.

**3. Wills ⇐767**

Where testator devised his interest in a partnership to his daughter and residue to his widow and subsequently con-

tracted to sell part of partnership property and placed grant deed and bill of sale in escrow but died before escrow conditions had been complied with, devise was not adeemed by reason of the purported sale, and devisee was entitled to proceeds from sale as against the widow. Probate Code, §§ 77, 78, 125; Civ. Code, § 1057.

**4. Partnership ⇐249**
**Wills ⇐587(5)**

Where testator devised partnership property to his daughter and residue to his widow and on death of testator surviving partner withdrew all funds in partnership savings account and deposited one-half of funds in account with executor pursuant to statute requiring a surviving partner to settle partnership affairs and pay executor the amount payable in right of testator, daughter was entitled to interest of testator in proceeds of savings account as against widow contending that since the account was opened in joint tenancy title to one-half interest deposited with executor vested in surviving partner, and since payment to the estate was voluntary, the widow was entitled to it under the residuary clause of will. Probate Code, § 571.

---

Appeal from Superior Court, Fresno County; Arthur C. Shepard, Judge.

Proceeding in the matter of the estate of James Ralph Erskine, deceased, to determine heirship by Jessie M. Erskine against Frances N. Erskine. From an adverse judgment, Jessie M. Erskine appeals.

Judgment affirmed.

Paul Staniford and G. R. Lovejoy both of Fresno, for appellant.

Lawrence W. Young, of Fresno, for respondent.

GRIFFIN, Justice.

This is a proceeding to determine heirship, which arose over a controversy between appellant, Jessie M. Erskine, widow of James R. Erskine, deceased, and respondent Frances N. Erskine, his only child by a previous marriage. Frances' mother and father were married in 1900. The mother died in 1935. Jessie and James Erskine were married in 1941.

In 1937, Helen M. Keller and Mr. Erskine became equal partners in the "Calwa Water Works", which partnership continued until the death of Mr. Erskine on March 4, 1946. On December 24, 1942, Erskine executed a will providing in part as follows:

"Fourth. I give, devise and bequeath all of my right, title and interest in and to the Calwa Water Works unto my said daughter Frances N. Erskine; provided, however, that in the event my said daughter, Frances N. Erskine, should predecease me then and in that event I give, devise and bequeath all of my said interest in and to the said Calwa Water Works unto my said wife, Jessie M. Erskine.

"Fifth. I give, devise and bequeath all of the rest, residue and remainder of my said property, whether the same be real, personal or mixed, and wheresoever situated, unto my said wife, Jessie M. Erskine; provided, however, that in the event my said wife, Jessie M. Erskine, should predecease me then and in that event I give, devise and bequeath all of my said property mentioned in this paragraph to my said daughter, Frances N. Erskine."

On April 1, 1946, Jessie M. Erskine was appointed administratrix. On October 17, 1945, Mrs. Keller and Mr. Erskine entered into a written agreement for the sale of the "distributive system" of said water works to James D. Matthews and wife. On that same day escrow instructions were signed, specifying the conditions of sale, and were placed with the title company. Before the escrow was closed Mr. Erskine died. Two months later the sale was completed.

One of the issues presented on this appeal is whether there was an ademption of respondent's legacy as to the distributive system of the Calwa Water Works, whether she is entitled to the proceeds of the sale, or whether those proceeds passed to appellant under the residuary clause of the will.

The other issue pertains to a claimed one-half interest in the proceeds of a $5,022.54 bank account which stood in the individual names of the partners of the Calwa Water Works, as joint tenants, and claimed by respondent to be company funds.

There is very little dispute as to the factual background of this case. The original partnership agreement recites that the partners each acquired a one-half interest in the "Calwa Water Works" including a certain contract between Mr. Keller and the Atchison, Topeka & Santa Fe Railway Company. Attached to the agreement is a list of capital assets showing "buildings, machinery, wells", etc., with the net value of $20,423.75, a bank checking fund of $1,523.56, and meter deposit funds of $170, other items of petty cash, and the value of material and supplies are listed. All totaled $22,154.10. Undistributed profits and rents less operating loss, were listed as $1,849.75.

As manager, Mr. Erskine was allowed $100 per month drawing account and the profits were to be divided equally from time to time or at such intervals as might be agreed upon by the parties. For several years the entire business was conducted by that partnership. Some years a profit was shown and others a loss.

The agreement of sale of October 17, 1945, recites that "subject to approval by the Railroad Commission * * * and subject to no objections being interposed by the Atchison Topeka & Santa Fe Railway Company," sellers agree to sell and convey to the purchasers, through escrow (1) a franchise granted to Mr. Erskine to operate a system of conduits for transportation of water along certain streets in Calwa Townsite; (2) that part of Calwa Water Works now used in distributing water therein, including mains, pipe line and hydrants within a specified boundary; also lots 38 and 39, block 7 therein; tools, equipment and supplies in place pertaining to the distributive system; and specifically excluded therefrom "all cash, accounts receivable, contract with the Atchison, Topeka & Santa Fe Railway Company, water pumps, wells, water mains, stand pipes, meters, and any equipment of any kind used in furnishing water to the said Santa Fe Railway". The consideration was to be $7,500, payable $1,000 into escrow as earnest money, to be credited on the purchase price if the transaction was completed, otherwise, in case of default by purchaser, to be retained by sellers as liquidated damages. $1,000 additional was to be paid into escrow prior to the completion of the term therein fixed, in addition to the $5,500 note. Sellers agreed to deliver into escrow a grant deed to the two lots and a bill of sale covering personal property described. A deed of trust on the two lots was then to be executed by the buyer as security for the $5,500 promissory note, and a chattel mortgage was to be given as additional security and was to cover all of the personal property mentioned, as well as *additional personal property in the form of equipment* for or improvement of said water distributing system which buyer agreed to purchase during the *term of the escrow.* It was agreed that the term of the escrow should commence as of the date of the agreement and end 60 days after seller mailed notice to the buyer that the Railroad Commission had granted permission for the consummation of the sale, and that the Atchison, Topeka & Santa Fe Railway Company had not interposed objections to said sale. It was then specifically agreed that upon such written notice, the buyer would "at once * * * proceed to obtain and to install on the aforesaid real property, a well and pump which shall be the source of water" for the system at the approximate cost of $2,500 and to lay such mains as would be necessary to connect therewith at buyer's expense. Sellers were to deliver into escrow their guarantee that for four years after date thereof they would furnish water to buyers, in event of emergency involving inability of buyers to produce water from their own well to be installed by them. Buyers were to assume operating control as of the day following the close of the escrow. This agreement, by specific reference thereto, was made a part of the escrow instructions. In addition they provided that "If you are unable to comply with these instructions prior to the expiration of sixty

days after notice as per agmt above referred to * * * you are instructed to comply with the same within such additional time as may be required by you, unless a demand is written and delivered to you (subsequent to such expiration and prior to the filing of any document required in this escrow) by any party who has signed this escrow, for the return of the money and documents to the parties who deposited same with you."

On January 18, 1946, Mr. Staniford, representing the sellers, delivered to the escrow holder a grant deed, bill of sale and stand-by agreement to furnish emergency water supply. He authorized it to deliver them *when* the escrow holder held for the seller $2,000 and *when* it could forward to him promissory note for $5,500, the trust deed and chattel mortgage and *when you have placed the same of record.* Also included in the list was the stand-by agreement and agreement dated October 17, 1945. Added to this communication is a clause: "These instructions may be revoked and the documents deposited herewith may be withdrawn if this escrow is not completed by February 21, 1946."

On the same day, Mr. Staniford, representing the Matthews, wrote a similar letter to the escrow holder, delivering to it a note for $5,500, deed of trust, chattel mortgage and stand-by agreement with authority to it to deliver them to sellers plus the additional $1,000 to be deposited in escrow prior to February 21, 1946, *when the escrow holder has "placed of record* the deed", and delivered the "policy of title insurance and *bill of certain personal property* * * *." The letter contained a similar clause that these instructions may be revoked and documents withdrawn if the escrow is not completed by February 21, 1946.

The parties applied to the Railroad Commission for, and were, on December 14, 1945, granted a written order authorizing the transfer. All the details in reference thereto were set out. Therein it was specifically stated that "The testimony shows that the purchasers will immediately upon the granting of this application make arrangements for the installation of a new well, pump and pressure system of sufficient capacity to render adequate service. It is expected that this installation, *which is a condition precedent to the transfer of the properties,* will be completed in sixty days." (Italics ours.)

It was stipulated and it clearly appears from the evidence that prior to the death of Mr. Erskine on March 4, 1946, the pumps and other additional utilities to be included in the chattel mortgage had not been purchased and installed, and that the well and the installations above mentioned had not been completed. On March 1, 1946, Mrs. Keller's agent, H. C. Nicholson and Matthews wrote the title company: "Do not record papers until * * * (we) * * * direct you to do so". After Mr. Erskine's death the above mentioned installations were completed. On April 10, 1946, Nicholson wrote the title company that when they had evidence that "the water supplied to the distributive system of Calwa City comes from the water supply recently created by Mr. and Mrs. J. C. Matthews, and the water supply coming from the pumping system on the Santa Fe right of way has been shut off, you may proceed with the closing of said escrow." A marginal notation beside this clause in the letter shows: "5-8-46 Completed." Signed "J. D. Matthews".

On May 13, 1946, the title company requested Mr. Staniford to have executed a new deed from the Calwa Water Works, showing the grantor to be Calwa Water Works, *a copartnership which acquired title as the Calwa Water Co.,* with a partnership form of acknowledgment, and also asked him to file a statement of partnership with them. The original deed was accordingly corrected and thus acknowledged by Mrs. Keller on behalf of the partnership on *May 20,1946,* after the death of Mr. Erskine.

The manager of the title company testified that this correction and new certification was necessary "in order to clear the title" and "for convenience in issuing the title policy".

It is undisputed that the deed was not recorded until May 23, 1946, and the chattel mortgage and trust deed until May 24, 1946.

Mrs. Keller continued to operate the water works and distributing system up to May 1, 1946, and collected, for the partnership, all money earned during that period. The new well was not "cut into the system" until about May 8th, although the purchasers took over the system on May 1st. After the escrow was closed the title company paid to the executrix $800.72 from the sale. The executrix thereafter included this amount and a one-half interest in the $5,500 note, as well as the cash ($2,511.27), drawn from the joint bank account and turned over to her by Mrs. Keller. The inventory likewise showed the entire value of the estate to be $49,782.23. $15,000 of this amount was the value of the remaining property of the Calwa Water Works going to Frances N. Erskine under paragraph 4 of the will. There was also joint tenancy property held by Mr. and Mrs. Erskine valued at $17,500.

The legal question involved here, under the evidence presented, is whether or not the portion of the specific bequest to Frances N. Erskine in and to the interest of her father in the Calwa Water Works was deemed by virtue of the purported sale.

The trial court found generally in accordance with the facts above related and specifically found that the installation of a water well and pump which was to be made a source of supply for the distributing system involved in the sale and the laying of the mains at the expense of the purchasers was a condition to be performed under the escrow instructions *before* delivery of the necessary papers and instruments in escrow to the rightful parties was to be made; that the purchasers did not own nor have in their possession such additional personal property at the time of Mr. Erskine's death; that they had not at that time installed said well or any of said equipment; that it was not installed until the latter part of April, 1946; that at the time of his death title to said distributive system had not passed to the purchasers and that title, at that time, was in Mr. Erskine and Mrs. Keller, in equal shares; that it was the intention of the sellers that title thereto should not pass until the purchaser had installed said pump and other equipment; and that title to the property here involved did not pass until on or about May 1, 1946.

Section 77 of the Probate Code provides: "Property passing by will: Contracts of testator. An agreement made by a testator for the sale or transfer of property disposed of by will previously made, does not revoke such disposal; but the property passes by the will, subject to the same remedies on the testator's agreement, for a specific performance or otherwise, against the devisees or legatees, as might be had against the testator's successors, if the same had passed by succession."

Section 78 of the Probate Code provides in part: "Neither a charge * * * nor a conveyance, * * * by which his interest in any such property is altered, but *not wholly divested,* is a revocation of the disposal; but the property, subject to such charge or encumbrance, or the remaining interest therein, passes by the will." (Italics ours.)

The general rule is stated in 26 Cal.Jur. 1026, sec. 307: "If, by contract, mortgage or other act of the testator, the latter's ownership or interest in the property was altered, but not wholly divested, the devise or bequest is not extinguished or adeemed, unless it appears that the testator intended to nullify or revoke the gift. If the testator entered into an agreement for the sale of the property, the devisee takes the title subject to the obligation of the contract; nor is the devise extinguished or adeemed unless the sale was fully consummated by the testator *previously to the latter's death.*" (Italics ours.)

Appellant relies strongly upon In re Estate of Dwyer, 159 Cal. 664, 115 P. 235, but in that case the real property agreed to be sold was not specifically mentioned in the will and further, the contract of sale had become fully executed on behalf of the purchasers and they were entitled to a deed some time before the decedent's death.

In the instant case the purchaser was still required to perform his part of the agreement and was not entitled to a deed or bill of sale until he had fully performed. Appellant also argues that the undisputed facts show an equitable conversion of the property from the time the sellers entered into the agreement to sell, because the terms of the agreement had been subsquently complied with. Citing In re Estate of Dwyer, supra; McDonald v. Huff, 77 Cal. 279, 19 P. 499; and Ostrander v. Davis, 8 Cir., 191 F. 156, 159.

[1] In 21 Corpus Juris, p. 883, § 28; 30 C.J.S., Escrows, § 9, the author states the rule to be: "If the grantor dies before the happening of the event or the performance of the condition, the legal title descends to his heirs subject to the purchaser's equitable interest." See, also, Whitney v. Sherman, 178 Cal. 435, 438, 173 P. 931; Sec. 1057, Civ.Code; Holman v. Toten, 54 Cal.App.2d 309, 313, 128 P.2d 808; In re Estate of McLaughlin, 97 Cal.App. 481, 275 P. 874; In re Estate of Sorensen, 46 Cal.App.2d 35, 36, 115 P.2d 241; In re Estate of Cline, 67 Cal.App.2d 800, 805, 155 P.2d 390.

In Vierneisel v. Rhode Island Insurance Co., 77 Cal.App.2d 229, 231, 175 P.2d 63, 64, it is said: "In the present case the conditions of the escrow were not certain to happen and title did not pass until plaintiffs had complied with the conditions of the escrow and were entitled to receive the deed."

Chadwick v. Tatem, 9 Mont. 354, 23 P. 729, was a case factually similar to the instant case, and where the provisions similar to sections 77 and 78 of our Probate Code were construed. It was there said, at page 731 of 23 P.: "If the deed is inoperative until the performance of the conditions, it follows that the estate is 'not wholly divested,' and passes by the terms of the will." The finding of the trial court that there had been no equitable conversion up to the time of the death of Mr. Erskine is supported by the evidence. (6 Cal.Jur. p. 532, sec 6.)

[2, 3] A will takes effect as of the date of death of the deceased and on that date Frances N. Erskine became owner of her father's interest in the Calwa Water Works. (Probate Code section 125.) From the evidence it clearly appears that although an agreement for the sale had been signed and there had been at least a partial compliance with its terms, there were conditions of the agreement that had not been fulfilled and therefore Mr. Erskine had not been, on the date of his death *wholly divested* of his interest therein. Under the terms of this agreement and escrow, had purchasers failed to dig the well and complete the additional improvements mentioned in accordance with the agreement, the sellers would have had the right to declare a forfeiture and on a return of the property it would have passed under the will to the daughter. Therefore, it can be said, and the court properly held that Mr. Erskine had not wholly divested himself of his interest therein on the date of his death.

The evidence likewise justifies the finding that the daughter was entitled to the interest of her father in the proceeds of the savings account turned over to the executor. The fact that the funds in the savings account were, prior to Mr. Erskine's death, partnership funds, cannot be logically questioned. They were, at all times, listed in the books of the company as such, and the court so found. A letter, dated December 13, 1944, from Mrs. Keller to Mr. Erskine, asking him to open a savings account is in evidence. It shows that there was, at the time, over $3,000 in excess of the outstanding bills in their checking account. She stated that it would be prudent and good business to establish a "reserve fund against future capital expenses" in their names as "joint partners". Such a savings account was opened but it appears from the record that Mr. Erskine opened the account in "joint tenancy" subject to the right of either to deposit or withdraw funds from it. After Mr. Erskine's death Mrs. Keller withdrew all of the funds which she believed belonged to the partnership and deposited one-half thereof with the executrix, to be subjected to the administration of the estate.

Appellant argues that title to that one-half interest vested in Mrs. Keller under the joint tenancy account and that since the payment to the estate was a voluntary one respondent was not entitled to distribution thereof but that she was entitled to it under the residuary clause of the will. Citing Doran v. Hibernia Savings & Loan Society, 80 Cal.App.2d 790, 182 P.2d 630.

[4] This is not an action where the bank or the surviving depositor is a party to the action which, under section 15a of the Bank Act (Act 652, Deering's Calif. General Laws, Vol. 1, p. 210) makes such a deposit conclusive evidence of the intention to vest title to the deposit in the survivor. We are not concerned with the rule that might apply had the executrix brought an action against Mrs. Keller or the bank endeavoring to establish an one-half interest in the joint tenancy savings account. The evidence clearly establishes the fact that the partners did in fact open and maintain that account with partnership funds and under the names indicated, for the express purpose of keeping it as a reserve fund to carry on their business. These funds were not declared dividends or profits. These facts were apparently agreed upon between them. The fact that title to the savings account may have passed to Mrs. Keller upon Mr. Erskine's death did not necessarily preclude her from turning one-half of that amount into the estate as part of the property of the partnership. The character of the property, as agreed upon by the parties, did not necessarily change when Mrs. Keller, knowing that as between the partners these funds were and always had been partnership funds, turned them over to the executrix under section 571 of the Probate Code, which section provides that it is the duty of a surviving partner to settle the affairs of the partnership and account to the executor and pay over such balances as may be payable to him in right of the deceased.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.



84 Cal.App.2d 435

**ADAMS et al. v. WOLFF et al.**

**Civ. 13556.**

**District Court of Appeal, First District, Division 1, California.**

**March 19, 1948.**

**Hearing Denied May 17, 1948.**

**1. Mandamus ⇐111**

Mandamus was a proper proceeding to compel the Civil Service Commission and City of San Francisco to pay a money judgment to city machinists for the difference between actual wages paid and what such wages should have been under the city charter where other grounds for the issuance of a writ of mandate existed. St. 1946, § 151.3, p. 3266.

**2. Mandamus ⇐177**

If a judgment is otherwise correct, it is appropriate to award a money judgment in a mandamus proceeding where other grounds for the issuance for a writ of mandate exist.

**3. Municipal corporations ⇐48(2)**

Under articles of the Constitution granting home rule to certain cities and to the city of San Francisco, the provisions of a charter granted have the force and effect of legislative enactments and are the supreme law of the state with respect to the government of such chartered cities. Const. art. 11, §§ 8, 8½.

**4. Constitutional law ⇐48**

Provision of a charter established for a city under the home-rule provisions of the Constitution will not be held to be unconstitutional unless it can be clearly shown to be violative of the state Constitution, and all doubts must be resolved in favor of constitutionality. Const. art. 11, §§ 8, 8½.

**5. Municipal corporations ⇐48(2)**

A charter adopted under the "home-rule" provisions of the Constitution, like the state Constitution itself, does not constitute a "grant" of power but constitutes a "limitation" of power. Const. art. 11, §§ 8, 8½.

See Words and Phrases, Permanent Edition, for all other definitions of "Grant" and "Limitation".

**6. Municipal corporations ⇐67(1, 5)**

Hiring of employees generally by a city to perform labor and services in connection with its municipal affairs, and the payment of the city's funds for services rendered to the city by its employees in the administration of its municipal affairs, are not subject to or controlled by general laws. St.1946, § 151.3, p. 3266; Const. art. 11, §§ 8, 8½.

**7. Municipal corporations ⇐65**

Section of the San Francisco charter as amended, providing that crafts employed by the municipality must be paid by the board of supervisors at the same "rate of pay" as might be established for such crafts by collective bargaining with private employers of industry in San Francisco, is a valid provision for the "government" of the municipality within the provision of the Constitution permitting cities to frame a charter for their own government. St. 1946, § 151.3, p. 3266; Const. art. 11, §§ 8, 8½.

**8. Constitutional law ⇐60**

The constitutional prohibition against delegating legislative powers restricts only a legislative body from delegating its legislative powers. Const. art. 11, § 13.

**9. Municipal corporations ⇐48(2)**

The charter of a city is comparable to the Constitution of the state and is governed by the same principles. Const. art. 11, §§ 8, 8½.

**10. Municipal corporations ⇐62**

Section of the San Francisco charter as amended, providing that crafts employed by the municipality must be paid by the board of supervisors at the same rate of pay as might be established for such crafts by collective bargaining with private employers of industry in San Francisco, is not violative of the constitutional provision prohibiting delegation of legislative powers. St.1946, § 151.3, p. 3266; Const. art. 11, §§ 8, 8½, 13.

**11. Municipal corporations ⇐62**

Section of the San Francisco charter as amended, providing that crafts employed by the municipality must be paid by the Board of Supervisors at the same rate of pay as might be established for such crafts by collective bargaining with private employers of industry in San Francisco, is not violative of the Constitution providing that the Legislature shall not delegate to any private corporation or individual any power to control city money or to perform any municipal function. St. 1946, § 151.3, p. 3266; Const. art. 11, §§ 8, 8½, 13.

**12. Municipal corporations ⇐62**

Constitutional provision that the Legislature shall not delegate to any private corporation any power to control city money or perform any municipal function is a restraint on the state Legislature's right to interfere with municipal affairs, and in no way regulates what may be done by a municipal corporation by charter provision. St. 1946, § 151.3, p. 3266; Const. art. 11, §§ 8, 8½, 13.

**13. Municipal corporations ⇐65**

The constitutional provision enumerating seven matters that may be covered by municipal charter does not, by enumeration, impliedly exclude any other matters that may be covered by charters, since a charter is a limitation on power, not a grant of power. Const. art. 11, §§ 8, 8½.

**14. Master and servant ⇐15(19)**

Municipalities are not bound by nor subject to the collective bargaining provisions of the Labor Code. Labor Code, § 923.

**15. Municipal corporations ⇐79**

With respect to matters of "general concern", local law is subordinate to the state law.

**16. Municipal corporations ⇐79**

Section of the San Francisco charter as amended providing that crafts employed by the municipality must be paid by the board of supervisors at the same rate of pay as might be established for such crafts by collective bargaining with private employers of industry in San Francisco is merely a charter standard set up for determining rates of pay for public employees, and is not an attempt to give public employees the right to bargain collectively in violation of the Labor Code. St.1946, § 151.3, p. 3266; Labor Code, § 923.

**17. Municipal corporations ⇐67(5)**

The fixing of salaries of municipal employees is a matter of municipal and not general state concern.

**18. Municipal corporations ⇐63(1)**

It is not the function of the court to pass upon wisdom or policy of a municipal charter provision, its function being simply to interpret and determine whether such provision violates a constitutional provision.

**19. Master and servant ⇐69**

Section of the San Francisco charter as amended, provided that crafts employed by the municipality must be paid by the board of supervisors at the same "rate of pay" as might be established for such crafts by collective bargaining with private employers of industry in San Francisco, includes within the quoted phrase, night shift pay and pay for holidays, since the rate of pay is the take home pay of the employees. St.1946, § 151.3, p. 3266; Const. art. 11, §§ 8, 8½.

See Words and Phrases, Permanent Edition, for all other definitions of "Rate of Pay".

---

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Proceeding in mandate by John Adams and others, individually and as members of the Automotive Machinists Lodge No. 1305, International Association of Machinists, against Harry K. Wolff, Milton S. Maxwell, and Allan E. Charles, as and constituting the Civil Service Commission of the City and County of San Francisco, and the City and County of San Francisco, a municipal corporation, for an injunction and for declaratory relief establishing plaintiffs as entitled to receive rates of pay guaranteed by city and county charter as amended. From the judgment, defendants appeal.

Affirmed.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for appellants.

Milton Marks and Morris Lowenthal, both of San Francisco, for respondents.

PETERS, Presiding Justice.

The plaintiffs, all civil service employees of the defendant city and county and employed by it as automotive machinists and mechanics, by this proceeding in mandate, for an injunction and for declaratory relief, sought and secured an adjudication that under § 151.3 of the city and county charter they are entitled to receive rates of pay for their services identical with that received in this area in private employment by machinists and mechanics pursuant to collective bargaining agreements by such private employees with their private employers.

The controversy turns upon the constitutionality and proper construction of § 151.3 of the city and county charter as adopted in 1945 and amended in 1946. Prior to 1945, § 151 of the city and county charter contained the conventional provision that the Board of Supervisors should fix the salaries of all municipal employees after and on the basis of a comprehensive investigation and survey of wages paid in private and public employment for like service. In 1945 the Board of Supervisors submitted to the electorate a proposal to amend the charter by adding § 151.3 as a new section. This new section was adopted by the people at the November, 1945, election and has been approved by the Legislature. In 1946 an amendment to the new section was proposed to the electors, was adopted by the people, and was approved by the Legislature.

The first sentence of § 151.3 as adopted in 1945 was not changed by the 1946 amendment, is still in effect, and reads as follows: "Notwithstanding any of the provisions of section 151 or any other provisions of this charter, whenever any groups or crafts establish a rate of pay for such groups or crafts through collective bargaining agreements with employers employing such groups or crafts, and such rate is recognized and paid throughout the industry and the establishments employing such groups or crafts in San Francisco, and the civil service commission shall certify that such rate is generally prevailing for such groups or

crafts in private employment in San Francisco pursuant to collective bargaining agreements, the board of supervisors shall have the power and it shall be its duty to fix such rate of pay as compensations for such groups and crafts engaged in the city and county service."

It is this portion of the section that is involved in this proceeding. The 1946 amendment provides the procedure for carrying the 1945 amendment into effect. So far as pertinent here, it reads as follows: "The rate of pay so fixed by the board of supervisors shall be determined on the basis of rates of pay certified by the civil service commission on or prior to April 1st of each year and shall be effective July 1st following: provided, that the civil service commission shall review all such agreements as of July 1st of each year and certify to the board of supervisors on or before the second Monday of July any modifications in rates of pay established thereunder for such crafts or groups as herein provided. The board of supervisors shall thereupon revise the rates of pay for such crafts or groups accordingly and the said revised rates of pay so fixed shall be effective from July 1st of the fiscal year in which the said revisions are determined."

The plaintiffs are all civil service employees of defendant city and county. In addition, all of the plaintiffs are members of Local 1305 of the International Association of Machinists. It is admitted that at all times pertinent to this proceeding Local 1305 had collective bargaining agreements with all private employers in San Francisco employing automotive machinists, mechanics and fender and body workers, establishing, among other things, rates of pay for all employees in those crafts. It is also admitted that pursuant to such agreements, and from June 1, 1946, down to the date of trial (February, 1947), all private employers of mechanics of the types here involved were paid a fixed sum per week for day work on the basis of a work week consisting of five days, except for those weeks in which certain designated holidays (New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Admission Day, when celebrated in San Francisco, Thanksgiving Day and Christmas Day) might occur on a work day, in which weeks the same rate of pay was fixed for a four-day week, with the designated holiday off without loss of pay. It is further admitted that, pursuant to such collective bargaining agreements, increased rates of pay of 10% to 15% respectively were paid for work on the "night" and "midnight" shifts. Such agreements further provided that foremen were to receive 10% in excess of the rates of pay fixed for journeymen.

The defendants, while paying its employees of the classes here involved the five-day week rate above mentioned for day work, with full knowledge of the other provisions of the collective bargaining agreements, have refused to pay its employees for the designated holidays on which they do not work, and have refused to pay the increased rates for the "night" and "midnight" shifts. Defendants concede that, if § 151.3 is constitutional, which they deny, plaintiff foremen are entitled to the added 10%.

[1, 2] No useful purpose would be served in setting forth the provisions of the judgment in detail. Its legal effect was to uphold the constitutionality of § 151.3, and to allow to plaintiffs their claimed rights to holiday pay, increased rates on the two night shifts and increased rates for foremen. There is no doubt that the trial court fixed these allowances in exact accord with the provisions contained in the collective bargaining agreements between Local 1305 and all the private employers of its members in San Francisco. The judgment also directed the defendants from July 1, 1946, and thereafter, to pay to plaintiffs the difference between the actual wages paid and what such wages should have been under the collective bargaining agreements. If the judgment is otherwise correct, there can be no doubt of the propriety of thus awarding a money judgment in a *mandamus* proceeding where other grounds for the issuance of a writ of mandate exist. Sonnicksen v. Sonnicksen, 45 Cal.App.2d 46, 113 P.2d 495; Murphy v. Sheftel, 121 Cal. App. 533, 9 P.2d 568; Scannell v. Murphy, 82 Cal.App.2d 844, 187 P.2d 790; see cases

collected 10 Cal.Jur. p. 496 et seq., §§ 41 and 42.

On this appeal defendants' principal contentions are that § 151.3 of the charter is unconstitutional in that a municipality is not authorized "to adopt a charter provision which causes and permits the city and county to be governed by private persons *and to charter away its rights;* and if the provision is valid from the constitutional standpoint, it nevertheless violates the general laws of the state which are to the effect that as to public entities there shall be no collective bargaining. Furthermore, the contracts created by the provision with respect to the city and county, are against public policy and therefore void." (App. Op.Brief, p. 5.) It is also contended that the power to fix the "rate of pay," as those terms are used in § 151.3, relates only to the "basic" rate of pay. Based on this premise it is next contended that the premium pay for holidays and night work is not part of the "basic" rate of pay, but relates to "working conditions." Based on this interpretation it is urged that the section, even if constitutional, has no application. None of these arguments is sound.

[3-5] San Francisco is a chartered city operating under Art. XI, §§ 8 and 8½ of the Constitution. The provisions of such a charter have the force and effect of legislative enactments and are the supreme law of the state with respect to the government of such chartered cities. Dalton v. Lelande, 22 Cal.App. 481, 135 P. 54; Stern v. City Council of Berkeley, 25 Cal.App. 685, 145 P. 167; Bottoms v. Superior Court, 82 Cal. App. 764, 256 P. 422; Tilden v. Blood, 14 Cal.App.2d 407, 58 P.2d 381; Yosemite, etc., Corporation v. State Board of Equalization, 59 Cal.App.2d 39, 138 P.2d 39; Whitmore v. Brown, 207 Cal. 473, 279 P. 447; Hermanson v. Board of Pension Com'rs, 219 Cal. 622, 28 P.2d 21. A provision of such a charter will not be held to be unconstitutional unless it can be clearly shown to be violative of the state Constitution, and all doubts must be resolved in favor of constitutionality. Bourland v. Hildreth, 26 Cal. 161; City and County of San Francisco v. Industrial Acc. Comm., 183 Cal. 273, 191 P. 26; People v. Southern Pac. Co., 209 Cal. 578, 290 P. 25; Pacific Indemnity Co. v. Industrial Acc. Comm., 215 Cal. 461, 11 P. 2d 1, 82 A.L.R. 1170; People v. Western Fruit Growers, 22 Cal.2d 494, 140 P.2d 13; Collins v. Riley, 24 Cal.2d 912, 152 P.2d 169. Defendants' contention to the contrary is not supported by reason or authority. It is also the law that a charter adopted under the "home rule" provisions of the Constitution, like the state Constitution itself, does not constitute a "grant" of power, but constitutes a "limitation" of power. Bank v. Bell, 62 Cal.App. 320, 217 P. 538; Voorhees v. Morse, 1 Cal.2d 179, 34 P.2d 153; West Coast Advertising Co. v. City and County of San Francisco, 14 Cal.2d 516, 95 P.2d 138; People v. Carter, 12 Cal. App.2d 105, 54 P.2d 1139; Murphy v. City of Piedmont, 17 Cal.App.2d 569, 62 P.2d 614, 64 P.2d 399.

[6, 7] Defendants base a rather vague argument on the language in § 8 of Art. XI authorizing cities of certain classes to "frame a charter for its own government." It is argued that such a city "may not frame a charter for its government by agreements between private employers and private employees; *and if the first paragraph of § 151.3 is held to be lawful and constitutional, the people of the city and county of San Francisco are now and will be governed by private individuals* having no city and county connections whatsoever." (App.Op.Br. p. 8.) In other words, it is urged that by § 151.3 the city has taken from the Board of Supervisors the power to fix salaries and placed such power in the unions and private employers. Such a provision, so it is claimed, does not constitute a charter provision by a city "for its own government." The argument is rather hard to follow. In City of Pasadena v. Charleville, 215 Cal. 384, 389, 10 P.2d 745, 747, it is said: "The hiring of employees generally by the city to perform labor and services in connection with its municipal affairs and the payment of the city's funds for services rendered to the city by its employees in the administration of its municipal affairs is not subject to or controlled by general laws." Thus, the hiring and paying of municipal employees is generally a "municipal affair" not subject to or controlled by general laws. This being

so, it is too clear to require further comment that a charter provision like § 151.3, which regulates the rates of pay of certain municipal employees, is a provision for the "government" of the municipality within the meaning of § 8 of Art. XI of the Constitution.

[8-10] The argument that § 151.3 unlawfully delegates powers to private employers and employees under the collective bargaining agreements is equally specious. The prohibition against delegating legislative powers restricts only a legislative body from delegating its legislative powers. It might be that the Board of Supervisors of a chartered city could not lawfully adopt an ordinance similar to § 151.3. But § 151.3 is not an ordinance, it is a charter provision—an enactment by the people amending the basic organic law of the city. The charter of a city is comparable to the Constitution of the state and governed by the same principles. Platt v. City and County, 158 Cal. 74, 110 P. 304; Dalton v. Lelande, 22 Cal.App. 481, 135 P. 54; Marculescu v. City Planning Comm., 7 Cal.App.2d 371, 46 P.2d 308. The people of San Francisco, by adding § 151.3 to their "Constitution," have determined how the wages of certain public employees shall be paid, and have provided that the Board of Supervisors must adopt the rates so fixed. That is not an unlawful delegation any more than a similar provision applicable to the state in the state Constitution would constitute an unlawful delegation.

[11, 12] Somewhat similar to this argument is the contention that § 151.3 violates § 13 of Art. XI of the state Constitution. That section provides, in part: "The Legislature shall not delegate to any special commission, private corporation, company, association or individual any power to make, control, appropriate, supervise or in any way interfere with any county, city, town or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments or perform any municipal function whatsoever." It is argued that: "If the legislature, because of § 13 of the Constitution, could not pass a law similar to the first paragraph of § 151.3, as a law of the State of California governing the city and county of San Francisco, the city and county would likewise have no right to pass such a charter provision unless it was specifically authorized by the Constitution * * *." (App.Op.Brief, p. 9.) The obvious answer to this contention is that § 13, supra, is a restraint on the state legislature's right to interfere with municipal affairs and in no way regulates what may be done by a municipal corporation by charter provision. Butterworth v. Boyd, 12 Cal.2d 140, 82 P.2d 434, 126 A.L.R. 838; American Co. v. City of Lakeport, 220 Cal. 548, 32 P.2d 622; Esberg v. Badaracco, 202 Cal. 110, 259 P. 730; City of Oakland v. Garrison, 194 Cal. 298, 228 P. 433; Mesmer v. Board, etc., 23 Cal.App. 578, 138 P. 935; see, also, In re Pfahler, 150 Cal. 71, 88 P. 270, 11 L.R.A.,N.S., 1092, 11 Ann.Cas. 911.

[13] It is also pointed out that § 8½ of Art. XI of the state Constitution enumerates some seven matters that may be covered by charters adopted pursuant to § 8. The subject matter of § 151.3 is not expressly covered by any of the classes set forth in § 8½. Apparently it is the thought of defendants that because the subject matter contained in § 151.3 is not expressly authorized in § 8½ of Art. XI, it is unconstitutional. To state the contention is to refute it. The seven matters expressly authorized by § 8½ cover only a very small part of the powers that may be set forth in a city charter. If § 8½ by enumerating seven powers impliedly excluded any other, than 95% or more of every city charter adopted under Art. XI would be unconstitutional. As already pointed out, a charter is a limitation on power not a grant of power.

[14-17] Another tenuous argument is made to the effect that § 151.3 covers matters of general state concern, and it is argued that the state has already occupied the field so that a charter provision cannot be passed relating to the same subject matter at variance with the state statute. This "occupation of the field" by the state is conceived by defendants to have been effected by § 923 of the Labor Code. That

section, in effect, provides that state policy encourages collective bargaining between employers and employees. In Nutter v. City of Santa Monica, 74 Cal.App.2d 292, 168 P.2d 741, it was held that municipalities were not bound by nor subject to the collective bargaining provisions of the Labor Code. On the basis of this argument and the above cited case, defendants argue that the public policy of this state is "that collective bargaining should exist generally *but not with respect to public corporations.*" (App.Op.Brief, p. 14.) They then rely on the familiar rule that with respect to matters of "general concern" local law is subordinate to the state law. The complete fallacy of this argument is that it assumes, contrary to the fact, that § 151.3 is a charter section providing for collective bargaining by public employees. It is not. The city employees do not bargain with the city to fix wages or other conditions of employment. Section 151.3 does not purport to give the public employees the right to bargain collectively, or otherwise. By that section the people have set up a standard for determining rates of pay that will insure these public employees a wage scale commensurate with wages received by workers in the same field in private industry. It is quite apparent that the "collective bargaining" aspect of § 151.3 is subordinate and incidental to the "rate of wage" aspect, and that the "collective bargaining" aspect does not apply to the public employees. It is clear that the fixing of salaries of municipal employees is a matter of municipal and not general concern. Popper v. Broderick, 123 Cal. 456, 56 P. 53; City of Pasadena v. Charleville, 215 Cal. 384, 10 P.2d 745; Butterworth v. Boyd, 12 Cal.2d 140, 82 P.2d 434, 126 A.L.R. 838; Department of Water and Power of City of Los Angeles v. Inyo Chemical Co., 16 Cal.2d 744, 108 P.2d 410; Trefts v. McDougald, 15 Cal.App. 584, 115 P. 655; Storke v. City of Santa Barbara, 76 Cal. App. 40, 244 P. 158.

[18] Defendants vigorously assert that § 151.3 contains a "viciousness" that may have "tremendous repercussions" upon city government generally (App.Op.Brief, p. 21), but they fail to disclose with any clarity what these dire consequences may be. The same argument was advanced in the trial court and the trial judge in his memorandum opinion disposed of the argument by the statement: "The dire effects which respondent contends will follow this holding are more or less imaginary." It must be remembered that it is not for the courts to pass upon the wisdom or policy of a charter provision. It is our function simply to interpret it and to determine whether such provision violates a constitutional provision. As was said in Watson v. Division of Motor Vehicles, 212 Cal. 279, 285, 298 P. 481, 484: "The courts have nothing to do with the wisdom, policy, or expediency of the law, for the power to make the law carries with it the power to judge of its necessity, expediency, and justice." This fundamental doctrine has frequently been stated by the courts. See Lelande v. Lowery, 26 Cal.2d 224, 157 P.2d 639; Bodinson Mfg. Co. v. California Employment Comm., 17 Cal.2d 321, 109 P.2d 935; Wholesale Tobacco Dealers v. National, etc., Co., 11 Cal.2d 634, 82 P.2d 3, 118 A.L.R. 486; Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 55 P.2d 177; Goodman v. Board of Education, 48 Cal.App.2d 731, 120 P.2d 665. Most of the arguments now being advanced by defendants are proper arguments to have advanced to the electors in 1945 and 1946 when this charter provision was before the people, but they are not proper arguments to advance to a court.

[19] The last main contention of defendants is a matter of interpretation. It will be remembered that the matters in dispute relate to holiday pay and premium pay on the night shifts. Section 151.3 requires the "rate of pay" to be fixed in the manner there set forth. It is contended that this relates only to the "basic" rate of pay, and that holiday and premium pay on night shifts does not relate to the "basic" rate of pay but relates to "working conditions," and it is urged that the fixing of working conditions is beyond the scope of § 151.3. It is probably true that § 151.3 relates only to the "basic" rate of pay and does not relate to "working conditions." But that in no way assists defendants. It is quite apparent that it was the intent of § 151.3 to give to the public employees of the type here involved the same take home

pay received by private employees in the same industry. That means that when the public employees work on a night shift, or where a work week is interrupted by a holiday they are to receive the same pay that private employees would receive for work similarly performed. It is quite obvious that night shift pay and pay for holidays is a part of the "basic" rate of pay, and is as much a part of the wage structure as the hourly wage itself. If evidence were necessary on such an obvious matter it was supplied by Norman Beals, San Francisco representative for the State Personnel Board, who so testified. The "basic" "rate of pay" is the take home pay of the employee. The charter provision guarantees that the take home pay of public employees shall be the same as private employees. That obviously includes holiday and premium pay for night work.

The judgment appealed from is affirmed.

WARD and BRAY, JJ., concur.

Hearing denied; SHENK and SCHAUER, JJ., dissenting.

## STEEN v. CITY OF LOS ANGELES et al.

L. A. 20025.

Supreme Court of California.

March 23, 1948.

**1. Administrative law and procedure ⇐468**
**Municipal corporations ⇐218(8)**

Provision of city charter that within 15 days after appointing power's statement of grounds for discharge of employee shall have been filed, board of civil service commissioners, on its own motion, may, or on written application of person discharged, filed with board within five days after service on him of such statement, shall, proceed to investigate grounds for such discharge, does not limit time in which hearing must be had, and it is necessary only that hearing be held within a reasonable time and that appointing power diligently prosecute the discharge proceeding.

**2. Administrative law and procedure ⇐795**
**Municipal corporations ⇐218(9)**

A clear indication that jurisdiction of board of civil service commissioners of city has been exhausted, after expiration of a certain period of time after discharge of a city employee, must exist before a court will find such loss of power.

**3. Administrative law and procedure ⇐817**
**Municipal corporations ⇐218(9)**

On the failure of an administrative board to give a hearing under appropriate circumstances to a city employee who has been discharged, and who demands a hearing, the proper procedure is for court to remand the case to the administrative board for proper proceedings.

**4. Dismissal and nonsuit ⇐60(1)**

Courts have inherent power independent of statutory provisions to dismiss an action on motion of the defendant where it is not diligently prosecuted.

**5. Administrative law and procedure ⇐467**
**Municipal corporations ⇐167**

A proceeding before a city's local administrative agency exercising quasi-judicial functions should be dismissed, where unreasonable time has elapsed, and where the proceeding is not diligently prosecuted.

**6. Administrative law and procedure ⇐460**
**Municipal corporations ⇐218(8)**

In hearing before board of civil service commissioners of city concerning discharge of city employee, burden of proving charges for which the employee was discharged rests on the appointing power making the charges.

**7. Administrative law and procedure ⇐467**
**Municipal corporations ⇐218(8, 11)**

In hearing before board of civil service commissioners of city concerning discharge of city employee, the duty of prosecuting the proceeding diligently is the duty of the appointing power which made the charges against the employee, and, if the appointing power is derelict, a motion to dismiss on that ground is proper, and, if the motion is granted, the employee should be reinstated.

**8. Administrative law and procedure ⇐467**
**Municipal corporations ⇐218(8)**

Generally, the time consumed by a pending appeal is not computed in ascertaining what is a reasonable time for prosecuting a proceeding such as a hearing before a city's board of civil service commissioners to determine whether discharge of city's employee was proper.

**9. Administrative law and procedure ⇐820**
**Municipal corporations ⇐218(8, 9)**

Where first order of board of civil service commissioners, in hearing before the board on question whether discharge of city employee by appointing power was authorized, was adverse to employee, and he sought an annulment thereof in proceeding for review which was denied by superior court, and he appealed, and denial was reversed, and remittitur went down, but he never sought an order of annulment from trial court and never sought a judgment entitling him to a hearing before the board, he was not entitled to dismissal of proceedings before the board on ground of delay in prosecution of charges against him.

---

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by Otto A. Steen against the City of Los Angeles, a municipal corporation, and others, for a declaratory judgment that plaintiff should be restored to his posi-

tion as a city employee. From a judgment for defendants, the plaintiff appeals.

Judgment affirmed.

Prior opinion 182 P.2d 602.

Cryer & Jones, George E. Cryer, and R. Alston Jones, all of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., and George William Adams and John F. Feldmeier, Deputy City Attys., all of Los Angeles, for respondents.

CARTER, Justice.

In this action for declaratory relief plaintiff failed to obtain the relief prayed for in his complaint in respect to his rights as a civil service employee of defendant, City of Los Angeles.

The controversy between the parties has been before this court previously. Steen v. Board of Civil Service Com'rs, 26 Cal.2d 716, 160 P.2d 816. In that case the plaintiff sought in the superior court a review and annulment of an order of the Board of Civil Service Commissioners (a local administrative agency exercising quasi judicial functions, hereafter called board) of the City of Los Angeles which sustained the discharge of plaintiff as a civil service employee of the Department of Water and Power (hereafter called department), a department of the government of said city. No evidence was introduced at the hearing on the petition for review inasmuch as it was opposed by respondents on the sole ground that the petition failed to state a cause of action, and the superior court rendered judgment denying relief on the ground that plaintiff had not filed a demand for reinstatement with the board within the time required, and that his petition failed to state a cause of action. On appeal from that judgment this court held that the demand was timely; that plaintiff must be accorded a hearing by the board, and his petition for review stated facts sufficient to show that he had been denied a hearing. The denial of the petition for review was accordingly reversed.

Prior to the foregoing proceeding, and on August 12, 1943, the department filed with the board a notice of discharge of plaintiff. On August 18, 1943, plaintiff made demand for a hearing by the board. On December 15, 1943, the board made its order sustaining the discharge. On February 25, 1944, plaintiff filed with the board a demand for reinstatement. Thereafter he commenced the proceeding for review above mentioned culminating in this court's decision in Steen v. Board of Civil Service Commissioners, supra. The remittitur in said case was filed in the superior court on August 1, 1945. Thereafter, in that proceeding, neither plaintiff, the board, department nor the city, took any further action except as hereinafter mentioned. The board did not file an answer or return to plaintiff's petition in that action. No further hearing was had thereon. Neither the board nor the department made any move to give plaintiff a hearing before the board (except as later appears). Plaintiff made no request for a hearing, other than the demand of August 18, 1943, hereinbefore mentioned. On February 5, 1946, plaintiff commenced the instant action to have it declared that the discharge proceeding against him should be dismissed on the grounds that the board had lost jurisdiction due to the delay in the prosecution of the charge against him, and that he was entitled to be reinstated. On May 29, 1946, plaintiff's review proceeding which culminated in the prior decision of this court (Steen v. Board of Civil Service Com'rs, supra) was dismissed on his motion in the superior court.

On June 28, 1946, the trial court rendered judgment in the instant action denying plaintiff relief, and declaring that the discharge proceeding before the board did not terminate by lapse of time, and it is still properly pending there; that plaintiff is entitled to a hearing before the board on the charges filed against him and the matter is remanded to the board for that purpose. Plaintiff appealed from that judgment. Thereafter, this court granted respondents' application to produce evidence here consisting of the record of a hearing before the board on August 9, 1946. At that time plaintiff moved the board for a dismissal of the proceeding on the ground that the board had lost jurisdiction and there was a fatal lack of diligence in the

prosecution of the charges against him. The motion was denied.

Plaintiff contends that the board was required, under section 112 of the city charter, to hold a hearing within 15 days after the statement of charges was filed with the board (in the instant case that would mean 15 days after August 17, 1943), or at least within a reasonable time; that inasmuch as over three years had elapsed since the filing of the notice of discharge, the proceeding against plaintiff must be dismissed; that the court proceedings above outlined do not excuse the delay; and that he was under no obligation to proceed to obtain judgment in the first action (the review proceeding) for the board was required to give him a hearing and its failure to so was the initial wrong in the case.

It should first be observed that the trial court in this action declared that plaintiff is entitled to a hearing before the board as this court decided in Steen v. Board of Civil Service Commissioners, supra. Thus the objective sought to be accomplished by the first action has been achieved.

[1-3] Section 112 of the Los Angeles Charter, after providing for the filing by the appointing power of the statement of grounds for discharge with the board reads: "Within fifteen days after such statement shall have been filed, the said board, upon its own motion, may, or upon written application of the person so removed, discharged or suspended, filed with said board within five days after service upon him of such statement, shall proceed to investigate the grounds for such removal, discharge or suspension." Assuming that the investigation referred to is the hearing the board must accord (see, Steen v. Board of Civil Service Com'rs, supra, 26 Cal.2d at pages 723, 725, 160 P.2d at pages 820, 821), plainly the reference to fifteen and five days does not limit the time in which the hearing must be had. The apparent intent is that within said fifteen days the board on its own motion may decide to grant a hearing, but that does not mean the hearing must be within that period. If the employee seeks relief within the five days limit, a hearing must be had, but it need not be within the five days. If the hearing had to be held within those short periods and there were many cases to be considered the administrative function would be thrown into hopeless confusion and rendered ineffective. It might well be physically impossible to meet the requirement. The board is an agency with continuing existence. It does not lose jurisdiction over a discharge proceeding merely by lapse of time. The most that can be said is that a hearing must be held within a reasonable time; that the appointing power, the initiator of the discharge proceeding, must diligently prosecute that proceeding. In Universal Consol. Oil Co. v. Byram, 25 Cal.2d 353, 153 P.2d 746, this court considered the propriety of remanding a matter to the county board of supervisors sitting as a board of equalization, where the action of the board denying relief was reviewed by the court and it was found a proper hearing had not been accorded. It declared that a remand to the board for a hearing was proper although under the statute the board (while sitting as a board of equalization) had a limited life each year. The court concluded that the "intent of the law" requires that the case be remanded to the board for a hearing. It is necessary that there exist a very clear indication that the jurisdiction of a board has been exhausted after the expiration of a certain period of time, before a court will find such loss of power. See, Whiting Finance Co. v. Hopkins, 199 Cal. 428, 249 P. 853; Buswell v. Supervisors, Etc., 116 Cal. 351, 48 P. 226. While special consideration was not given to the wording of the statutes involved, it is established that the proper procedure upon the failure of an administrative board to give a hearing under appropriate circumstances, is to remand the case to the board for proper proceedings. (La Prade v. Department of Water & Power, 27 Cal.2d 47, 162 P.2d 13; Bila v. Young, 20 Cal.2d 865, 129 P.2d 364; Ware v. Retirement Board, 65 Cal.App.2d 781, 151 P.2d 549. The policy underlying such a rule is that the determination of the issues should first be made by the administrative agency. It is given jurisdiction for that purpose, and interference with that jurisdiction should not be permitted until it has been pursued to the point of exhaustion. Therefore, insofar as the termination of the

jurisdiction of the board is concerned, the conclusion must be that it does not lose its jurisdiction to proceed in accordance with the provisions of the charter by delay in the conduct of a hearing.

[4, 5] If we consider the matter of delay in a hearing by the board as analogous to laxity in the prosecution of a civil action—in bringing it to trial, it appears that courts have inherent power independent of statutory provisions to dismiss an action on motion of the defendant where it is not diligently prosecuted. Raggio v. Southern Pac. Co., 181 Cal. 472, 185 P. 171; Gray v. Bybee, 60 Cal.App.2d 564, 141 P.2d 32; Hibernia Savings & Loan Soc. v. Lauffer, 41 Cal.App.2d 725, 107 P.2d 494; Vogel v. Marsh, 122 Cal.App. 748, 10 P.2d 791; Oberkotter v. Spreckels, 64 Cal.App. 470, 221 P. 698; 9 Cal.Jur. 526, 527, 539, 540; 5 Cal.Jur.Ten.Yr.Supp. (1944 Rev.) pp. 250, 251; 27 C.J.S., Dismissal and Nonsuit, § 65. The policy to expedite justice underlying the rule, exists where the proceeding is before a local administrative agency exercising quasi-judicial functions such as the board in the instant case. By analogy a proceeding before such a board should be dismissed where an unreasonable time has elapsed—where the proceeding is not diligently prosecuted.

[6, 7] Under the city charter, a statement of the charges, as ground for the discharge of a civil service employee, are filed with the board. The burden of proving these charges rests upon the appointing power, the one making the charges. La Prade v. Department of Water & Power, supra, 27 Cal.2d at page 51, 162 P.2d at page 15. Thus in the discharge proceeding before the board, the appointing power is analogous to what in a civil action would be the plaintiff, and the employee the defendant. It follows that the duty to prosecute diligently the proceeding before the board is that of the appointing power, and if it is derelict, a motion to dismiss on that ground is proper. If granted the employee should be reinstated.

[8, 9] In the instant case, as appears from the evidence proffered in this court, plaintiff moved the board for a dismissal at the hearing on August 9, 1946, and it was denied. Plaintiff now claims that for the board to refuse to dismiss was an abuse of discretion and hence it may be so declared by the court in this action. Plaintiff did not move to dismiss the proceeding before the board before he commenced this action. But assuming that plaintiff is not required to raise the question of dismissal for failure to prosecute before the board rather than in the court in this action, he has not made out a case of abuse of discretion. It will be recalled that the first order of the board (December 15, 1943) was adverse to him. He sought an annulment thereof in his proceeding for review which was denied by the superior court. He appealed, and the denial was reversed. The remittitur went down, but he never sought an order of annulment from the trial court. The proceeding in the court below was somewhat similar to the sustaining of a demurrer followed by a judgment of dismissal and an appeal therefrom. The denial of relief was reversed by this court—no more—no less. The matter was thus at large with the petition for review pending and no action on the part of the court. "The proceeding [after reversal] is left where it stood before the judgment or order was made, and the parties stand in the same position as if no such judgment or order had ever been rendered or made. They have the same rights which they originally had." 2 Cal.Jur. 996. There was no judgment, therefore, in the review proceeding. Plaintiff was free at all times to obtain such a judgment—the relief he sought. The appointing power could not, at least prior to the reversal, prosecute the matter further before the board without compromising its position that the board's order sustaining the discharge was valid—that everything in respect to a hearing that was required had been done. There is nothing to indicate bad faith by the appointing power in seeking to sustain the validity of the proceeding. As a general principle the time consumed by a pending appeal is not computed in ascertaining what is a reasonable time for prosecuting a proceeding. See, Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153; Westphal v. Westphal, 61 Cal.App.2d 544, 143 P.2d 405. After the denial of relief by the trial court was reversed, and the

remittitur went down, there was nothing to prevent plaintiff from obtaining a judgment entitling him to a hearing before the board. He was the moving party in that proceeding. He was in a position analogous to an appellant (he was seeking a review and annulment of the board's order) and as such the duty rested upon him to prosecute his proceeding which may be likened to an appeal. He makes no showing of any reason why he did not proceed in the first action. He is therefore not entitled to a dismissal because of the delay in the prosecution of the charges against him.

We have heretofore referred to the granting of respondents' request to produce evidence here consisting of the record of a hearing held by the board on August 9, 1946, resulting in the charges against plaintiff being sustained. Supplemental material offered by plaintiff on the same subject was also received. That evidence was received solely for the purpose of completing the picture of the proceedings taken. We do not here purport to pass upon the correctness of the determination reached at that hearing. That is a matter that may be reviewed by the superior court in proper proceedings therefor.

The judgment is affirmed.

GIBSON, C. J., and TRAYNOR and SCHAUER, JJ., concur.

SHENK, EDMONDS, and SPENCE, JJ., concur in the judgment.




84 Cal.App.2d 509

**PEOPLE v. SMITH et al.**

**Cr. 656.**

District Court of Appeal, Fourth District, California.

March 23, 1948.

**1. Burglary ⇐41(3)**
**Criminal law ⇐1159(6)**

Though existence of an intent to commit theft at time of entry is necessary in order to sustain a burglary conviction of one charged with entering with intent to commit theft, such element is rarely susceptible of direct proof and must usually be inferred from circumstances, and where evidence is sufficient to justify reasonable inference that such intent existed, the verdict must not be disturbed.

**2. Burglary ⇐41(1)**

Evidence sustained burglary conviction.

**3. Criminal law ⇐1169(7)**

In burglary prosecution, defendant, who did not object, was not prejudiced by admission of testimony of police officer concerning a conversation had with a codefendant at a time when defendant was not present, where the testimony which reflected on the credibility of the codefendant did not implicate defendant and codefendant's untruthfulness appeared from other evidence.

Appeal from Superior Court, Orange County; Warren Steel, Judge.

Oliver Smith and others were convicted of burglary, and the named defendant appeals.

Judgment affirmed.

Russell E. Parsons, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Wm. E. James, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendants were charged with burglary in having entered a service station in Santa Ana with the intent to commit theft. They were represented by the public defender and all pleaded not guilty. A verdict of guilty as to each was returned by a jury and various sentences were imposed. The defendant Smith, who admitted a prior conviction, was sentenced to San Quentin and he alone has appealed from the judgment. No motion for a new trial was made.

The following facts appear from the evidence. On the afternoon of July 25, 1947, the four defendants left Los Angeles in an automobile to "take a ride." On their way to Santa Ana they stopped at a station

on Firestone Boulevard where they purchased gasoline and had the car "serviced." They then went on to Santa Ana, arriving at 3 p. m. at the service station here in question, which was operated by Mrs. Banfield and her son. They asked for some gas and some oil, and when the son started to put gas in the car Smith asked him if it was all right to go in and pay his mother. He replied "Yes" and Smith went to the other side of the car from the station and talked to the folks in the car, and received money from some of them. Smith then went into the station and the son followed him telling his mother that they owed $3.38. The son got some oil and went out and began putting it in the car. As he did so, two of the defendants came and talked to him.

About this time, Smith handed Mrs. Banfield a five-dollar bill and 38¢ in pennies. She gave him back two $1.00 bills whereupon he handed her one of these bills and asked for small change. He then walked to a position so that when she gave him the change she would have her back toward the door and the car. She gave him $1.00 in dimes and nickels, counting it into his hand. When she finished, he turned his hand and the money fell to the floor. Both of them stooped to pick up the money and as she was thus engaged Mrs. Banfield saw the defendant Robinson, who had entered the station, withdrawing her hand from the open till with money in it. One compartment of the till had contained a Pepsi-Cola receipt, a $20 bill and three ten-dollar bills. Mrs. Banfield saw that this money was gone, and defendant Robinson ran over to a Pepsi-Cola box in the station. Mrs. Banfield then closed the door and accused the defendant Robinson of taking the money, which she denied. Defendant Robinson then took some $5 bills and a cigaret lighter from her pockets, and demanded that Mrs. Banfield search her. The other defendants entered the room and the men kept insisting that Mrs. Banfield take the defendant Robinson into the rest room and search her. Mrs. Banfield refused to do this. About this time Mrs. Banfield observed that the defendant Huff was showing more interest in the Pepsi-Cola box than he was in the disturbance which was going on. As he was "just ready to put his hand on it" she rushed over and pushed him back, and then saw the missing money in the water in the box. She took out the water-soaked money, the $20 bill and the three tens being folded in the Pepsi-Cola receipt. The money was still water-soaked when she turned it over to the police a few minutes later. At this time defendants Belcher and Smith each offered her a dollar, begged her not to call the police, and said: "Let us pay you. Lets just forget it." Mrs. Banfield took down the license number of the car and phoned to the police. The defendants were picked up a few minutes later and while they admitted the general facts they denied having entered the premises for the purpose of theft, and defendant Robinson denied she had taken the money from the till. She said: "They haven't got anything on me. She has got her money."

[1] The appellant first contends that the evidence is insufficient to sustain the conviction. While he admits that it is sufficient to show that defendant Robinson took $50 from this till, he argues that nothing appears to connect him with that act, and nothing to show any entry of this building with the purpose and intent that a theft should be committed. While the existence of such an intent at the time the entry was made was necessary, in order to sustain a conviction of burglary, this element is rarely susceptible of direct proof and must usually be inferred from all of the facts and circumstances disclosed by the evidence. Where the evidence is sufficient to justify a reasonable inference that such intent existed the verdict may not be disturbed. People v. Swenson, 28 Cal.App.2d 636, 83 P.2d 70.

[2] In the instant case, it is not without significance that these parties stopped for gas on the short trip to Santa Ana and again for more gas when they arrived there. Their actions at the service station were not only unusual, but indicate that they were acting together in accordance with some plan. The appellant asked if he could pay the lady inside before the supplies were furnished. He then went over on the opposite side and talked with

the other occupants of the car. When he entered the station some of the other defendants proceeded to engage the attention of the attendant who was servicing the car. After having paid the bill he asked for small change and while receiving it took a position so that Mrs. Banfield's back would be toward the door. Having received the change he turned his hand so that the money fell to the floor. He was in a position to see the defendant Robinson come into the station and Mrs. Banfield was not. The cash register was open and the defendant Robinson took the money. When she found that its loss was discovered she placed it in the Pepsi-Cola box. All of the defendants had entered the building and the defendant Huff knew where the money was. The appellant's insistence that Mrs. Banfield take the defendant Robinson into the rest room to search her indicates that he also knew she had secreted it, and could well have been designed to give the others an opportunity to retrieve the money. After the money was found the appellant offered to pay Mrs. Banfield to forget the matter. All of these facts and circumstances, including the way these defendants worked together from the beginning, are sufficient to justify an inference that the appellant intended when he entered the building to distract Mrs. Banfield's attention and to give the defendant Robinson an opportunity to take money from the till, which would naturally be left open while change was being made. The entire matter was a question of fact for the jury and the evidence is sufficient to support the verdict and judgment.

[3] The only other point raised is that the court erred in allowing a police officer to testify as to a conversation he had, later that day, with the defendant Robinson but not in the presence of the appellant. The only thing in this evidence which is material is that the defendant Robinson at first denied that she had ever entered this service station and later admitted that she had done so, after she was confronted by Mrs. Banfield. This matter is raised for the first time on appeal. When this officer was asked about this conversation appellant's counsel started to object, but did not state the grounds. The court said "Let's have all the conversation." The district attorney then said: "All right. If we don't bring it out, you can." He then proceeded with his questions and no objection was made. Subsequently, another officer testified as to the same conversation and no objection was made or attempted. No request was made to have this testimony limited, in its application, to the defendant Robinson. While this evidence had a bearing on the truthfulness of the defendant Robinson, it did not purport to implicate the appellant in any way. The defendant Robinson's untruthfulness amply appeared from other evidence, and the rest of the conversation was favorable to the appellant. Neither error nor prejudice appears.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.




84 Cal.App.2d 297

**SMITH et al. v. CITY OF LOS ANGELES et al.**

**ARTHUR REALTY CORPORATION v. LOS ANGELES COUNTY FLOOD CONTROL DIST. et al.**

**STAHL et al. v. CITY OF LOS ANGELES et al.**

**Civ. 15911–15913.**

District Court of Appeal, Second District, Division 1, California.

March 10, 1948.

As Modified on Denial of Rehearing April 6, 1948.

Hearing Denied May 6, 1948.

**1. Trial** ⇦1

A "trial" is the examination before a competent tribunal, according to the law of the land, of facts or law put in issue in a cause for purpose of determining such issue.

See Words and Phrases, Permanent Edition, for all other definitions of "Trial".

**2. Judgment ⇐572(2)**

Where final judgments were entered on sustaining of demurrers, they were final determinations of rights of parties and could be pleaded in bar to any other suit for same cause of action.

**3. Dismissal and nonsuit ⇐60(2)**

Where demurrer, grounded on claim that complaint did not state facts sufficient to constitute a cause of action was sustained without leave to amend and a judgment was entered thereon for defendant, proceeding was a "trial" within statute requiring dismissal of action not brought to trial within five years after commencement thereof, even though plaintiffs appealed from and obtained a reversal of the judgment with directions to overrule the demurrer. Code Civ.Proc. § 583.

---

Appeals from Superior Court, Los Angeles County; William J. Palmer, Judge.

Actions by Daphne B. Smith and others and by Luther B. Stahl and others against the City of Los Angeles and others, and by the Arthur Realty Corporation against Los Angeles County Flood Control District and others, to recover for flood damages to property. From adverse judgments, plaintiffs appeal.

Reversed and remanded with directions.

Julius V. Patrosso, Earle M. Daniels, Hallam Mathews, Kenneth W. Kearney and Philip C. Farman, all of Los Angeles, for appellants Daphne B. Smith et al.

Julius V. Patrosso and Earle M. Daniels, both of Los Angeles, for appellant Arthur Realty Corporation.

W. L. Pollard, of Los Angeles, for appellants Luther B. Stahl and Ruth Stahl, et al.

Ray L. Chesebro, City Atty., Gilmore Tillman, Chief Asst. City Atty. for Water and Power, Mark A. Hall, Asst. City Atty., and Wendell Mackay, Deputy City Atty., all of Los Angeles, for respondents City of Los Angeles, and Department of Water and Power.

Harold W. Kennedy, Co. Counsel, and Roy W. Dowds, Asst. Co. Counsel, both of Los Angeles, for respondents Los Angeles County Flood Control District and County of Los Angeles.

Bauder, Veatch & Gilbert, of Los Angeles, for respondents Southern Pac. R. Co. and Southern Pac. Co.

WHITE, Justice.

Plaintiffs appeal from judgments dismissing the above entitled actions pursuant to the provisions of Section 583 of the Code of Civil Procedure, upon the ground that the same had not been brought to trial within a period of five years after the commencement thereof.

Because, except for a chronological statement of the pertinent proceedings, the facts in all three cases are in substantial respects identical, and involve the same legal questions, a stipulation has been filed in this court that all three cases are to be heard and determined upon the one set of briefs filed by appellants Daphne B. Smith et al., and respondents' brief in reply thereto. In the interest of brevity we shall hereinafter refer to the Smith case as "the case at bar," and to the companion cases as "the Arthur case" and "the Stahl case," respectively.

The three cases now engaging our attention were instituted by numerous plaintiffs seeking to recover damages from the defendants resulting from the flooding of their property in March, 1938, alleged to have been occasioned by certain obstructions erected and maintained by the defendants in the easterly or main channel of the Tujunga River, by reason of which the waters naturally flowing therein were diverted therefrom and into another channel from which they escaped, allegedly by reason of its inadequacy to hold and carry the same.

All three actions were commenced by the filing of complaints on February 27, 1939. To these, demurrers were interposed by the defendants and sustained on May 23, 1939, with leave to amend.

Due to the bulkiness of the complaints in the case at bar and the Stahl case, a stipulation was entered into by counsel wherein it was agreed that no further amended complaints need be filed in these two cases until after the pleadings were finally settled in the Arthur case.

Thereafter, a first and second amended complaint were filed in the Arthur case, to each of which defendants again interposed demurrers, which in each instance, were again sustained with leave to amend.

On February 27, 1942, a third amended complaint was filed in the Arthur case, and on March 25, 1942, a first amended complaint was filed in the case at bar. To these two last-named pleadings the defendants interposed demurrers, which were argued on the 19th and 20th days of October, 1942, and taken under submission. On January 6, 1943, both of said demurrers were sustained *without leave to amend* and on January 22, 1943, separate judgments were entered that plaintiffs in said two actions take nothing.

With reference to the Stahl case, it appears that pursuant to a stipulation of counsel entered into after the sustaining of the demurrer to the original complaint filed therein, a first amended complaint was filed in that action on March 3, 1943, to which a demurrer was interposed and sustained *without leave to amend,* on April 5, 1943, following which a judgment was entered on April 20, 1943, that plaintiffs in the Stahl case take nothing.

From the several judgments entered as aforesaid in all three cases, plaintiffs therein appealed to the District Court of Appeal, and on October 31, 1944, Division Three of this court rendered its decision as follows: "Each of the judgments is reversed with directions to the trial court to overrule the demurrers of the respective defendants to the several causes of action." Smith v. City of Los Angeles, 66 Cal.App.2d 562, 153 P.2d 69, 82. Petitions for hearing in the Supreme Court having been filed and denied, the remittiturs were lodged in the office of the County Clerk of Los Angeles County on January 3, 1945. Thereafter, answers were filed by the several defendants and each cause was at issue on and after April 30, 1945. On January 3, 1946, plaintiffs filed a memorandum to set the causes for trial, pursuant to which, each of the cases was set for trial on July 8, 1946.

When, on the last-named date, plaintiffs in all three cases appeared in court ready for trial, they were met by a motion of the defendants to dismiss each of said causes upon the sole ground that the same had not been brought to trial within five years from the date of commencement thereof, and hence that the court had lost jurisdiction. In each instance the motion was upon the ground stated and was granted. Thereafter, a judgment of dismissal was entered, from which the present appeals were taken.

It may serve to clarify the ensuing discussion of the legal questions presented if we here set forth the time elapsing between certain periods during various stages of this litigation.

| Proceedings | Time Elapsed |
|---|---|
| From date of filing complaints February 27, 1939, until filing of the last demurrers to the amended complaints on May 22, 1942. | 3 yrs, 2 months, 25 days. |
| From date of filing of the last demurrers to the amended complaints on May 22, 1942, and final determination of appeals on January 3, 1945. | 2 yrs, 7 months, 12 days. |
| From date remittiturs were lodged in the office of the County Clerk on January 3, 1945, until end of 5-year period based on filing of complaints on February 27, 1939, excluding holidays appointed by the President of the United States. | 1 yr, 1 month, 28 days. |
| From date when last demurrers to amended complaints were sustained, January 6, 1943, until remittitur was lodged in the office of the County Clerk, January 3, 1945. | 1 yr, 11 months, 28 days. |

Respondents concede that it would have been impracticable to bring the cases to trial during the period between January 6, 1943, and January 3, 1945, upon which last-named date the remittiturs were filed, and that the running of the five years specified in Section 583 of the Code of Civil Procedure should be suspended during that period be-

cause of the pending appeals. They contend, however, that part of the 5-year period had already run from February 27, 1939, when the actions were filed, until January 6, 1943, when the demurrers were sustained—a period of three years, 10 months and 9 days. That after the remittiturs were filed on January 3, 1945, the five-year statutory period started running again, of which there remained one year, 1 month and 21 days, ending, with the exclusion of the aforesaid holidays, on March 3, 1946. As heretofore noted, the cause was set for and called for trial on July 8, 1946.

The only provisions of Section 583 of the Code of Civil Procedure with which we are here concerned are the following:

"* * * Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action * * *. When in an action after judgment, an appeal has been taken and judgment reversed with cause remanded for a new trial (or when an appeal has been taken from an order granting a new trial and such order is affirmed on appeal), the action must be dismissed by the trial court, on motion of defendant after due notice to plaintiff, or of its own motion, unless brought to trial within three years from the date upon which remittitur is filed by the clerk of the trial court."

The first question presented is whether, as in the cases now engaging our attention, where a demurrer to a complaint was sustained without leave to amend, and a judgment was entered thereon for the defendant, and where the appellate court reversed the judgment, with directions to the lower court to overrule the demurrer, but did not remand the cause for a new trial, was the action brought to trial within the meaning of Section 583 of the Code of Civil Procedure?

In this regard appellants contend that any proceedings had in an action which result in a final judgment, as distinguished from a procedural ruling, is a "trial" within the contemplation of Section 583 of the Code of Civil Procedure, and this without regard to whether or not the judgment results from a determination of an issue of law or one of fact.

[1] A definition of the word "trial," one quoted and never to our knowledge disapproved, is found in the case of Tregambo v. Comanche Mill & Mining Co., 57 Cal. 501, 505, as follows:

"A trial is the examination before a competent tribunal, according to the law of the land, of the facts or *law* put in issue in a cause for the purpose of determining such issue. When a court hears and determines any issue of fact *or of law for the purpose of determining the rights of the parties,* it may be considered a trial." (Emphasis added.)

[2] We are persuaded that such an issue was presented on the hearings of the demurrers, grounded on the claim that plaintiffs' complaints did not state facts sufficient to constitute a cause of action. The trial of the issues thus presented was the trial of the cause as a cause and not the settlement of a mere matter of form in procedure. When the final judgments were entered on the sustaining of the demurrers, it was a final determination of the rights of the parties, and could be pleaded in bar to any other suit for the same cause of action.

[3] The foregoing definition of a "trial" includes trials which involve only questions of law. General demurrers such as were here interposed, challenging as they did the sufficiency of the facts, went direct to the determination of the rights of the parties, and all rights involved in the complaints. The judgments rendered herein, being upon orders sustaining demurrers without leave to amend, constitute a trial on the merits, based upon issues of law raised by such demurrers, and must be considered as judgments after trial. Tregambo v. Comanche Mill & Mining Co., supra; Goldtree v. Spreckels, 135 Cal. 666, 669, 670, 671, 672, 67 P. 1091; Booth v. County of Los Angeles, 69 Cal.App.2d 104, 108, 158 P. 2d 401; Erganian v. Brightman, 13 Cal. App.2d 696, 700, 57 P.2d 971; Provencher v. City of Los Angeles, 10 Cal.App.2d 730, 732, 52 P.2d 983; Olwell v. Hopkins, 28

Cal.2d 147, 150, 168 P.2d 972. In City of Pasadena v. Superior Court, 212 Cal. 309, 313, 298 P. 968, 970, it is said:

"It is well settled that a trial need not involve the determination of a fact, but may consist solely or partially in the determination of an issue of law."

Respondents contend that the foregoing cases are inapplicable because none of them involve a construction of Section 583 of the Code of Civil Procedure. However, the foregoing authorities do hold unequivocally that proceedings which result in a judgment finally determining the rights of the parties constitutes "a trial," as that word is used in our Code of Civil Procedure, and we see no reason why the word "trial," as applied to the facts of the cases now before us, should be accorded a different meaning under the provisions of Section 583 of the Code of Civil Procedure.

Respondents' contention that the judgments rendered in the instant cases were not final "because the plaintiffs took an appeal from said 'judgment' and it was reversed by the District Court of Appeal * * *" cannot be upheld because the judgments with which we are here concerned disposed of the cases and all the questions and issues arising therein. Williamson v. Joyce, 137 Cal. 151, 153, 69 P. 980.

Respondents place great reliance upon the case of Perrin v. Miller, 35 Cal.App. 129, 169 P. 426, cited with approval by the Supreme Court in the case of Superior Oil Co. v. Superior Court, 6 Cal.2d 113, 116, 56 P.2d 950. In the Perrin case an answer and cross-complaint were filed, to which demurrers were interposed by the plaintiff and *overruled*. Nothing further having been done in the proceeding for more than five years following the filing of the answer, the trial court, on motion of the defendant, dismissed the action. The District Court of Appeal affirmed the order of the trial court. There can be no question that under the facts of that case no "trial" was had because the overruling of a demurrer does not constitute a determination of "any issue of fact or law for the purpose of determining the rights of the parties." Had the trial court sustained the demurrer without leave to amend and rendered judgment for the plaintiff, the situation would be analogous to the one now before us. It is true that in the course of its opinion the court stated that "the word 'trial' must be construed as referring to a hearing and determination of the issues of fact involved." To us it is manifest that such statement was clearly obiter. Under the facts of that case there had been no "trial" because no hearing was had for the purpose of and which resulted in a judgment finally determining the rights of the parties. In the instant cases the judgments finally determined the rights of the parties following a hearing upon tendered issues of law.

In the case of Superior Oil Co. v. Superior Court, supra, the preliminary injunction granted therein did not result in the final determination of the rights of the parties. It expressly provided that it was to remain in force only until the entry of final judgment in the action. In its opinion, the Supreme Court, referring to the term "trial," said, 6 Cal.2d at page 116, 56 P.2d at page 952:

"It is the trial of the issues of fact (Perrin v. Miller, 35 Cal.App. 129, 169 P. 426), the purpose of which is to determine the cause on the merits, and it is not completed until the decision of the court is made and filed with the clerk (Broder v. Conklin, 98 Cal. 360, 33 P. 211; section 632, Code Civ. Proc.), unless findings be waived (section 634, Code Civ.Proc.). Whether made and filed or waived, judgment may then be entered and the cause thus be disposed of on the merits."

We do not regard the foregoing language as holding that a "trial" never ensues unless a hearing has been had upon "issues of fact," but on the contrary, that because a hearing has been had upon issues of fact that in itself is not sufficient to constitute a "trial" as that word is used in our Code of Civil Procedure. As we view the decision, it is is not authority for the statement that there was no "trial" because there was no hearing upon issues of fact, but rather that because the proceedings had, although they involved a preliminary determination of issues of fact, did not result in a judgment finally determining the rights of the parties to the action. Were we to follow respond-

ents' contentions regarding what constitutes a "trial" it would necessarily result in a determination that where a cause is submitted on an agreed statement of facts, there was no "trial" because no determination of any issue of fact was involved, but only one of law, viz., what judgment should be entered. Furthermore, the case of Superior Oil Co. v. Superior Court, supra, should be read in the light of the later case of O'Day v. Superior Court, 18 Cal.2d 540, 544, 116 P.2d 621, 624, wherein our Supreme Court stated:

"* * * Generally speaking, a 'trial' includes all rulings of a court in proceedings before it *made in furtherance of the decisions made upon the issues in the case which form the basis of the judgment.* Stow v. Superior Court, 178 Cal. 140, 172 P. 598; see, also Green v. Duvergey, 146 Cal. 379, 80 P. 234; Goldtree v. Spreckels, 135 Cal. 666, 67 P. 1091." (Emphasis added.)

In the cases now engaging our attention the issues which formed the basis of the judgments were those tendered by the demurrers, and they were issues of law.

What we have herein stated is equally applicable to the cases of Meier v. Superior Court, 55 Cal.App.2d 675, 131 P.2d 554; Breakstone v. Giannini, 70 Cal.App.2d 224, 160 P.2d 887; and Smith v. Wiget, 75 Cal. App.2d 591, 171 P.2d 563, also relied upon by respondents.

The very fact that judgments have been rendered would seem to strongly imply that a "trial" has been had, for as said by the Supreme Court in Matter of Lambert, 134 Cal. 626, 632, 66 P. 851, 854, 55 L.R.A. 856, 86 Am.St.Rep. 296:

"* * * It is a cardinal principle in English jurisprudence that, before any judgment can be pronounced against a person, there must have been a trial of the issue upon which the judgment is given."

Respondents direct our attention to the legislative history of section 583 of the Code of Civil Procedure, but we find therein nothing to support the conclusion that the word "trial" as used in the section means anything different from the meaning it has whenever used in any other section of the code. We therefore conclude that the judgments entered herein after an order sustaining a demurrer without leave to amend constituted judgments after trial.

It is noteworthy also that prior to the date set for trial, and on March 8, 1946, defendants had made a motion similar to the one here under consideration, to dismiss upon the same grounds in the Superior Court, which said motion was denied. Following such denial, the defendants filed a petition for writs of mandate and prohibition in this court to compel the dismissal of said actions (2nd Civ. No. 15336), which petition was denied on April 4, 1946, without opinion. Thereafter, a similar petition was filed with the Supreme Court (L.A. No. 19708), which petition was by that court denied on May 6, 1946, without opinion. Subsequently, defendants filed with the Supreme Court a petition for hearing to review the action of this court in denying the original petition filed herein. This last-named petition was also denied by the Supreme Court on May 27, 1946, without opinion.

Inasmuch as we hold that the sustaining of the demurrers herein without leave to amend, followed by judgments for the defendants, constituted a "trial" within the meaning of Section 583 of the Code of Civil Procedure, we conceive it to be unnecessary to examine and decide the contentions of appellants that upon the reversal of the judgments herein, the actions were not subject to dismissal under the provisions of Section 583 of the Code of Civil Procedure because they were brought to trial within a period of three years after the remittitur of the appellate court was lodged with the clerk of the trial court and, that in computing the period of five years within which an action must be brought to trial under the provisions of Section 583 of the Code of Civil Procedure, where a final judgment has been entered upon an order sustaining a demurrer to the complaint without leave to amend, followed by an appeal and reversal of the judgment, the time elapsing between the filing of the demurrer and the final determination of the appeal must be excluded.

For the foregoing reasons, the judgments from which these appeals were taken are, and each of them is reversed, and the causes are remanded with directions to the court below to proceed with trials thereof.

YORK, P. J., and DORAN, J., concur.

84 Cal.App.2d 347

**ANDRE et al. v. ALLYNN et al.**

**No. 13620.**

District Court of Appeal, First District, Division 1, California.

March 15, 1948.

**1. Appeal and error ⇐927(3), 997(2)**

Judgment of nonsuit could be supported only if disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it was legally entitled and indulging in every legitimate inference which could be drawn from that evidence, the result was a determination that there was no evidence of sufficient substantiality to support a verdict for plaintiff.

**2. Schools and school districts ⇐122**

Under evidence that 16-year-old schoolboy on way to choir practice and walking down ramp in school on which he was required to go because of weak leg due to a previous injury and because of setup of school knew of danger of slipping where portion of nonslip carpet had worn off and was holding onto railing, and in moment of abstraction took hand off railing and slipped and fell, whether such momentary forgetfulness or abstraction was a proximate cause of accident and constituted contributory negligence, was for jury.

**3. Negligence ⇐136(9, 26)**

Contributory negligence is not established as matter of law unless the only reasonable hypothesis is that such negligence exists and reasonable men could have drawn that conclusion and none other, and where there are different inferences that may be drawn, one for and one against, the one against will be followed, and, before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion.

**4. Negligence ⇐136(27)**

Momentary forgetfulness of a known danger by person injured does not constitute contributory negligence per se, unless circumstances are sufficient to enable court to determine that forgetfulness showed want of ordinary care.

**5. Negligence ⇐66(1, 2)**

Knowledge that danger exists is not knowledge of the amount of danger necessary to charge a person with negligence in assuming the risk caused by the danger, but doing of act with appreciation of amount of danger, as well as of danger itself, is necessary to render person negligent as a matter of law in assuming the risk.

**6. Schools and school districts ⇐122**

In action for injury when 16-year-old schoolboy walking down ramp in school in moment of abstraction or forgetfulness took hand off railing and slipped and fell at place he had seen others, as well as himself, slip but not fall, whether schoolboy realized the amount of danger was for jury.

**7. Negligence ⇐136(27)**

Failure to be aware of a known danger because of abstraction on part of injured person does not constitute contributory negligence as a matter of law.

**8. Schools and school districts ⇐122**

Where 16-year-old schoolboy slipped and fell when going down ramp in school at place he knew to be slippery, whether he was distracted due to hailing a fellow student causing him to forget the danger, so as to take the forgetfulness out of category of contributory negligence as a matter of law, was for jury.

**9. Schools and school districts ⇐89**

Sixteen-year-old schoolboy who slipped and fell when going down ramp in school at place he knew to be slippery, was bound only to that duty of care which a normal child of the same age would be expected to exercise in such a situation.

---

Appeal from Superior Court, Contra Costa County; Harold Jacoby, Judge.

Action by La Rue Andre, a minor, by and through his guardian ad litem, Raymond G. Andre, and Raymond G. Andre, against Gus Allynn and others, as trustees of the Richmond School District, a body politic, David Gray, John Peterson, and others, for injury sustained when plaintiff was walking down a ramp at the Richmond Union High

School. From a judgment of nonsuit, plaintiffs appeal.

Judgment reversed.

Nathan G. Gray, of Berkeley, and J. Adrian Palmquist and Palmquist & Hanlin, all of Oakland, for appellants.

Hagar, Crosby & Crosby, of Oakland, for respondents.

BRAY, Justice.

The basic question to be determined here is whether abstraction or momentary forgetfulness of a known danger constitutes contributory negligence *as a matter of law.*

[1] As this is an appeal from a judgment of nonsuit, such judgment can be supported only if, "disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff." Card v. Boms, 210 Cal. 200, 202, 291 P. 190, 191; Docherty v. Key System, 80 Cal.App.2d 888, 184 P.2d 33. In view of the above rule, only the facts most favorable to plaintiff will be set out. Contradictory evidence, with one exception, will be omitted.

Plaintiff La Rue (Larry) Andre, aged 16 years, in the second year of high school, was injured while going down a ramp at the Richmond Union High School. (For convenience, Larry will hereafter be referred to as plaintiff.) The building consisted of two floors, connected by ramps at both ends. Plaintiff had attended the school for a year and a half before the accident. The accident was caused by the fact that a portion of a non-slip cork carpet or covering had worn off and left the ramp in a slippery condition. The incline of the ramp was about four inches to the foot, and a covering over the concrete surface was necessary to prevent slipping. A number of students had slipped at this place. They slipped frequently. The superintendent of buildings and grounds of the Richmond schools admitted that he had known the condition for a year, and that it needed correction, in order to prevent people from slipping. No attempt was made to block off the worn portion of the ramp so that students would not use it.

Plaintiff had just left his locker and was going to choir practice, following the normal usual path. He used the ramp daily. The exposed smooth condition of the cement had existed as long as he had been at the school. Plaintiff wore leather heels and was proceeding at a normal walk, carrying two books in his left hand, and a map in his right. He was not thinking about the exposed surface of the ramp. He had reached a point about two-thirds or three-quarters of the way down the ramp, which was not crowded. His vision was not obstructed in any way. "No, I wasn't thinking of it because my mind—I was trying out to get into choir and I was thinking pretty strong on that because I like it, and when I saw Al, I said 'Hi,' and that is all I can think of that I could have been thinking of. I was only thinking of one thing at a time." He was looking at Al, and said "Hi" to him. As he stepped down with his right foot it hit the cement and started sliding out from under him. He had the map in his right hand (the side toward the railing). He dropped the map and reached for the railing but went down, breaking his left leg above the knee.

Plaintiff had seen other persons slip but not fall at the same place before, knew the ramp was slippery, and had slipped there himself about ten or fifteen times, although he had never fallen. At the time of the accident his left leg was weak due to two breaks it had received, one about six months before. He could not run and did not use the stairs which were available in the building because of his weak leg, which still troubled him. Plaintiff testified that he did not believe he had hold of the railing. His testimony in this respect is contradicted by Al Turetta, a fellow student, who stated: "In fact he was holding onto it when he started to say 'Hi' to me. He let loose and started to do like that (indicating [a wave of the hand]), and started to grab back onto it and missed it." Al was "pretty sure" that was the way it happened.

At the close of plaintiff's case defendants moved for a nonsuit on two grounds, first, that there was no evidence of negligence

on the part of defendants, and secondly, that the evidence established as a matter of law that plaintiff was guilty of contributory negligence. The court granted the motion on the second ground only.

[2, 3] Under the rule applying to nonsuits, there can be no question but that there was sufficient evidence to go to the jury on the question of defendants' liability, and that the evidence justifies the inference that plaintiff, although knowing of the danger of slipping at this place, was holding on to the railing, and in order to greet a fellow student, in a moment of abstraction or forgetfulness, took his hand off the railing, slipped and fell. Whether such momentary forgetfulness or abstraction by a student in a place where he was permitted and even required by the condition of his leg and the set-up of the building to go, and where he would pass and necessarily greet other students, was a proximate cause of the accident and constituted contributory negligence, was for the jury to determine. In Anthony v. Hobbie, 25 Cal.2d 814, 155 P.2d 826, the rule in this respect is well stated. At page 818 of 25 Cal.2d at page 829 of 155 P.2d, the court says, supporting its statement by the citation of eighteen cases: "But cases in which it can be said that the negligence of plaintiff contributes proximately to the accident as a matter of law are rare. The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion."

As said in White v. Davis, 103 Cal.App. 531, 542, 284 P. 1086, 1091: "The question as to whether a given state of facts constitutes contributory negligence, as a matter of law, or whether it is a matter that should go to the jury, as a question of fact, is often a close one. The solution depends entirely upon the existing circumstances in each particular case. Unusual circumstances may determine in a given case whether or not reasonable minds might legitimately draw different conclusions on the question of negligence."

[4] A somewhat similar case to the one at bar is the case of Schleif v. Grigsby, 88 Cal.App. 174, 263 P. 255, in which a hearing was unanimously denied by the Supreme Court. A telephone wire had been maintained for a considerable period, hanging approximately nine feet nine inches above a road. Plaintiff, while moving some furniture on a truck to a ranch he had just leased, encountered the wire. He observed that it hung too low to permit his load to pass thereunder, so he cut and separated the wire. The wire was replaced. In the two months he remained on the ranch "he had occasion from time to time to note the presence of the wire, and at one time followed the line to the Grigsby home to learn what line it might be." 81 Cal.App. at page 181, 263 P. at page 258. On the day of the accident, he had loaded some furniture and personal effects upon a small truck, which was driven by another person. Plaintiff was standing in the body of the truck upon a small trunk holding the load in place. While thus riding, he came in contact with the above mentioned wire, which caught him under the chin, threw him off the truck and badly injured him. Based on plaintiff's previous knowledge of the presence of the wire, defendant contended that plaintiff was guilty of contributory negligence as a matter of law. In overruling this contention the court considered the very proposition urged by defendants in this case. 81 Cal. App. at page 182, 263 P. at page 258. "The rule of law contended for is as follows: Momentary forgetfulness of a known danger not induced by a sudden and adequate disturbing cause is contributory negligence, qualifying this by the statement that to forget is not negligence unless it shows a want of ordinary care. The qualification is not absolute, but depends upon the facts of the particular case. There is a long line of cases holding that forgetfulness is as a matter of law negligence that will defeat recovery. [Citing cases.] It is upon this theory that appellant bases her claim of con-

tributory negligence chargeable to respondent. However, as is said in Jacobson v. Oakland Meat Co., 161 Cal. [425], 430, 119 Pac. 653, Ann.Cas.1913B, 1194, one element in all these cases is the plaintiff's familiarity with the danger he forgot. To arbitrarily adopt as a standard of negligence per se the rule that if one may be charged with a knowledge, past or present, of a danger, he is precluded from recovery for injuries sustained therefrom and let the rule rest there for all cases would be to establish a doctrine dangerous in its application and unsound in principle and one not warranted by the present weight of authority. Courts are unwilling to declare that forgetting a known danger always amounts to negligence (Jacobson v. Oakland Meat Co., supra). The true rule to be deducted from the cases cited is that the forgetfulness shown must be under circumstances sufficient to enable a court to determine that such lack of memory constituted negligence per se. In all of the cases cited there appear circumstances showing either an employment connected in some way with the dangerous instrumentality, or an intimacy therewith long continued, and further that the danger was of a nature readily apparent and easily discernible *to the extent that injury could result only from a forgetfulness.* In the case of Davis v. California Street Cable R. Co. [supra], 105 Cal. [131] 135, 38 P. 647, which is the strongest case supporting the contention of appellant, the court says: 'Each rests upon its own peculiar circumstances. If the facts are doubtful, as the result of uncertain evidence or conflicting testimony, the question should be submitted to a jury.'

"In Giraudi v. Electric Imp. Co., 107 Cal. [120], 126, 40 P. [108], 110, 28 L.R.A. 596, 48 Am.St.Rep. 114, we find this statement: 'To forget is not negligence, unless it shows a want of ordinary care, and it is a question for the jury.'

"The case of Anderson v. Southern California Edison Co., [77] Cal.App. [328], 246 P. 559, is in line with the foregoing * * *." (Emphasis added.)

While in the Schleif case the shade, leaves and branches of a tree obscured the view of the line, that fact does not affect the rule that to constitute contributory negligence as a matter of law it must appear that the injury could result only from a forgetfulness. In our case, at the very least, the question of whether the accident could have resulted only from plaintiff's momentary forgetfulness and raising his hand to greet a friend is one upon which reasonable minds may differ, and therefore, one which must be left to the jury.

[5, 6] Defendants contend that plaintiff, because he had seen others slip at this same place, had slipped there himself, and because of the weakened condition of his leg was more susceptible to injury, should be held to a greater realization of the amount of danger existent. They make such contention to answer the following principle, which they concede is the law: "Knowledge that danger exists is not knowledge of the amount of danger necessary to charge a person with negligence in assuming the risk by such danger. The doing of an act with appreciation of the *amount* of danger in addition to mere appreciation of the danger is necessary in order to say as a matter of law that a person is negligent." Ridge v. Boulder Creek etc. School Dist., 60 Cal.App.2d 453, 460, 140 P.2d 990, 993. But whether a 16 year old student, who had seen others, as well as himself, slip, but not fall, at this place, even in his weakened condition, would appreciate the *amount* of danger, was a matter for the jury. The knowledge of the building superintendent that the place needed correction did not impress him with the *amount* of danger. Then, how can it be said that as a matter of law the student appreciated the amount of danger?

In Smith v. Southern Pac. Co., 201 Cal. 57, 255 P. 500, it was held to be a question for the jury whether it was want of ordinary care on the part of a plaintiff not to have kept in mind the practice of the trains not to stop in a certain place, a fact he well knew, and the danger to him thereby while attempting to cross a street. In Gibson v. County of Mendocino, 16 Cal.2d 80, 105 P.2d 105, where the plaintiff stepped into a known danger because her attention was momentarily diverted by the sound of the fire siren, "due to the fact that she had been 'burned out once'" and she had turned

to count the blasts, it was held that such conduct did not constitute contributory negligence as a matter of law.

Defendants have cited cases in which minors have been held to be guilty of contributory negligence as a matter of law, such as Bolar v. Maxwell Hardware Co., 205 Cal. 396, 271 P. 97, 60 A.L.R. 429, where a minor was injured as a result of the explosion of a toy cannon constructed by him in which he used gunpowder purchased from defendant; Wallace v. Great Western Power Co., 204 Cal. 15, 266 P. 281, where a minor "shinnied" 33 feet up the vertical supports of a high voltage cable tower and was electrocuted; Whalen v. Streshley, 205 Cal. 78, 269 P. 928, 60 A.L.R. 445, where a minor was injured by being thrown by an unbroken mule, which he was causing to buck; Mathews v. City of Albany, 36 Cal.App.2d 147, 97 P.2d 266, 98 P. 2d 1025, in which a minor, thoroughly acquainted with the explosive properties of powder, found some unexploded fireworks, opened them up, poured their powder into an empty shell and set it off; Studer v. Southern Pac. Co., 121 Cal. 400, 53 P. 942, 66 Am.St.Rep. 39, where while a train was blocking a street crossing, a minor attempted to cross the train between two of the cars, and while in the act of climbing over the coupling was killed by the train starting to back. As stated in Davis v. California Street Cable R. Co., 105 Cal. 131, 38 P. 647, "Each [case] rests upon its own peculiar circumstances." 105 Cal. at page 137, 38 P. at page 648.

It is apparent that in none of the above cases was there a situation comparable to that in the case at bar. In each, the minor, knowing of the danger, deliberately did an act which was the proximate cause of his injury. Nicolosi v. Clark, 169 Cal. 746, 147 P. 971, L.R.A.1915F, 638, included by defendants with the above citations, is entirely aside from the question, as the negligence of the minor was based upon the fact that he was guilty of trespass, if not of peculation.

It is interesting to note that after the opinion in Spendlove v. Pacific Electric Ry. Co., Cal.App., 177 P.2d 27 (a case upon which defendant relies), was written, a hearing was granted in the Supreme Court. That court (30 Cal.2d 632, 184 P.2d 873) did not follow the opinion of the District Court of Appeal in holding the minor automobile driver guilty of contributory negligence as a matter of law, but held it to be a matter for the determination of the jury.

This last decision illustrates the fact that in the last few years the tendency of the Supreme Court has been away from the stricter view of preceding years, where frequently contributory negligence was established as a matter of law, to the present situation in which such cases "are rare." See Anthony v. Hobbie, supra, 25 Cal.2d 814, 818, 155 P.2d 826.

Defendants rely greatly on Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 296 P. 76, and Funari v. Gravem-Inglis Baking Co., 40 Cal.App.2d 25, 104 P.2d 44. In both of those cases, the plaintiffs not only knew of the slippery condition, but were well aware of the danger and assumed the risk of continuing on. There was no question, as here, of momentary forgetfulness. As pointed out in Neel v. Manning, 19 Cal.2d 647, 655, 122 P.2d 576, 580, "* * * even though the evidence did establish that the alleged defect in the construction of defendant's premises was patent and observable to any one using the stairway [the rule established in the two above-cited cases], and that in addition plaintiff by reason of her past visits to the restaurant was familiar with the existing condition, there would still be the question for the determination of the jury as to whether or not it was a want of ordinary care on the part of plaintiff not to have kept in mind such element of danger when stepping toward the wall rail to allow other persons descending the stairs to pass."

[7] Whether plaintiff's failure here to be aware of the danger was due to forgetfulness, or abstraction in thinking about his desire to be accepted in the choir, is immaterial as the rule is the same in both instances. "Even forgetfulness of a known danger will not always operate to prevent a recovery, for to forget is not negligence unless it shows a want of ordinary care. Roseberry v. Edward F. Niehaus & Co., 166 Cal. 481, 137 P. 232; Rosella v. Paxinos,

110 Cal.App. 299, 294 P. 39. And it has been repeatedly held that mere abstraction on the part of the injured person does not constitute contributory negligence as a matter of law. Hodge v. Weinstock, Lubin & Co., 109 Cal.App. 393, 293 P. 80. The question of contributory negligence was, therefore, properly submitted to the jury." McStay v. Citizens Nat. Trust & Savings Bank, 5 Cal.App.2d 595, 600, 43 P.2d 560, 562.

"Even though appellant's testimony was susceptible of the one construction that prior to the accident she did observe the unevenness of said platform, which it is claimed constituted the element of danger, there would still be the question for the determination of the jury as to whether or not it was a want of ordinary care on the part of appellant not to have kept in mind such element of danger while arising from the stool and leaving the platform. Hayward v. Downer, 65 Cal.App. 450, 224 P. 265; Meindersee v. Meyers, 188 Cal. 498, 205 P. 1078. In the former case it was said: 'There is much respectable authority in support of appellant's first point, and such, in fact, was the rule in this state until the Supreme Court, in Meindersee v. Meyers, 188 Cal. 498, 503, 205 P. 1078, held that, notwithstanding this knowledge and means of knowledge, it was for the jury to determine whether it was a want of ordinary care for the injured not to have the source of danger in mind.'" Oles v. Kahn Bros., 81 Cal.App. 76, 82, 253 P. 158, 161. To the same effect, Neel v. Manning, Inc., supra, 19 Cal.2d 647, 656, 122 P.2d 576.

The courts are getting away from the principle established in Reynolds v. Los Angeles Gas & Electric Co., 162 Cal. 327, 122 P. 962, 39 L.R.A.,N.S., 896, 9 Ann.Cas. 1913D, 34, and in Davis v. California Street Cable R. Co., supra, 105 Cal. 131, 38 P. 647, to the effect that the sudden and disturbing cause which excuses forgetfulness of a known peril, and takes it out of the category of contributory negligence as a matter of law, must be an extreme situation of emergency. In Kirk v. Los Angeles Ry. Corporation, 26 Cal.2d 833, 161 P.2d 673, 164 A.L.R. 1, the plaintiff, forgetting her position of peril near the car tracks, stooped to grab up her purse which had been knocked from under her elbow by a companion who was calling her attention to the approaching car. In so doing her right hip was struck by the car. "Whether the act of plaintiff in stooping to retrieve her purse was contributory negligence should have been submitted to the jury. * * * it was a jury question whether the act of retrieving the purse was such as would be performed by a person of ordinary prudence. It could be reasoned that such act was an instinctive unthinking effort to preserve property which would be reasonable to expect of a reasonably prudent person having due regard for his safety. It is not a case of momentary forgetfulness which is not induced by some disturbing event, such as existed in Reynolds v. Los Angeles Gas & Electric Co., 162 Cal. 327, 122 P. 962, 39 L.R.A.,N.S., 896, Ann.Cas.1913D, 34; and Brett v. S. H. Frank & Co., 153 Cal. 267, 94 P. 1051. Rather, it was an instinctive reaction or act on sudden impulse which we are unable to say was out of character for a person of ordinary prudence." 26 Cal.2d at page 840, 161 P.2d at page 676, 164 A.L.R. 1. See also Schleif v. Grigsby, supra, 88 Cal.App. 174, 263 P. 255.

[8] Defendants contend that because plaintiff testified that he said, or was trying to say, "Hi," as he was bringing his right foot down to the slippery spot, his exchange of salutations with Al did not constitute a distraction. This is a rather tenuous argument, as, if plaintiff was actually distracted before he slipped, it would make no difference whether it was before he started to step or was in the act of stepping. In any event, this, as well as the question of whether he consciously stepped into a known danger and neither forgot nor was in a condition of abstraction, was a matter for the jury to consider.

[9] We cannot say as a matter of law that abstraction concerning choir practice, or forgetfulness due to hailing a school chum suddenly, is not an instinctive reaction or act on sudden impulse, or that it was out of character for the ordinary schoolboy of plaintiff's age and experience. "Plaintiff is bound only to that duty of care which a normal child of the same age would

be expected to exercise in such a situation." Taylor v. Oakland Scavenger Co., 17 Cal. 2d 594, 603, 110 P.2d 1044, 1049.

The judgment appealed from is reversed.

PETERS, P. J., and WARD, J., concur.




84 Cal.App.2d 548

**DEL PORTO v. O'DONNELL.**

**Civ. 13554.**

District Court of Appeal, First District, Division 2, California.

March 25, 1948.

Rehearing Denied April 24, 1948.

**Specific performance ⇐117**

Purchaser was not entitled to maintain action for specific performance of written contract to sell real property, in absence of allegation or proof of tender of payment required by contract, or excuse other than alleged fact that vendor was unable to deliver premises free from tenants, in view of contract provision for such contingency, since upon purchaser's default, vendor was authorized to treat contract as forfeited and to retain deposit. Civ.Code, §§ 1439, 1440.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Frank Del Porto against Stephen F. O'Donnell for specific performance of a written contract to sell real property. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Ray E. Montrose and Theodore M. Monell, both of San Francisco, for appellant.

Eugene H. O'Donnell and Ralph Bancroft, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for specific performance of a written contract to sell real property. Judgment of non-suit was entered on the ground that plaintiff had failed to prove a case for specific performance.

The contract called for the payment of $1,000 down (which was paid) and a balance of $6,500 to be paid to a designated title company upon payment of which the seller was to deliver to the same title company a duly acknowledged deed of conveyance. No part of the balance was paid. The complaint failed to allege payment or offer to pay the balance. And no proof of either was tendered. The purchaser was thus in default and, under the express terms of the contract the seller was then authorized to treat the contract as forfeited and to retain the deposit. Civil Code, sec. 1439.

Though the plaintiff did not plead an excuse for a tender to bring his case within section 1440 of the Civil Code he now argues that his tender was excused because the seller was unable to deliver the premises free from tenants. But this contingency was covered by the contract which read: "If above premises are wholly tenant occupied, this offer is made with the express understanding that purchaser(s) cannot occupy any portion of said premises, unless, and until the OPA has given written permission to evict tenant(s) from portion of building the purchaser(s) desire to occupy unless, however, the tenant(s) voluntarily move."

A typewritten addendum appears in the contract reading: "Said Seller agrees to not rent the 5-room unfurnished flat (upper), now vacant, and to deliver same to purchaser for occupancy within a period of two weeks from March 1st, 1945."

The only evidence which tends to prove the unpleaded excuse for performance is that at some time some one permitted some one to move some furniture into the upper flat. The seller did not agree to rent the upper flat. The only evidence is that somebody moved into the upper flat without his permission and there is no evidence that the purchaser made any objection on that ground.

Since appellant failed either to allege or prove tender or excuse for tender and since the only thing in the nature of an excuse to avoid his forfeiture is answered by his own contract, appellant's case comes squarely within the rule of Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 10, 55 P. 713, 43 L.R.A. 199, 69 Am. St.Rep. 17, holding that neither party to such a contract could maintain an action for its performance without having performed the conditions to be performed by him. For recent cases see Dunner v. Hoover, 43 Cal.App.2d 753, 758, 111 P.2d 737; Reyburn v. Young, 11 Cal.App.2d 478, 54 P.2d 86; Mayer v. Beondo, 83 Cal.App.2d 665, 189 P.2d 327; Lifton v. Harshman, 80 Cal.App.2d 422, 435, 182 P.2d 222.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.




84 Cal.App.2d 390

**JONES v. BROWN et al.**

**Civ. 16050.**

District Court of Appeal, Second District, Division 1, California.

March 16, 1948.

Hearing Denied May 13, 1948.

**1. Attorney and client ⇐134(2)**

Where defendants employed plaintiff as their attorney under contract whereby plaintiff was to receive one-third of the amount recovered by him in behalf of defendants on claim for personal injuries, but defendants wrongfully discharged plaintiff before completion of the case and employed other attorneys, plaintiff was entitled to recover one-third of the amount of the judgment obtained for defendants by the other attorneys.

**2. Appeal and error ⇐1010(1)**

Trial court's findings supported by substantial evidence are binding on an appellate court.

**3. Attorney and client ⇐130**

Fact that defendants were Negroes of an advanced age and were ignorant did not estop plaintiff, a Negro attorney, from asserting a claim for attorney fees under contract whereby defendants employed plaintiff as their attorney in personal injury action for a contingent fee of one-third of the amount of recovery.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Clarence A. Jones against Caroline Brown and Sam Brown to recover attorney fees. From an adverse judgment, defendants appeal.

Judgment affirmed.

Hulen C. Callaway, Richard Hunt Sampson and Dewitt Morgan Manning, all of Los Angeles (John S. Newhouse, of Los Angeles, of counsel), for appellants.

Willis O. Tyler, of Los Angeles, for respondent.

DORAN, Justice.

The complaint herein alleges that on February 8, 1944 the appellants Brown engaged the respondent Jones, an attorney at law, to prosecute an action for damages against one Gerald J. Altfilisch. The damages in question were alleged to have been suffered by Caroline Brown as a result of being struck by an automobile driven by the said Altfilisch. It is further alleged that the respondent filed a complaint on behalf of the appellants, served the defendant Altfilisch, set the case for trial, and "was willing to do everything necessary to be done in said cause and to present the same for trial and to fully complete all of his part of the said contract", but that on or about October 6, 1944, the Browns "without any just cause or reason therefor did discharge the plaintiff as their attorney and did dismiss him from the said case and did engage other attorneys"; that said other attorneys completed the case and recovered a judgment in appellants' favor in the amount of $20,987.68.

The contract referred to was in writing, signed by both clients, by Attorney Jones,

and by two witnesses. It is apparently complete except that the date "——— day of February, 1944" is not filled in. By this contract appellants "retained" Jones "as their attorney"; the attorney "accepts the employment * * * and agrees to render his best service and use his best endeavor to obtain a full and satisfactory adjustment and to protect and conserve every right, claim and interest of said first parties (appellants) arising out of this accident or claim." As attorney fees and compensation it is agreed that Clarence A. Jones "shall receive 33⅓ per cent of whatever money received, directly or indirectly of either party hereto, in compromise or settlement of said matter or claim from said negligent party or by any person, company, firm, or corporation for and on behalf of said negligent party." The contract then provides that said attorney "shall have lien on any judgment or money received or that may be obtained from said negligent party."

Answering this complaint the appellants Brown admit the execution of "a certain agreement in writing, employing plaintiff as their attorney", but are "unable to remember the exact terms of the said agreement". The answer further alleges "that they had just cause for requesting plaintiff to withdraw as attorney * * * in that plaintiff is a negro and was employed by defendants upon the condition that he associate with him in the preparation and trial of the action white counsel"; further that Jones had been negligent in the conduct of the case, in failing to have the case set for trial until after the clients had requested his withdrawal, in failing to take depositions of the defendant Altfilisch, in failing to determine that Altfilisch was acting as an agent of Wilding Picture Productions, a corporation, and in failing to join said corporation as a defendant.

The trial court found that the contract of employment, providing for the payment of a 33⅓ per cent contingent fee to Attorney Jones, was openly and fairly entered into as alleged; that said attorney was wrongfully discharged by the Browns on or about October 6, 1944, and that prior to that time Jones "was willing to do everything necessary to be done in said case, and did in this behalf do everything necessary to be done". The court further found that it was not true that the Browns employed Jones upon the condition that a white attorney should be associated with Jones in the case, and that respondent was not guilty of negligence in preparing the case or in taking any steps in connection therewith. Judgment was rendered for respondent in the sum of $6,995.89 representing 33⅓ per cent of the judgment recovered by the appellants.

It is the contention of appellants that there was just cause for discharging the respondent attorney; that the attorney was negligent in handling the case; that a client may discharge an attorney with or without cause; that in any event "Appellants' maximum liability should be limited to the reasonable value of respondent's services". Appellants further insist that the attorney "is estopped from asserting his claim and contract" for the reason that "appellants are both colored people and of advanced age", ignorant and unsophisticated, and that when the substitution of attorneys occurred Jones did not "call appellant Brown's attention to Brown's obligation under the contract". In this connection appellants call attention to the fact that if the judgment in Jones' favor is sustained, then the appellants will be deprived "of all but $3,583.62 of their original recovery of $20,987.68", having paid 40 per cent of the judgment to the substituted attorneys, Tripp, Callaway, Sampson & Dryden and Walter L. Gordon, and 33⅓ to respondent Clarence A. Jones under the contract in question.

"There seems to be no divergence of authority to the effect that if an attorney is discharged for sufficient cause he is entitled to no more than the reasonable value of his services rendered prior to his discharge", says the Supreme Court in Salopek v. Schloemann, 20 Cal.2d 150, 153, 124 P.2d 21, 23. The converse of the rule is found at page 155 of the same opinion in 20 Cal. 2d, at page 24 of 124 P.2d, where the court states: "But if, as here, he (the client) has entered into a contract to compensate the attorney on a contingency basis and discharges him before the services have been completed, he (the client) takes the chance

that the attorney may claim and establish that he (the attorney) was discharged without sufficient cause." It is true, as appellants' brief avers, that two justices expressed views therein, to the effect that the prevailing California rule should be changed. However, such suggested change has not been made, and the rule was again approved in Denio v. City of Huntington Beach, 22 Cal.2d 580, 591, 140 P.2d 392, 397, 149 A.L.R. 320, where the court said: "We conclude that * * * if such discharge was wrongful, plaintiffs (attorneys) are, under the long-established rule in California, entitled to recover the compensation specified by the terms of such contract of employment". Indeed, appellants "freely admit that our appellate courts have, on a number of occasions, held that where an attorney is discharged without cause, he may recover the full contract amount where all contingencies set forth in the contract are met", but contend that "these decisions should be reconsidered and overruled".

[1, 2] The record herein, discloses substantial evidence which supports the trial court's findings that the contingent fee contract in question was openly and fairly entered into; that the respondent attorney was not at fault in the conduct of the cause and that said attorney was wrongfully discharged by the appellants before completion of the case. While it is true that the record also reveals certain conflicting evidence in reference to these matters, this fact does not alter the situation in respect to appellate consideration. Such review is limited by the well established rule that where it appears that substantial evidence supports the findings of the trial court, such findings are binding on an appellate court.

[3] The appellants' contention that the respondent is estopped from asserting a claim for the compensation stipulated in the written contract, is untenable. Nothing in the record affords any basis for such an estoppel. Neither the appellants' age, color nor alleged ignorance lend force to this theory and there is no showing that the attorney attempted to take advantage of any of these facts in dealing with the appellants. In this connection it will be noted that attorney and clients were of the same race and color. Nor can it be deemed "unconscionable" or "an extreme miscarriage of justice", in the language of appellants' brief, to affirm a judgment which sanctions the enforcement of a contract found to have been fairly entered into. The practical consequences of such enforcement in an individual case cannot here or elsewhere negative the customary contractual obligations assumed when one executes a written agreement. The decision rendered appears to be in conformity with the rule as expressed in the California cases hereinbefore mentioned.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

Hearing denied; GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., dissenting.




84 Cal.App.2d 401

**WILKERSON et al. v. BROWN et al.**

Civ. 3500.

District Court of Appeal, Fourth District, California.

March 16, 1948.

**1. Automobiles ⇐245(14, 61)**

Whether alleged failure of driver of truck colliding with automobile at an intersection on a dark, foggy morning to keep his windshield clean and dry was negligence and the proximate cause of the collision was properly submitted to the jury. Vehicle Code, § 676(c).

**2. Automobiles ⇐245(46)**

In action for death of motorist in intersectional collision, whether truck driver violated statute by traveling in excess of the speed limit as he approached the intersection when his vision of approaching traffic was obstructed because of darkness and fog was for jury. Vehicle Code, §§ 511(a) (4), 513.

**3. Automobiles ⇐245(78, 80)**

In action for death of motorist in intersectional collision with truck, evidence

created a conflict with any presumption of due care on part of decedent arising from inability of decedent to testify because of death, and negligence of decedent in violating Vehicle Code sections relative to speed, right of way, and in failing to observe defendant's truck was for jury. Vehicle Code, §§ 511(a) (4), 513.

**4. Negligence ⇐6, 56(3)**

An act or failure to act below a statutory standard is "negligence per se," and when evidence establishes that a violation thereof proximately caused injury, and no excuse or justification of a violation of such statute is shown, responsibility may be fixed on the violator.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence Per Se".

**5. Negligence ⇐121(1)**

The presumption of negligence arising from violation of a statute establishing a standard of conduct is not conclusive but may be rebutted by showing that the act was justifiable or excusable under the circumstances.

**6. Negligence ⇐136(12)**

Whether violation of statute establishing a standard of conduct was justifiable or excusable so as to rebut the presumption of negligence arising from violation are questions of fact for jury except where court is impelled to say that from the facts reasonable men can draw only the conclusion that the negligence of the violator contributed to the accident.

**7. Automobiles ⇐171(13)**

An operator of a motor vehicle which has entered an intersection prior to or at the same time as another vehicle cannot arbitrarily rely on the right of way gained as the result of excessive speed or by other negligent act or violation of law.

**8. Trial ⇐267(3)**

In action for death of motorist in intersectional collision with truck on dark and foggy morning, modification of instruction in language of statute requiring installation of windshield wiper on motor vehicles and operation of wiper under conditions of fog and rain by deleting clause from instruction that failure to comply with statute without lawful excuse is negligence, and modification of another instruction requiring findings for plaintiffs on issue of defendants' negligence, if defendants violated any statute relating to operation of motor vehicle which proximately caused collision, by adding phrase prohibiting finding for plaintiffs on issue of negligence, if circumstances beyond control of defendants excused violation, was not error. Vehicle Code, § 676(c).

**9. Trial ⇐253(4)**

In action for death of motorist in intersectional collision with truck, instruction, stating in part that the words "unavoidable" or "inevitable" simply denote an accident that occurred without having been proximately caused by negligence, was not error as failing to point out that, if defendant was guilty of negligence which was a proximate cause of the collision, the defense of unavoidable accident must fail.

**10. Trial ⇐295(1), 296(1)**

Instructions would be considered as a whole and in connection with other instructions given in determining whether instructions were proper.

**11. Appeal and error ⇐999(1)**

Jury verdict reached under proper instructions was binding on appeal.

---

Appeal from Superior Court, San Bernardino County; Martin J. Coughlin, Judge.

Action by Margie Viola Wilkerson and others against Marion Brown and others for damages occasioned by the death of Felix Wilkerson, deceased, as a result of a motor vehicle collision. From an adverse judgment, plaintiffs appeal.

Judgment affirmed.

Duckworth, King & Knauf, of San Bernardino, for appellants.

Spray, Davis & Gould, of Los Angeles, for respondents.

GRIFFIN, Justice.

This action was brought by the heirs of Felix Wilkerson for damages occasioned

by his death as a result of a motor vehicle collision. A jury returned a verdict for defendants. A new trial was denied. Negligence of defendant driver and contributory negligence of the deceased were pleaded. The accident happened on March 27, 1946, about 5:30 a. m. at the intersection of Grove and Merrill avenues in Chino. Wilkerson was driving his maroon colored Chevrolet car north on Grove. Defendant Marion Brown, employed by defendant Allura Farm Dairy, was driving a one-ton truck, loaded with filled milk cans belonging to defendant employer, in a westerly direction on Merrill Avenue. Each avenue was about 22 feet wide and was paved. A heavy fog blanketed the area although the fog was "spotty." Visibility was from 25 to 100 feet. It was also dark and headlights were burning on both car and truck. Each driver was the sole occupant of the vehicle in which he rode. The point of impact, as evidenced by marks on the highway, appeared to be in the center of the intersection. The Chevrolet car traveled in a northwesterly direction and came to rest on its wheels approximately 73 feet from the projected point of impact. The truck continued in a northwesterly direction, rolled over, struck a power pole 60 feet from the point of impact, severed it, and came to rest 71 feet northwest of the center of the intersection. Although there were many marks on the highway leading up to the car and truck, no visible rubber marks were left by either vehicle prior to the impact.

Wilkerson was killed and Brown was rendered unconscious but not otherwise seriously injured. He was the only eyewitness to the accident to testify at the trial. He testified, in his deposition received in evidence, that it was foggy; that he didn't have his windshield wiper going right then because he "didn't think there was any need of it"; that he "had just shut it off"; that "it worked good"; that being off it didn't affect his ability to drive; and that it was off at the time. He then said that he was "not sure whether it was on or off". At the trial he testified "* * * I don't believe I had it on at the time"; that he shut it off "because the windshield was not particularly foggy"; that he turned it off when the windshield was clear and on when it started to fog up. As to his speed, he testified that he approached the intersection at a speed of from 25 to 30 miles per hour and when he was two or three feet from the intersection he observed the Chevrolet car 50 feet away and that the Chevrolet appeared to be traveling faster than his truck.

From photographic exhibits in evidence it appears that the entire right side of the Chevrolet car, from the rear door forward, was driven inward. The left front portion of the bumper on the truck was bent in about five or six inches and the framework on the truck was pushed against the transmission which was broken. Maroon colored paint was found on the truck from its cab, on its left side, back toward the rear of the truck. The grill and front bumper on the Chevrolet was gone. Its right front fender was damaged. The wind shield was broken.

Brown testified that the Chevrolet car struck the left front wheel and fender of his truck.

[1] From this evidence plaintiffs contend that defendant Brown was guilty of negligence as a matter of law proximately causing the death of Wilkerson, citing such cases as Harrington v. Freddi, 133 Cal.App. 96, 23 P.2d 525; Mathers v. County of Riverside, 22 Cal.2d 781, 141 P.2d 419.

Plaintiffs' contention (point 1) that the evidence conclusively shows that defendant driver failed to keep his windshield clean and dry and that such conduct was negligence as a matter of law under section 676, subdivision (c) of the Vehicle Code and was the proximate cause of the accident, is not borne out by the evidence. The most that can be said is that there was a conflict in this respect.

[2] The other contention is that the evidence conclusively shows that defendant violated section 511, subdivision (a) (4) by traveling in excess of the speed limit as he approached the intersection when his vision of approaching traffic was obstructed, citing such cases as Skaggs v.

Wiley, 108 Cal.App. 429, 292 P. 132; and Potapoff v. Mattes, 130 Cal.App. 421, 19 P.2d 1016. The evidence clearly presented a factual question for the jury to determine which was presented under proper instructions on the subject. Sec. 513, Vehicle Code; Matsuda v. Luond, 52 Cal. App.2d 453, 126 P.2d 359; Tuderois v. Hertz Drivurself Stations, 70 Cal.App.2d 192, 160 P.2d 554.

[3] Under point 2 plaintiffs claim that since Wilkerson was dead and unable to testify, he was presumed to be free of negligence in the manner in which he drove, and that there was no evidence in the record to overcome that presumption; that he was, therefore, as a matter of law, not guilty of contributory negligence. The argument overlooks all of the evidence presented to the jury in this case as to the conduct of the deceased immediately prior to and at the time of the happening of the accident. The testimony of defendant Brown and the physical facts shown by the exhibits and related by witnesses were sufficient to create a conflict with any claimed presumption of due care on the part of Wilkerson. The jury, after being fully instructed on the question, decided this issue against plaintiffs. Isham v. Trimble, 5 Cal.App.2d 648, 43 P.2d 581; Barry v. Maddalena, 63 Cal.App.2d 302, 305, 146 P.2d 974.

Point 3 involved an instruction (17), offered by plaintiffs in the language of section 676, subdivision (c) of the Vehicle Code, but containing the additional clause: "Failure to comply with the provisions of this section without lawful excuse is negligence." The trial judge deleted the latter part from the instruction. Plaintiffs claim error. The portion deleted was, in substance, included in plaintiffs' instruction No. 19, about which they also complain because the trial judge added an extra sentence thereto. As proffered, it read in part: "If you find * * * that defendant * * * violated any statute * * * relating to the operation of a motor vehicle * * * and you further find * * * that such violation * * * was a proximate cause of the collision, then you will find for the plaintiffs upon the issue of the negligence of the defendants." The court added: "* * * unless circumstances resulting from causes beyond the control of the defendant Brown were such as to excuse and justify any violation, if you find there was a violation."

It is argued that the effect of the modification resulted in a failure of the court to instruct the jury that a violation of the sections in question would constitute negligence per se, citing Prescott v. City of Orange, 56 Cal.App.2d 144, 132 P.2d 523; Gallichotte v. Cal. Mutual etc. Ass'n, 4 Cal.App.2d 503, 41 P.2d 349; Satterlee v. Orange Glenn School District, 29 Cal. 2d 581, 177 P.2d 279. It will be noted that the portion of instruction 17, offered by plaintiffs and deleted by the court, did not refer to such failure to comply with that section as negligence per se but only that it was negligence. Such was the effect of instruction 19. Plaintiffs offered no instruction requesting the court to instruct the jury that such violation was negligence per se.

In the Satterlee case, at page 589 of 29 Cal.2d, at page 283 of 177 P.2d, the court, after reciting the general rule that in an emergency, or under unusual conditions, it is generally held that circumstances may be shown to excuse the violation, quotes this additional clause: "However, the fact which will excuse the violation of a statute has been defined by the court as one resulting 'from causes or things beyond the control of the person charged with the violation.'" (Citing cases.)

[4–6] It is true that an act or failure to act below a statutory standard is negligence per se, and when the evidence establishes that a violation thereof proximately caused the injury, and no excuse or justification of a violation of such statute is shown, responsibility may be fixed on the violator. The presumption of negligence arising from such a violation is not conclusive, but may be rebutted by showing that the act was justifiable or excusable under the circumstances. These questions are questions of fact for the jury except in a case where the court is

impelled to say that from the facts reasonable men can draw only the conclusion that the negligence of the violator contributed to the accident.

[7, 8] An operator of a motor vehicle which has entered an intersection prior to or at the same time as another vehicle cannot arbitrarily rely on the right of way gained as the result of excessive speed or by other negligent act or violation of law. These are the general principles enunciated in the Satterlee case, where it was held that it was not error to refuse an instruction that plaintiff's violation of the Vehicle Code provisions relating to rights of way at intersections constituted negligence, where such instruction did not tender the issue whether the circumstances were such as to *excuse violation* where there was evidence that the bus had increased its speed before reaching the intersection, and also that the driver did not observe the automobile until almost the moment of the impact. Whether defendant driver did violate any section of the Vehicle Code, in the instant case, was a factual question for the jury. Likewise, if he did violate any such section, then whether such violation was a proximate cause of the accident, and if *there was such a violation* whether it was *excused under the circumstances* were factual questions and not ones of law for this court to determine. Prescott v. City of Orange, supra. Having the Satterlee case in mind, the trial judge modified plaintiffs' instructions accordingly. While the instructions, as modified, did not elaborately present the rule discussed in that case, viewing them in the light of the evidence here presented, there was no conflict between the rule, as discussed, and the instructions here given, as modified. No prejudicial error resulted.

Several instructions were given on the various elements of the doctrine of contributory negligence. Under point 4 plaintiffs concede that these elements were properly stated, but argue that since there was no evidence that the deceased was guilty of contributory negligence the giving of such instructions was reversible error, citing Davenport v. Stratton, 24 Cal.2d 232, 254, 149 P.2d 4. The evidence, as heretofore pointed out, relative to the operation of the vehicle of deceased and whether he violated the Vehicle Code sections relative to speed, right of way, or whether he negligently failed to observe defendant's truck, under the circumstances, were factual questions for the jury, to be weighed against any presumption of due care running in favor of deceased. No error resulted.

[9] Point 5 involves instruction No. 40, relating to unavoidable or inevitable accidents. Plaintiffs claim that the instruction does not point out that if defendant was guilty of negligence which was a proximate cause of the collision, the defense of unavoidable accident must fail; that the trial court's failure to so qualify the instruction was error, since defendant was guilty of negligence as a matter of law. We have heretofore held against plaintiffs' argument that defendant was guilty of negligence as a matter of law. The instruction itself covers, to some extent, the qualification claimed to be lacking. It states in part that the words "unavoidable" or "inevitable," "simply denote an accident that occurred without having been proximately caused by negligence." A similar instruction was approved in Temple v. DeMirjian, 51 Cal.App.2d 559, 564, 125 P.2d 544.

[10, 11] Point 6 involves a similar complaint pertaining to instructions Nos. 29, 25, 28 and 20, regarding the eminent peril rule, the relative duties of the respective drivers to exercise ordinary care, and the duty to yield the right of way, which latter instruction followed the language of instruction No. 150 of the California Jury Instruction (Civil). It is claimed that defendant Brown was driving his truck in violation of the law and was therefore guilty of negligence as a matter of law and that the instruction on the imminent peril rule was therefore not applicable. We have disposed of this contention. We have examined the remaining instructions above mentioned. All of them, when considered as a whole and in connection with the other instructions given, were proper. Stroud v. Hansen, 48 Cal.App.2d 556, 562, 120 P.2d 102; Barlow v. Crome, 44 Cal.

App.2d 356, 112 P.2d 303. As above recorded, the questions here presented under the instructions were factual questions for the jury. Florine v. Market Street Ry. Co., 64 Cal.App.2d 581, 149 P.2d 41; Bramble v. McEwan, 40 Cal.App.2d 400, 104 P.2d 1074; Maus v. Scavenger Protective Ass'n, 2 Cal.App.2d 624, 39 P.2d 209; Satterlee v. Orange Glenn School District, supra. The jury was the trier of the facts and its verdict thereon, having been reached under proper instructions, becomes binding on the issues raised by the plaintiffs on this appeal.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.




## SUMMERS v. TICE et al. *

Civ. 16002, 16005.

District Court of Appeal, Second District, Division 1, California.

March 16, 1948.

**1. Weapons ⇐18(2)**

Where three parties went hunting together in a place where they had a right to go, and at all times the conduct of one hunter was careful, skillful and prudent, but by the unforeseen negligent conduct of the second hunter the third was injured when several shots were fired, the first hunter was not liable for injury to the third in absence of evidence indicating any breach of duty on his part to the injured hunter or any negligence.

**2. Appeal and error ⇐882(3)**

A party who has pleaded and tried his case on one theory cannot adopt a different theory on appeal and raise an issue separate from the cause of action alleged in his complaint.

**3. Weapons ⇐18(2)**

Where three parties were engaged in a hunting expedition in a place where they had a right to be, and plaintiff, having become separated from the rest, was injured when several shots were fired, but there was no showing as to how many shots were fired, or that either of the two defendants fired in the direction of plaintiff, evidence was insufficient to sustain finding that either defendant or both jointly were guilty of negligence proximately causing plaintiff's injury.

---

Appeals from Superior Court, Los Angeles County; John A. Holland, Judge pro tem.

Action by Charles Summers against Harold W. Tice and Ernest Simonson for personal injuries arising out of a hunting accident. From the judgment, defendants appeal.

Reversed and remanded for new trial.

Joseph D. Taylor, of Los Angeles, and Wm. A. Wittman, of South Gate, for appellant Tice.

Gale & Purciel, of Bell, for appellant Simonson.

Werner O. Graf, of Los Angeles, for respondent.

BARTLETT, Justice pro tem.

On November 20, 1945, plaintiff and respondent, Charles A. Summers, and defendants and appellants, Ernest Simonson and Harold W. Tice, went on a hunting expedition together on the open range near Welton, California. Being in pursuit of quail each of them was appropriately armed with a shotgun loaded with 7½ shot. The complaint alleged that at a time when plaintiff was at a point approximately 200 feet from the defendants, each of them negligently discharged his gun, with the result that shot was lodged in the respondent's right eye and in his upper lip. The complaint also contains this allegation (Paragraph V): "That plaintiff is in doubt as to the person from whom he is entitled to redress and therefore has joined both defendants in this action with the intent that

* Subsequent opinion 199 P.2d 1.

the question as to which of the defendants is liable, and to what extent, may be determined by this Court."

It is further alleged that as a result of the negligence of defendants, and each of them, plaintiff lost his right eye and sustained injuries to his lip and in connection with the operation to his eye, suffered certain special damages. The answers denied the allegations of negligence and the defendant Simonson pleaded contributory negligence on the part of plaintiff. The court then found each defendant guilty of negligence and that the negligence of each defendant was a proximate cause of the injury to plaintiff. No finding whatever was made as to the allegations of Paragraph V.

A judgment was then rendered against the defendants, and each of them, for $10,000.00. At the time of the trial plaintiff testified:

"* * * I think about 4 o'clock in the afternoon we came upon a place very similar to this Los Angeles bowl in the contour of the terrain, I would say, and we discovered in there approximately 50 birds, quail, and after we had scattered them and got them, each one of us had two or three birds apiece, we started hunting out the singles, and Mr. Tice and Mr. Simonson were down near the base of the hill, and I walked up in a kind of curved direction toward the top, or in that direction, and I had sat down for a moment, a kind of rest after climbing up the hill, and the birds were coming up my way, I got up and walked I imagine about 25 feet or so from where I was sitting, and I had been looking in a general direction at Mr. Tice and Mr. Simonson, but there was a bird coming that way, and I heard two shots, almost together, simultaneously, and I got shot in the eye, in the face.

"Q. Which eye? A. In the right eye, and one in the upper lip, near the center."

He also testified:

"Q. You say you heard two shots just immediately preceding your injury, were you or were you not looking directly at Mr. Tice and Mr. Simonson at that time? A. I was looking in their general direction, yes.

"Q. But you don't know which one fired either one of those shots, or both of them, is that it? A. If I had seen a gun pointing toward me I would have turned my head."

The only other witness called by the plaintiff as to the accident was defendant Simonson under the provisions of section 2055 of the Code of Civil Procedure. He was asked very few questions, and merely testified that just before Summers cried out that he had been hit, Tice had fired one shot and he had fired right after it. The plaintiff then rested.

The defendants and each of them moved for a nonsuit upon the ground, among others, that there was no evidence of negligence on the part of either defendant. In fact there was no evidence in the record that either defendant so much as aimed a gun in plaintiff's direction. Nevertheless, the court denied the motion.

The defendant Tice then testified that at the time referred to in plaintiff's testimony there were just two shots fired and both of them were fired by Simonson. Simonson, again called to the witness stand, testified that three shots were fired, two by himself and one by Tice. He further stated that at the time he shot, the plaintiff was not in sight. There was still no evidence in the record as to either defendant firing in the direction of plaintiff or as to which defendant shot plaintiff in the eye.

Let us first consider the appeal of the defendant Tice. It is his contention that the judgment should be reversed for the reason that there is no finding as to which defendant was guilty of the act which injured the plaintiff although by paragraph V of his complaint the plaintiff himself put the question in issue; that the evidence is insufficient to show that any negligence on the part of Tice was the proximate cause of the injury to plaintiff's eye and that where separate injuries result from the acts of independent tort feasors, the damages must be segregated. Respondent in his brief ignores these contentions and states the following as the sole question involved: "Where two hunters, in pursuit of a common purpose, in the presence of each other, negligently fire shotguns loaded with iden-

tical birdshot, in the general direction of a third hunter, whose presence and whereabouts are known to both, are they jointly and severally liable for the resulting injury, although it cannot be definitely determined whose birdshot actually pierced the third hunter's eye?"

The premise upon which this question is based is wrong in two particulars: first, here three hunters, one of whom was injured, were on a hunting expedition together; and, second, there is no evidence in the record of any negligence on the part of Tice. Respondent states that the question is one for which there seems to be no precise precedent in California and proceeds to cite cases from other jurisdictions. Not one of these cases is in point in a situation such as we have here.

In Oliver v. Miles, 144 Miss. 852, 110 So. 666, 50 A.L.R. 357, two hunters fired at partridges across a public highway in reckless disregard of the rights of persons using this road, and a traveler on the highway was shot. In the absence of proof as to which hunter fired the shot causing the injury to the third person who was not of their party, the court held that the defendants were jointly engaged in the unlawful enterprise of shooting across a highway and were jointly liable.

Benson v. Ross, 143 Mich. 452, 106 N.W. 1120, 114 Am.St.Rep. 675 is the next case he cites. In this case three men acting in concert were shooting at a mark in violation of a city ordinance. The court held that they were joint tort feasors and jointly liable for an injury to a third person.

Reyher v. Mayne, 90 Colo. 586, 10 P.2d 1109, 1110, is another case cited. The plaintiff in this action, a licensed guide and hunter, had been authorized by the owner of the premises to hunt on the border of a lake. In this lake there had been constructed blinds for the use of hunters in one of which the plaintiff was. He had placed twelve live geese as decoys, harnessed and secured along the shore of the lake on both sides of and in front of the blinds. Suddenly the plaintiff heard the fire of guns and observed that his decoy geese were being shot and he arose to protest and himself received in his face and upper body the discharge of a gun held by one of the defendants. There was no doubt but that all of the defendants were trespassers. The land was fenced and posted and on the closed gate which the defendant opened there was a sign "No Hunting or Tresspassing Allowed." The question before the court was whether or not it was error to give judgment against both defendants when only one of them had fired the shot that resulted in the bodily injury to the plaintiff. The court held that the destruction of the geese constituted a part of the plaintiff's cause of action and that both of the defendants had fired at and killed some of these geese and that it was while they were persisting in this unlawful act that the plaintiff was injured; that both were on land where they were without right to be and acting in concert. A judgment against both of them was affirmed.

In Brown v. Thayer, 212 Mass. 392, 99 N.E. 237, it was held that the owners of two automobiles, driven at a negligent rate of speed and racing with each other, were jointly and severally liable for the death of a pedestrian who was struck by one of the automobiles. On the road along which this race was taking place was a carriage going in the same direction. One of the automobiles went to the right of the carriage and the other to the left of the carriage, not even leaving the pedestrian a place to dodge. The manner in which they conducted themselves was in express violation of a statute and the court held that where two or more tort feasors by concurrent acts of negligence which although disconnected yet in combination inflict the injury, the plaintiff may sue them jointly. It is noteworthy that the judgment in the case cited, like the judgment in the instant case, did not segregate the damages and upon that ground the judgment was reversed.

The next case which respondent cites was one which might more appropriately be called to our attention by the appellant. This is the case of Martin v. Farrell, 66 App.Div. 177, 72 N.Y.S. 934, 935. Horses belonging to the defendants were placed in a pasture over night with a horse belonging to the plaintiff. The plaintiff's horse was injured by being kicked by one

of the defendant's horses. The court held that the case did not depend upon the ownership of the horses nor as to whether they were known to be vicious, and that in such a case if both were negligent both were liable although it was not known whose horse had actually committed the act. The court then goes on to say, "The important question of fact herein is whether the defendants, and each of them, personally, or by direction to others, pulled the staple of the lock and turned the horses into the lots." The court then held that the evidence was not sufficient to show that one of the defendants either pulled the staple of the lock on the gate or took part in the turning of the horses into the lot, and, inasmuch as his negligence in that regard was not shown, reversed the judgment as to that defendant.

The other two cases referred to in respondent's brief are not such as to give any aid in solving the question involved here. It will be seen that in all of the cases cited by respondent, the defendants were acting in concert in the violation of some statute, were grossly negligent and, as a result of that violation of law, some innocent person, not of their party, was injured.

The following is a quotation from respondent's brief:

"In Volume 4 of 'Restatement of the Law of Torts', paragraph 876, page 438, we find the following illustration under the heading 'Persons Acting in Concert':

"'A and B are members of a hunting party. Each of them, in the presence of the other, shoots across a public road at an animal, this being negligent as to persons on the road. A hits the animal. B's bullet strikes C, a traveler on the road. A is liable to C.'"

The illustration given is one cited in the text as an illustration of the rule laid down therein which is as follows:

"876. Persons Acting in Concert.

"For harm resulting to a third person from the tortious conduct of another, a person is liable if he

"(a) orders or induces such conduct, knowing of the conditions under which the act is done or intending the consequences which ensue, or

"(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

"(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person."

In commenting on this rule, it is stated in the text on page 436:

"Advice or encouragement to act operates as a moral support to a tort feasor and if the act encouraged is known to be tortious, it has the same effect upon the liability of the adviser as participation or physical assistance. If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tort feasor and is responsible for the consequences of the other's act."

The illustration given in respondent's brief is illustration 3.

Further commenting on this rule, on page 440, we find the following:

"Further, one who assists in doing an act which from his standpoint does not involve elements of undue risk is not liable merely because another with whom he cooperates is negligent (see Illustration 9). Likewise, one who supplies another with the means of committing a tort is not liable if he has no reason to suppose that a tort will be committed (see Illustrations 10 and 11). In none of these cases is the defendant committing a breach of duty to the injured person.

"Illustrations:

"9. A and B hunt together but not in the prosecution of a joint enterprise. It is not negligent to hunt where they are and neither of them has reason to believe that the other will be negligent. Under the unreasonable belief that it is an animal, A shoots at a moving object which proves to be a man. B is not liable for A's negligent act."

[1] Under the reasoning of these rules from "Restatement of the Law of Torts", Tice could not be liable. It is evident that the real test is whether or not the defendant committed any breach of duty to the

njured person. There is no evidence that Tice did anything to violate any breach of duty he owed to the plaintiff; that he was negligent in any way; that he had any reason to believe that Simonson would breach any duty he owed to the plaintiff or would be negligent. To uphold plaintiff's contention we would be forced to hold that if A, B and C go hunting together in a place where they have a right to go and at all times on the expedition the conduct of A is careful, skillful and prudent, but that by the unforeseen negligent conduct of B, C is injured, nevertheless, in spite of his own exemplary conduct, A is liable for the injury to C. There is no reason in logic or law for such a holding and no decision to any such effect has been called to our attention.

This contention of respondent's that the defendants are jointly liable, regardless of whose negligence caused the injury to plaintiff, is advanced for the first time on appeal. The complaint is based on an entirely different theory and the case was tried on the issues raised by the complaint and the answer thereto. The complaint definitely did not seek to hold the defendants liable by reason of any joint tort or joint act, or one defendant for damages caused by the other, but was drawn upon the theory that the plaintiff should recover from each defendant on account of his separate tort. That is shown clearly by paragraph V of the complaint, which we have already quoted. The court made no finding in regard to this allegation and its failure to do so led to absurdities in its findings. As examples, take these portions of findings 13 and 14, "that as a direct and proximate result of the shots fired by defendants and each of them, a birdshot pellet was caused to and did lodge in plaintiff's right eye * * *. The court finds that said injuries suffered by said plaintiff were the result of the gross negligence of the defendants and each of them."

[2] A party who has pleaded and tried his case on one theory cannot adopt a different theory on appeal and raise an issue separate and distinct from the cause of action alleged in his complaint. Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409; Foti v. Morrissey, 57 Cal.App.2d 328, 134 P.2d 51; Hanchett v. Wiseley, 107 Cal.App. 230, 290 P. 311.

[3] The record in this case is entirely devoid of any evidence to support two important findings in regard to the appellant Tice: one, that Tice was negligent; two, that any act of Tice was the proximate cause of any injury to plaintiff.

The statements which we have made concerning the appeal of Tice are, in the main, equally applicable to the appeal of Simonson. On the question of the sufficiency of the evidence to justify the findings as to Simonson, there was testimony in the record by the plaintiff and by Tice that at and just before the accident, but two shots were fired, and Tice testified that he did not shoot. This was in conflict with Simonson's testimony that three shots were fired at the critical time, he having fired two of them and Tice one. Tice also testified as to certain statements on the part of Simonson which constituted admissions on the part of Simonson that he fired the shot which injured plaintiff. If we were to accept Tice's testimony that he fired no shot as true and that only two shots were fired then a finding that Simonson was negligent and that his negligence proximately caused the injury could be sustained. However, the court made a specific finding that Tice's testimony, both in regard to not having fired a shot at the time and as to the statements he testified were made by Simonson, was false. Such being the court's findings, there is no evidence left in the record to support the findings as to Simonson either.

The judgment is reversed as to both defendants and the cause is remanded for a new trial.

DORAN, Acting P. J., and WHITE, J., concur.

84 Cal.App.2d 409

## In re WHITE'S ESTATE.

Civ. 13529.

District Court of Appeal, First District, Division 1, California.

March 17, 1948.

1. Wills ⇐733(1)

The death of deceased is effective date of bequest.

2. Wills ⇐565(1)

A completed manuscript which had not been printed and offered for sale by publisher at time of death of author who had contracted with publisher for publication of manuscript, was an "unpublished manuscript" within will giving "unpublished manuscripts" to legatee, and legatee had common-law right to first publication and by implication the right to the royalties, subject to whatever rights publisher had against author by reason of contract, notwithstanding that at time of death manuscript was not in author's office drawer marked "unpublished manuscripts" but was in possession of legatee pursuant to author's instructions to send to publisher after checking for errors. Civ. Code, § 982; Probate Code, §§ 77, 78, 106.

See Words and Phrases, Permanent Edition, for all other definitions of "Unpublished Manuscript".

---

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Proceeding in the matter of the estate of Stewart Edward White, deceased, wherein Harwood A. White filed a petition for partial distribution. Mrs. Leslie Kimmell filed an answer. From an order denying the petition, Harwood A. White appeals.

Order affirmed.

Griffith & Thornburgh, of Santa Barbara, and John G. Baldwin, of San Francisco, for appellant.

Leslie F. Kimmell, of Laguna Beach, and Frank V. Kington, of Redwood City, for respondents.

BRAY, Justice.

Stewart Edward White, the well-known author, died testate. The portions of his will pertinent here are: Article III(h). "All of the remainder of the personal property included in my estate, such as furniture, rugs, manuscripts, mementoes, and articles of historical interest, with the exception of those herein specifically bequeathed and expressly excepting any and all securities, I give and bequeath unto my brother, Harwood White, of Ashley Road, Santa Barbara, California, and direct that he dispose of the same in such manner and to such persons as in his discretion he shall deem advisable, but preferably in accordance with any memorandum of instructions which I may leave at the time of my death. In the event it shall be found by my said brother and my executor that any of said articles of personal property may be sold, then I direct them so to sell such articles and to retain the proceeds thereof in my estate to be distributed in accordance with the terms hereof. * * * (k) To Mrs. Leslie Kimmel, * * * all unpublished manuscripts, to be handled by her in accordance with instructions which I have given her."

The will was executed July 23, 1946. Decedent died September 18, 1946. For some time prior to and at the time of making his will, White had been engaged in writing a manuscript. Between the date of the will an of his death decedent completed the manuscript and sent it to respondent, the legatee under paragraph (k) above, who had worked with him in its preparation. She was to check it for errors and send it to the publisher. On September 10, just eight days before he died, decedent entered into an agreement with E. P. Dutton & Co., Inc., for publication of a book from the manuscript, the book to be called "With Folded Wings." This contract provided for exclusive rights to the copyright and to publication in the publisher, with royalties to the decedent. Appellant is the brother of decedent, and the person mentioned in paragraph (h) above. About August 10, less than a month after the execution of the will and before the death of decedent, appellant discovered in the decedent's office

a drawer in one of his filing cabinets labeled "Unpublished Manuscripts." There is no evidence that the manuscript in question here was in the drawer at that time.

Appellant filed in the estate of decedent a petition for partial distribution asking that "all rights to the book, 'With Folded Wings'" be distributed to him under Article III(h) of the will. Respondent filed an answer to that petition, setting up her claim to the manuscript and to the book, under Article III(k), and asking that the title thereto be confirmed in her. After a hearing, the court found that the manuscript was an "unpublished" manuscript and as such was bequeathed to respondent under paragraph (k) of Article III of the will, denied appellant's petition, and confirmed respondent's title to the manuscript and the book.

The real question is, did the testator intend that the bequest of "all unpublished manuscripts" should include "With Folded Wings." "The cardinal rule in the interpretation of a will is that 'it is to be construed according to the intention of the testator.' Civ. Code, § 1317. As said in [Re] Estate of Young, 123 Cal. 337, 55 P. 1011: 'the purpose of construction as applied to wills is unquestionably to arrive, if possible, at the intention of the testator; but the intention to be sought for is not that which existed in the mind of the testator, but that which is expressed in the language of the will.' It is not the business of the court to say, in examining the terms of a will, what the testator intended, but what is the meaning to be given to the language which he used. Where the terms of a will are free from ambiguity, the language used must be interpreted according to its ordinary meaning and legal import, and the intention of the testator ascertained thereby." In re Estate of Blake, 157 Cal. 448, 458, 108 P. 287, 291. "The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained." Sec. 106, Probate Code. "If a disputed word or phrase has a well-defined legal or popular meaning, the presumption is that the testator intended the expression to have this meaning; and this presumption will be given effect, unless an intention to use the term in another sense is disclosed by the context of the will, the matter to which the word refers, or the draftsman's understanding as to the meaning of the expression." 26 Cal.Jur. p. 887.

Under the above rules, what is the meaning of "unpublished?" Webster's New International Dictionary (1946) defines "publish" as follows: "3. To bring before the public, as for sale or distribution; esp.: a. To print, or cause to be printed, and to issue from the press, either for sale or general distribution, as a book, newspaper, piece of music, engraving, etc. * * * Print, Publish are often confused. A book may be printed without being published; it is published only when it is offered for sale, or put into general circulation; as 'Moxon told me * * * that he was about to print but (I think) not to publish, those elegiacs on Hallam' (E. Fitzgerald); 'Sir William Drummond's late book about the Bible—printed, but not published' (Byron)." 18 C.J.S., Copyright and Literary Property, states: "Publication is the act of making public or known, as by offering for sale or distribution, the subject matter in question * * *." Headnote, § 13(1). "Private circulation is not publication, but printing and offering for sale constitute publication, and exposure for for sale constitutes a publication * * ." Page 151. "Mere printing in itself does not amount to a publication, for the obvious reason that a book may be withheld from the public after it has been printed." Page 152. "A consignment of books to dealers with instructions not to sell or to offer for sale until a specified time is not a publication, but a sale after that time has arrived is a publication." Page 153. See also In re Publishing Docket in Local Newspaper, 266 Mo. 48, 187 S.W. 1174, and 34 Am.Jur. 446.

[1, 2] Admittedly the manuscript had not been printed, or even set up in type at the time of the death of the decedent, which, of course, is the effective date of the bequest. In re Estate of Babb, 200 Cal. 252, 252 P. 1039. Thus, taking the words of the testator in their ordinary and gram-

matical sense, "With Folded Wings" was an "unpublished" manuscript.

To escape the obviousness of this conclusion, appellant contends that because decedent maintained a drawer labeled "Unpublished Manuscripts," his use of that language in the will meant that he intended only to include the manuscripts actually in the drawer at the time of his death. Decedent obviously was an intelligent man, and undoubtedly knew the meaning of the word "unpublished." While he had to remove the manuscript from the drawer (if it ever was there) to contract and arrange for publication, that act would not require the conclusion that by so doing, he, contrary to the ordinary and legal definition, considered the manuscript published; and as said in Re Estate of Blake, supra, 157 Cal. at page 459, 108 P. at page 291, "It is not the business of the court to say, in examining the terms of a will, what the testator intended, but what is the meaning to be given to the language which he used." The place where the manuscript was at the time of death was immaterial. Had decedent intended to make the restriction or limitation contended for by appellant, instead of saying "unpublished manuscripts," he would have said "all manuscripts in the drawer labeled 'unpublished manuscripts.'"

Appellant concedes that "The primary purpose of the court in construing any will must be to determine the testator's true intention," citing In re Estate of Axcelrod, 23 Cal.2d 761, 147 P.2d 1, and other authorities. He also refers to the following quotation from In re Estate of Hollingsworth, 37 Cal.App.2d 432, 435, 99 P.2d 599, 601: "A rule to be followed in the interpretation of the provisions of a will is that the testamentary instrument is to be examined with a view of discovering the decedent's testamentary scheme or general intention. The meaning of the particular words, phrases and provisions is to be subordinated to this scheme, plan or dominant purpose."

That decedent meant just what he said, that "unpublished" manuscripts were to go to respondent, is shown by the entire context of both paragraphs (h) and (k). In the bequest to respondent he gave her all unpublished manuscripts "to be handled by her in accordance with instructions which I have given her." Thus, a reasonable interpretation is that until a manuscript became actually a published, as distinguished from an unpublished manuscript, it was to be hers to handle.

In paragraph (h) appellant is given "the remainder of the personal property * * * such as furniture, rugs, manuscripts, mementoes, and articles of historical interest, with the exception of those herein specifically bequeathed * * *." The will then goes on to direct that the above be disposed of, and that if any of this personal property can be sold, appellant is to sell it and distribute the proceeds as directed. From the above, it is evident that the use of the word "manuscripts," in connection with mementoes and articles of historical interest, as opposed to the use of the words "unpublished manuscripts" specifically bequeathed in paragraph (k), is consistent with an intent to give appellant only copies of manuscripts already published and apart from rights incident thereto. Decedent speaks of selling the articles, if they may be sold, and retaining the proceeds for the estate. He would not refer to selling royalties from a published manuscript or even an about-to-be published manuscript. As stated in 3 Page on Wills, p. 46, "A provision that personal property, of which a bequest was made, was to be sold, is said to show that testator did not intend that money should pass thereby." Reading the two subdivisions together, it appears that decedent intended his brother to have all manuscripts which had been published, while respondent was to receive the unpublished ones. To hold, as urged by appellant, that decedent intended only to bequeath respondent the manuscripts which he had segregated and marked as "unpublished" by placing them in the marked drawer is a tenuous and strained construction of the language used. Suppose decedent, the day of his death, had been examining one of the unpublished manuscripts which he kept in the drawer, and had left it in another room of his house, dying before he returned it to its accustomed place; it certainly could not be contended that such

manuscript was not included in the bequest to respondent.

Appellant contends that the moment decedent sent the manuscript to his publisher and executed a contract for its publication, he removed the manuscript itself from the designation of "unpublished manuscript" which he himself used; and secondly, that he segregated the reproduction rights in the book from the mere physical manuscript by substitution of a valuable contractual asset; that all decedent retained was a right to the royalties. As to the second point, while this may be true as between decedent and his publisher, the manuscript itself did not pass into the category of a "published" manuscript.

Appellant cites Stephens v. Cady, 55 U.S. 528, 14 How. 528, 14 L.Ed. 528, and American Tobacco Co. v. Werckmeister, 207 U.S. 284, 28 S.Ct. 72, 52 L.Ed. 208, 12 Ann.Cas. 595, for the proposition that at common law the transfer of the manuscript of a book does not carry with it the right to print and publish the work, and contends that this rule supports his above contention.

However, this contention is answered by the following sections of the Probate Code: (Sec. 77) "An agreement made by a testator for the sale or transfer of property disposed of by a will previously made, does not revoke such disposal; but the property passes by the will, subject to the same remedies on the testator's agreement, for a specific performance or otherwise, against the devisees or legatees, as might be had against the testator's successors, if the same had passed by succession." (Sec. 78) "Neither a charge or encumbrance placed by a testator upon property previously disposed of by his will, for the purpose of securing the payment of money or the performance of any covenant or agreement, nor a conveyance, settlement, or other act of a testator, by which his interest in any such property is altered, but not wholly divested, is a revocation of the disposal; but the property, subject to such charge or encumbrance, or the remaining interest therein, passes by the will."

In re Estate of Dwyer, 159 Cal. 664, 115 P. 235, holds that while at common law the general rule is that a sale of devised property by an executory contract of sale is a revocation of the devise, our code provisions have modified the common law rule.

"Respondent's contention that the legacy given to appellant has been adeemed cannot be sustained. While it is true that ademption ordinarily applies to special and not to general legacies (28 R.C.L. 344), it is only accomplished when a change with respect to the subject matter takes place which results in the satisfaction or abolishing of the gift. In Re Estate of McLaughlin, 97 Cal.App. 485, 488 and 490, 275 P. 875, 877, it is said:

"'In 3 Woerner's Law of Administration, 1523, § 446, it is said a legacy is adeemed when, by some act of the testator the thing devised has ceased to exist in the form which it is described in the will, for the reason that, upon the death of the testator, there is nothing answering the description of that property which may be delivered to the legatee. * * * In 40 Cyc. 1046, § C, it is said: "The weight of authority is to the effect that a change, subsequent to the making of the will, in the form of property devised or bequeathed does not prevent the operation of the provisions of the will and the property in its changed form passes to the devisee or legatee."'" In re Estate of Cline, 67 Cal. App.2d 800, 805, 155 P.2d 390, 393.

"There is no doubt that apart from statute the law recognizes certain rights of property in the original intellectual products of an author, which are entitled to the same protection as rights in any other species of property; that the author has the right of first publication and that such right is transferable. [Citing cases.]" Loew's Incorporated v. Superior Court, 18 Cal.2d 419, 421, 115 P.2d 983, 984. "It is governed by the same rules of transfer and succession, is protected by the same process, and has the benefit of all the remedies accorded to other personal property so far as applicable." 18 C.J.S., Copyright and Literary Property, § 5. "The owner of any product of the mind, or of any representation or expression thereof, may transfer his property in the same." Civ. Code, sec. 982, as of 1946. "The right and property of an owner in a copyright may be be-

queathed by will." 18 C.J.S., Pocket Part, Copyright and Literary Property, § 85.

At least until publication, the common law right to first publication, and the rights incident thereto, existed concurrently with the manuscript and passed to respondent under paragraph (k), by virtue of Probate Code sections 77 and 78, subject, of course, to whatever rights Dutton & Co. had against the decedent by reason of the contract.

Appellant contends that on execution of the contract, decedent then held two distinct property interests, first, the contract right to the royalties, and secondly, the right as the author to the physical document constituting the original manuscript. Assuming this to be true, it does not alter the interpretation of paragraph (k). The manuscript had not yet become a "published" one, and therefore went to respondent, and by implication carried with it the right to the royalties.

"Bequests by implication have from remote times been sustained where no direct language in a will is found to support them, but where from informal language used such reasonable construction can be placed on it as implies an intention to make a bequest. As said in the American and English Encyclopedia of Law (1st Ed., vol. 29, p. 382): 'Implication may arise under a recital, reference of elliptical expression which necessarily implies something else as contemplated by the testator; from the form of the gift; or from a direction to do something which cannot be carried into effect without of necessity involving something else as a necessary consequence.'

"While, of course, conjecture and speculation cannot be indulged in to import into the will of a testator something which no language used by him warrants simply because he seems to have omitted something which it is reasonable to assume should have been provided for, still, when he has used language which can be reasonably interpreted to raise a devise, it should be so construed." In re Estate of Blake, supra, 157 Cal. 448, 466, 467, 108 P. 287, 295.

Taking the words of the will in their ordinary and grammatical sense, the words "unpublished manuscripts" can only be given the meaning adopted by the lower court, namely, a manuscript which has not yet been published, even though contracted to be published. In re Estate of Hartson, 218 Cal. 536, at page 539, 24 P.2d 171, 173, is cited by appellant to the effect that "It is also well settled that, where the provisions of a will are capable of two interpretations, under one of which those of the blood of the testator will take, while under the other the property will go to strangers, the interpretation by which the property goes to those of the blood of the testator is preferred." This, of course, assumes that the clause is susceptible of two fairly equal interpretations. However, to give a construction favorable to the brother, appellant here, would require a very strained, technical and unwarranted interpretation of simple words used by a person skilled in the use of words calculated to convey ordinary, every-day meanings.

The order appealed from is affirmed.

PETERS, P. J., and WARD, J., concur.




84 Cal.App.2d 357

**PEOPLE v. WARD et al.**

**Cr. 2504.**

District Court of Appeal, First District, Division 1, California.

March 15, 1948.

1. Criminal law ⇐980(2)

Evidence on hearing to determine degree of robbery justified trial court's conclusion that a real gun, rather than a toy, was used in perpetration of robbery and that offense was robbery in the first degree. Pen.Code, § 211a.

2. Robbery ⇐11

A metal toy pistol, resembling a 32 automatic and weighing one-half pound, which defendants claimed they used in a robbery to intimidate victim and which

readily could have been used as a bludgeon was a "dangerous weapon" within the meaning of robbery statute thereby making offense robbery in the first degree even if toy pistol, instead of real one, were used. Pen.Code, § 211a.

See Words and Phrases, Permanent Edition, for all other definitions of "Dangerous Weapon".

Appeal from Superior Court, Alameda County; O. D. Hamlin, Jr. Judge.

Charles T. Ward and Clayton D. Cirveau were convicted of robbery, the former after trial and the latter on a plea of guilty. On a hearing to determine the degree of robbery, both defendants were found to be guilty in the first degree and Cirveau appeals.

Affirmed.

Edward E. Craig, of Berkeley, for appellant.

Fred N. Howser, Atty. Gen. and David K. Lener, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Charles T. Ward and Clayton D. Cirveau were charged with robbery. Ward pleaded not guilty and was convicted as charged. Cirveau first pleaded not guilty and then withdrew that plea and entered a plea of guilty. Testimony was taken by the court to establish the degree of robbery as to defendant Cirveau. As to defendant Cirveau the court found the degree to be first degree. Cirveau alone appeals from that portion of the judgment of the trial court determining that his offense was first degree, it being contended that, as a matter of law, it was second degree.

The pertinent statute is § 211a of the Penal Code. It provides: "All robbery which is perpetrated by torture or by a person being armed with a dangerous or deadly weapon is robbery in the first degree. All other kinds of robbery are of the second degree."

It is the contention of appellant that the evidence shows that the weapon here used was a toy cap pistol, and it is urged that such weapon is neither "dangerous" nor "deadly." The point is without merit.

The record shows that on March 12, 1947, Ward and appellant robbed a drugstore operated by Clarence J. De Laney in Oakland. De Laney testified that these two men came into the store; that Ward was carrying the gun; that they ordered him into the back room and robbed him; that he saw a "black gun pointing at me"; that at the preliminary hearing he had testified that it looked like a real gun to him, and that he had then stated that it was a real gun; that that was still his statement; that "I can say it looked like a real gun * * * an automatic * * * a pistol"; that he had not then carefully examined it.

Appellant and Ward both testified that the gun used by Ward in the holdup was a toy cap pistol resembling a .32 automatic. Appellant testified that, on the occasion of the robbery, they used an automobile borrowed from one Jack Houston, and that the toy pistol was in the car; that Ward had this toy pistol in his hand when they entered the store; that neither he nor Ward had any other gun at the time of the robbery; that after the robbery they tossed the toy pistol onto the back seat of the automobile. Ward corroborated this testimony.

The record also shows that about two weeks after the De Laney robbery Ward was arrested in San Francisco while in the company of one Beal, appellant not being present. Ward was then driving the same automobile used in the De Laney holdup. The officer who arrested Beal and Ward testified that on that occasion he took a gun away from Beal, and, when he asked Ward where his gun was, Ward told him that it was in the back of the front seat cushion; that he felt behind the cushion and found a loaded .32 automatic; that thereafter he, the officer, searched the automobile for other guns; that he removed the front and back cushions; that he did not find any other gun and did not, in particular, find any toy pistol under the back seat.

Walter M. Houston, an uncle of appellant, was then called as a witness. He

testified that after the robbery he had purchased the automobile involved from his step-son, Jack Houston; that toward the end of July or the first of August, 1947, he had removed the back cushion of the automobile and there found a toy pistol.

The .32 automatic and the toy pistol were then exhibited to De Laney, but the witness could not state "positively" which weapon had been used. Both Ward and appellant thought that the toy pistol, which was introduced into evidence, was the gun used in the holdup.

[1] On this evidence the trial court fixed the degree of the crime at first degree. It is apparent that this determination can be sustained on either or both of two theories. In the first place, while it is true that De Laney could not positively state that Ward menaced him with a real gun, his testimony shows that he "thought" it was a "real gun"; that it "looked like a real gun", and that he would state that it was a real gun. When this testimony is considered, together with that of the policeman who arrested Ward several weeks later while Ward was driving the same automobile used in the De Laney robbery, which testimony was to the effect that Ward then admitted a .32 loaded automatic found behind the front seat cushion was his, and that the officer then searched under the back cushion and did not find the toy pistol that Houston claims he found several months later, it is at once apparent that, under elementary appellate principles, the implied finding of the trial court that a real gun was used in the De Laney robbery is amply supported.

[2] In the second place, even if the evidence uncontrovertibly demonstrated that a toy pistol had been used (which it does not), that would not mean that the finding that such weapon was a "dangerous" one within the meaning of § 211a of the Penal Code is not supported. There can be no doubt at all, in this state, that an unloaded gun can be a "dangerous" or "deadly" weapon within the meaning of § 211a. People v. Raleigh, 128 Cal.App. 105, 16 P.2d 752; People v. Egan, 77 Cal.App. 279, 246 P. 337; People v. Freeman, 86 Cal.App. 374, 260 P. 826. The rationale of these cases is best expressed in the following excerpts from People v. Freeman, supra, at page 376 of 83 Cal.App., at page 827 of 260 P.:

"Notwithstanding the fact that ordinarily and in and of itself the instrumentality may be in fact comparatively harmless, if, considering the attendant circumstances, together with the present ability of its possessor, the instrument is capable of being used in a deadly or dangerous manner, for the purpose of the particular occasion only, the character of the instrument may be established.

"In the instant case it is apparent that, although the defendant who had possession of the unloaded pistol at the time the robbery occurred was ten or twelve feet distant from the victim, it was possible for such defendant within a very short space of time to have used the pistol as a bludgeon or club; thus rendering it a most 'dangerous' weapon within the meaning of the statute."

It is apparent that if the trier of the facts can find that an unloaded gun can be a "dangerous" weapon within the meaning of the section because it could be used as a bludgeon, a "toy" pistol of the same size and shape likewise can be found to be a "dangerous" weapon. The evidence shows that this toy pistol in size and shape resembles a .32 automatic. It also shows that it was a metal gun. It was exhibited to the trial court, and has been brought to this court as an exhibit. An examination of it shows that it weights one-half pound, is 6½ inches long, and that it looks like a real gun. Under such circumstances the trial court was amply justified in finding that the "toy" pistol was in fact a "dangerous" weapon. This was the precise holding of this court in a toy pistol case in People v. Coleman, 53 Cal.App.2d 18, 127 P.2d 309.

The judgment appealed from is affirmed.

BRAY, J., concurs.

WARD, Justice.

I concur in the judgment. I am satisfied that proof to a moral certainty and beyond

all reasonable doubt was presented in the trial court that the "weapon" used in the perpetration of the offense charged against the appellant was a "dangerous" weapon. The exhibit in question is not a legal document which requires judicial interpretation, but merely a mechanism the dangerous character of which is a question of fact. It is my opinion that the evidence contributed by members of a reviewing court has no weight unless a higher tribunal directs that questions of fact other than those referred to in the state Constitution shall be determined by an appellate court. In brief, this is a case in which justices of an appellate court affirm the trial court's findings by personal "examination" of the facts. If such affirmation is allowed, then negation of such conclusion should be permitted. This leads to substitution of factual conclusions by an appellate court though there may be no abuse of discretion by the trial judge or jury.




84 Cal.App.2d 427

**WILSON v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.**

**SAME v. MOORE et al.**

**BROADNAX v. MOORE.**

**Civ. 15893.**

**District Court of Appeal, Second District, Division 1, California.**

**March 17, 1948.**

Rehearing Denied April 7, 1948.

Hearing Denied May 13, 1948.

**1. Courts** ⇐90(1)
**Vendor and purchaser** ⇐335

The buyer under contract for sale of real estate cannot after her default, without excuse therefor, maintain action to recover moneys paid under the contract, and repeated affirmation of such rule in a long uninterrupted series of cases has caused it to become settled doctrine under rule of "stare decisis."

See Words and Phrases, Permanent Edition, for all other definitions of "Stare Decisis".

**2. Contracts** ⇐318

"Wilful within statute providing that a party may be relieved from forfeiture, upon making full compensation to other party, except in case of a grossly negligent, "wilful", or fraudulent breach of duty means voluntary, spontaneous, intentional, or designed. Civ.Code, § 3275.

See Words and Phrases, Permanent Edition, for all other definitions of "Wilful".

**3. Vendor and purchaser** ⇐185

Purchaser who after executing contract and paying part of down payment served written notice cancelling escrow and did nothing further to consummate her contract and who in so doing knew and intended what she was doing and was a free agent, was guilty of a "wilful" breach and hence could not be relieved of forfeiture under statute permitting party to be relieved from forfeiture upon making full compensation to other party except in case of grossly negligent, "wilful", or fraudulent breach of duty. Civ.Code, § 3275.

**4. Vendor and purchaser** ⇐185

Statute permitting a party to be relieved from forfeiture upon making full compensation to other party, except in case of a grossly negligent, wilful, or fraudulent breach of duty, could not be invoked by purchaser who in her letter breaching contract offered to pay escrow charges but did not offer to compensate vendor and did not make tender into court or to vendor or prove that she was ready, willing and able to make payment due. Civ.Code, § 3275.

**5. Vendor and purchaser** ⇐335

Vendor's right to retain amounts paid on purchase price by defaulting purchaser existed regardless of any provisions in contract for forfeiture or liquidated damages.

**6. Brokers** ⇐39

Where payment of commission to real estate broker is dependent on an unfulfilled condition, broker cannot recover.

**7. Brokers** ⇐64(2)

Under escrow instructions providing for payment at close of escrow of any in-

cumbrances necessary to place title in condition called for, and payment of commission to real estate broker, payment of commission was conditioned on closing of escrow, and where escrow was never closed because of default by purchaser without fault of vendor, broker was not entitled to recover commission from vendor.

---

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Eva Wilson against the Security-First National Bank of Los Angeles, and others to recover back certain payments made on purchase price of real estate wherein Clyde J. Broadnax filed a cross-complaint against Ethel M. Moore the seller of the real estate, to recover real estate commission. From a judgment in favor of the defendants and against the plaintiff Eva Wilson and in favor of Clyde J. Broadnax on his cross-complaint against Ethel M. Moore, Eva Wilson and Ethel M. Moore appealed.

Judgment affirmed on the appeal of Eva Wilson; judgment reversed on the appeal of Ethel M. Moore.

J. Q. Gilchrist and John L. Mace, both of Los Angeles, for appellant and respondent, Ethel M. Moore.

Sidney Fischgrund and Samuel H. Sherman, both of Los Angeles, for appellant, Eva Wilson.

J. Marion Wright and Owen E. Kupfer, both of Los Angeles, for respondent Clyde J. Broadnax.

BARTLETT, Justice pro tem.

This is an action by plaintiff, Eva Wilson, for money had and received, against the defendants to recover from them certain payments which she had made on the purchase price of real estate. There is also a cross-complaint by Clyde J. Broadnax, defendant and respondent, against Ethel M. Moore, the seller of the property in question, to recover a real estate commission. The judgment was in favor of the defendants and against the appellant Eva Wilson and in favor of Clyde J. Broadnax on his cross-complaint against Ethel M. Moore.

The defendant Ethel M. Moore was the owner of an apartment house in the City of Los Angeles which she was offering for sale. The defendant Clyde J. Broadnax, a licensed real estate broker, secured an offer to purchase the apartment from Eva Wilson and accepted a $200 deposit on account of the purchase price from Eva Wilson, and issued his receipt to her.

On October 9, 1944, the seller, Ethel M. Moore, and the buyer, Eva Wilson, executed and deposited escrow instructions with the Security-First National Bank of Los Angeles for the sale and purchase of this apartment house which instructions constitute a contract of purchase and sale. This contract provided for a purchase price of $40,000, $14,000 to be paid in cash by the buyer and the balance to be secured by first and second trust deeds to be executed by the buyer. The escrow instructions further provided for a payment of a commission of $2,000 to the broker upon certain conditions which will be referred to later. The buyer deposited in this escrow a total sum of $2,750 which sum was at the time of trial retained by the defendant bank as stakeholder pending a final judgment in the case. On February 23, 1945, the buyer served written notice cancelling the escrow. On March 2, 1945, the seller notified the buyer in writing that the seller was ready to perform and that the buyer would be bound by the agreement and the buyer's deposit would be forfeited if she did not proceed with the escrow by March 6, 1945. The buyer did nothing to further consummate her agreement to purchase, and on June 13, 1945, filed this complaint for money had and received.

There are two separate appeals: the first is an appeal by the buyer, Eva Wilson, from the entire judgment; the second is an appeal by the seller, Ethel M. Moore, from the judgment in favor of the broker Clyde J. Broadnax, which awarded him a commission. The defendant, Security-First National Bank of Los Angeles, being a mere stakeholder, is not a party to this appeal. As the issues in these two

appeals differ, they will be considered separately.

The Appeal of the Buyer Eva Wilson

In view of certain arguments made by appellant, there are some additional matters which are pertinent in a consideration of her appeal. The buyer does not claim that there was any fraud or misrepresentation upon the part of the seller or the broker. Neither is there any contention that there was any waiver by the seller of any of the conditions of the contract or that there was any conduct on her part which would constitute an estoppel.

By February 1, 1945, the buyer had paid $2,975 of the $14,000 she had agreed to pay. She never did execute either of the two trust deeds which were to cover the balance of the purchase price of $40,000.

On February 18, 1945, the appellant buyer asked for a further extension of time to complete the purchase, which the seller told her she would grant, and the buyer was to go to the bank and sign amended instructions concerning it. Instead of doing so, on February 23, 1945, she served a written notice cancelling the escrow and demanding a return of the money which she had paid in. The seller was never in default, deposited in the escrow the deed and other documents, and did all the things which she agreed to do. She refused to join with the buyer in the cancellation of the escrow and on March 2, 1945, notified the buyer to comply with her agreement by March 6, 1945, or the monies paid would be forfeited. The buyer did nothing between those dates or later until June 13, 1945, when she filed this action for money had and received. She has neither tendered to respondent or into court the payments due, nor has she made or offered to make full or any compensation to the seller in any manner other than an offer to pay the escrow fees.

The buyer testified as to her reasons for not going on with the contract as follows:

"Q. Isn't it a fact that the reason you never went through then with this transaction was because you couldn't raise the money? A. No."

And later on in her testimony:

"Q. When Mrs. Moore had agreed to give you an extension of time of 90 days why didn't you show up the next morning and sign up for it? A. Because I didn't want the property."

[1] The trial court decided this case strictly in accordance with the rule laid down in the leading case of Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17, that the buyer under a contract for the sale of real estate cannot after her default, without excuse therefor, maintain an action to recover the monies paid under the contract. So far as the law as set forth in this decision is concerned, its repeated affirmation in a long uninterrupted series of cases has caused it to become settled doctrine under the rule of stare decisis. Appellant seeks to avoid the effect of these decisions by the following contention: "Under section 3275 of the Civil Code, plaintiff in the instant case is entitled to recover the full amount of the installments paid on condition that she make 'full compensation to the other party'." The section referred to reads as follows: "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

[2, 3] The buyer's contention instantly raises the question as to whether or not her conduct in breaking the contract was wilful. The word "wilful" as used in civil cases has been defined many times. In Davis v. Morris, 37 Cal.App.2d 269, at page 274, 99 P.2d 345, 348, the court considers the meaning of the word and says:

"* * * In the case of May v. New York Motion Picture Corp., 45 Cal.App. 396, 404, 187 P. 785, 788, it was held that the term 'wilful' in its ordinary use, merely means that one intentionally fails or refuses to perform an act which is required to be done. It is said in that regard:

"'In civil cases, the word "willful," as ordinarily used in courts of law, does not

necessarily imply anything blameable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent.' Citing cases."

The buyer in the case before us knew what she was doing, intended what she was doing, and was a free agent. The term has been considered not only generally but as it is used in section 3275 of the Civil Code. In Parsons v. Smilie, 97 Cal. 647, 32 P. 702, the word as used in that section is given the same meaning as voluntary, spontaneous, intentional, designed.

The holding in Taylor v. United States Fidelity & Guarantee Co., 86 Cal.App. 382, 390, 260 P. 898, 901, is that the party could not be relieved from a forfeiture as "The breach here was spontaneous and voluntary, and therefore willful * * *."

In Crowell v. City of Riverside, 26 Cal. App.2d 566, 80 P.2d 120, 127, the breach was of an inhibition against subletting. It was contended that the provisions of section 3275 of the Civil Code would relieve against a forfeiture. Among the grounds stated by the court as to the applicability of this section in the premises, after stating that wilful as used in this section is to be understood in its ordinary sense of "voluntary" or "spontaneous", said: "Moreover, the subletting was voluntary, intentional, and so deliberate as to be evidenced by a carefully drawn written instrument. In these circumstances it would be impossible to treat it as otherwise than 'willful.'"

In the instant case, the breach of the contract was voluntary, intentional, and so deliberate as to be evidenced by a carefully drawn written instrument. From the buyer's own testimony and the other evidence in the record we must, therefore, conclude that this contention is not tenable.

[4] There is another aspect of the matter which deserves consideration. In her letter to the bank breaching the contract, the appellant offered to pay the escrow charges. Other than that she has offered to do nothing. As we have seen, she has not offered to make full or any compensation to the other party, has made no tender into court or to the other party or proven that she is ready, willing and able to make the payment due. In a case where exactly that situation existed and the buyer asked that he be relieved from a forfeiture under the provisions of section 3275 of the Civil Code, the court said: "This contention is sufficiently answered by the fact that appellant has done nothing to entitle him to relief under that section. He has not made or offered to make 'full compensation' to respondent. He had made neither a tender to respondent nor into court, and has failed to plead or prove that he is ready, willing, and able to make the payments due." (Christin v. Story, 119 Cal.App. 326, 333, 334, 6 P.2d 301, 304.)

[5] Appellant's next contention is stated thus: "Where the parties to a contract for the sale of realty make an agreement as to the amount payable as liquidated damages, in the event of default, such an amount controls, and the court may not fix an arbitrary amount as damages in contravention to the terms of the agreement made by the parties." This contention cannot prevail as it is immaterial whether or not there was such a provision in the contract. The right of the seller to retain the amounts paid on the purchase price exists regardless of any provisions in the contract for forfeiture or liquidated damages. The contention that an agreement for liquidated damages was illegal was made in the case of Krobitzsch v. Middleton, 72 Cal.App.2d 804, 165 P.2d 729. The court there said, 72 Cal.App.2d at page 812, 165 P.2d at page 733:

"A complete answer to this contention is found in Glock v. Howard, etc., Co., 123 Cal. 1, at pages 11, 12, 55 P. 713, at page 716, 43 L.R.A. 199, 69 Am.St.Rep. 17, wherein the court says: 'When an equitable showing is not made to excuse the breach, the vendor has the right in equity, as he always has at law, to retain the moneys paid by the vendee. Therefore we have said that it matters not in such contracts that the parties have declared that the vendor may retain the moneys paid as

stipulated damages. The name which the parties thus give does not alter the fact nor change the vendor's rights. If it be said that the clause for stipulated damages is void, still the vendor is entitled to retain the money.'" (Citing additional cases.)

See also Martinelli v. Hogrefe, 123 Cal. App. 438, 11 P.2d 412; Winter v. Kitto, 100 Cal.App. 302, 279 P. 1024.

The Appeal of Seller Ethel M. Moore from that Portion of the Judgment Awarding a Commission to the Broker.

[6, 7] The broker's claim for a commission is based upon the seller's agreement to pay a commission contained in the escrow instructions signed by her. The appellant concedes that a broker's claim for a commission can be based upon such an agreement and also that the broker produced a buyer who by signing the escrow instructions executed an enforceable agreement to purchase which was also signed by the seller. However, she contends that portion of the escrow instructions which provided for the payment of the broker's commission is conditional upon a contingency which never occurred. The portion of the escrow instructions referred to reads as follows:

"* * * Pay at close of escrow any encumbrances necessary to place title in the condition called for and the following: Pay commission of $2000.00 to Clyde J. Broadnax (Real Estate Broker's License No. 3025), * * *"

The terms of the contract are definite and certain and are capable of but one construction. The event upon which the payment was conditioned never occurred as the escrow was never closed. The cases of Hargrave v. Moody, 56 Cal.App. 498, 205 P. 890, and Coulter v. Howard, 203 Cal. 17, 262 P. 751, 752, hold that in cases such as this one, where the payment of a commission to the broker is dependent upon an unfulfilled condition, the broker cannot recover. Respondent attempts to distinguish these cases from the one here by calling attention to the fact that in Coulter v. Howard, supra, the wording of the condition was "at close of escrow but only out of funds then due and payable to me out of this escrow". And in Hargrave v. Moody, supra [56 Cal.App. 498, 205 Pa. 892] it was "from proceeds of escrow when completed". Far from distinguishing these cases from the one at bar, the quoted words show how similar they were to the words in the contract in the instant case, and the applicability of the principle of law set forth in those cases to the situation existing here. The law governing contracts of this character is clearly set forth in Smith v. Frans Nelson & Sons, Inc., 214 Cal. 295, 5 P.2d 427, as follows:

"The case of Coulter v. Howard, 203 Cal. 17, 262 P. 751, is authority for the proposition that the statute of frauds (section 1624, subd. 6, Civ.Code) may be satisfied as to the employment of a real estate broker by resort to appropriate language in escrow instructions, if signed by the party sought to be charged. But it is likewise evident that, unless overcome by some direct attack in equity, the broker must accept the apposite burdens and conditions contained in the letter of authority which thus confirms his employment. And where, as here, the legal effect of the contract is to provide for the payment of a commission only upon completion of the escrow transaction, so as to invest the defendant with a clear title to the property it is to receive in exchange for its own, the commission does not become due where, through no fault of the defendant, the transaction is never completed.

"In Coulter v. Howard, supra, the defendant was held liable because her own act prevented consummation of the escrow transaction. Here we have the reverse situation. The party sought to be charged was willing to complete the exchange and, but for the other party thereto, would have done so. Said other party, however, failed or refused to carry out his covenants. The broker's claim in this case must therefore fall with the collapse of the other negotiations. It is not permissible for the broker to resort to the escrow document for a ratification of his employment and then, in contradiction of the other provisions thereof, establish by parol a different contract as to the conditions under which the

commission is to become due. To permit such a course would be to defeat the very object the statute of frauds was designed to accomplish."

It follows that the broker in the instant case is not entitled to a commission.

As to the appeal of the appellant, Eva Wilson, the judgment is affirmed. As to the appeal of the appellant, Ethel M. Moore, from the judgment on the cross-complaint, the judgment is reversed.

DORAN, Acting P. J., and WHITE, J., concur.

Hearing denied; SHENK and SCHAUER, JJ., dissenting.




## MOUSHEK CHAKMAKJIAN v. LOWE.*

Civ. 15857.

District Court of Appeal, Second District, Division 1, California.

March 19, 1948.

Rehearing Denied April 7, 1948.

Hearing Granted May 17, 1948.

**1. Workmen's compensation ⇐2121**

Compensation award based on a permanent disability rating and on cost of medical care and treatment did not duplicate elements of damage contained in judgment against uninsured employer based on findings that employee was injured in his health, strength and activities, and caused to suffer great pain and bodily anguish, and hence compensation was not required to be credited upon judgment. Labor Code, §§ 3700 et seq., 3706–3710, 3712, 4554, 4555; Const. art. 20, § 21.

**2. Workmen's compensation ⇐2106**

Where award of Industrial Accident Commission exceeds amount of damages recovered in an action at law, and elements of damage covered by award are not duplicated by but are in addition to those covered by the judgment in the action at law, employee is entitled to enforce payment of both award and judgment. Labor Code, §§ 3700 et seq., 3706–3710, 3712, 4554, 4555; Const. art. 20, § 21.

* Subsequent opinion 201 P.2d 801.

**3. Workmen's compensation ⇐2100**

Statute conferring upon injured employee right to recover damages in an action at law against an uninsured employer and also to recover compensation for his injuries was adopted as additional means of enforcing compliance by employers with public policy of the state in matter of compensation. Labor Code, §§ 3706–3709; Const. art. 20, § 21.

**4. Workmen's compensation ⇐2100**

Constitutional and statutory provisions relating to workmen's compensation and actions for damages against an uninsured employer are free from uncertainty so that there is no need for construction, and courts have duty to follow provisions of law as written. Labor Code, §§ 3700 et seq., 3706–3710, 3712, 4554, 4555; Const. art. 20, § 21.

**5. Workmen's compensation ⇐2121**

Statute providing that where judgment for damages in excess of compensation awarded by Industrial Accident Commission is obtained against uninsured employer, compensation shall be "credited" upon such judgment, does not contemplate such "credit" as would extinguish judgment, but intends that such "credit" will be given only where its application would serve to reduce but not extinguish obligation upon which it is applied. Labor Code, § 3709.

See Words and Phrases, Permanent Edition, for all other definitions of "Credit".

**6. Workmen's compensation ⇐2106**

Under statute providing that an employee may proceed against an uninsured employer by filing application for compensation and in addition may bring an action at law against such employer for damages, an injured employee is given two distinct remedies and may pursue either or both and need not first seek compensation before proceeding with action at law. Labor Code, § 3706.

**7. Workmen's compensation ⇐2119**

Action which statute authorizes injured employee to bring against uninsured employer for recovery of damages is one based on negligence. Labor Code, § 3708.

**8. Workmen's compensation ⇐2120**

Under statute providing that in action by injured employee against uninsured employer it is presumed that injury was direct result and grew out of negligence of employer, the presumption is evidence. Labor Code, § 3708.

**9. Negligence ⇐121(1)**

Rule permitting indulgence in a presumption of negligence is a rule of evidence.

**10. Workmen's compensation ⇐2141**

In action by injured employee against uninsured employer, whether statutory presumption of negligence is dispelled by evidence is a question of fact upon which findings of trial court are conclusive, and it cannot be said that presumption vanishes from case as matter of law when contradicted by employer. Labor Code, § 3708.

**11. Workmen's compensation ⇐2141**

In action by employee against uninsured employer for injuries from alleged negligence which caused employee's hand to be drawn into teeth of saw, where factual background presented by employee was not so inconsistent with possibiliy that accident could have been caused by negligence of employer as to compel conclusion as matter of law that employer was not at fault, whether statutory presumption of negligence had been controverted was question of fact for trial court. Labor Code, § 3708.

**12. Appeal and error ⇐1046(5)**

In action by injured employee against uninsured employer, where, following direct examination of employer, the court stated that he didn't see any need of cross-examining and asked "How can you possibly escape liability under her testimony?" but court thereafter reversed ruling to extent of allowing employer to put on evidence, and employer then offered additional testimony, and argued cause, and cause was submitted for decision, employer was not prejudiced. Labor Code, § 3700 et seq.

**13. Workmen's compensation ⇐2141**

In action by injured employee against uninsured employer, statutory presumption of negligence was not rebutted as matter of law. Labor Code, § 3708.

---

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Moushek Chakmakjian against Jennie Lowe to recover damages for personal injuries. Judgment for plaintiff and defendant appeals.

Affirmed.

Stanton & Stanton and Louis B. Stanton, all of Los Angeles, for appellant.

Herlihy & Herlihy and Joseph W. Pierce, all of Los Angeles, for respondent.

WHITE, Justice.

Plaintiff first instituted an action for damages against defendant in the Superior Court of Los Angeles County pursuant to the provisions of Labor Code, sections 3706–3709, inclusive. Thereafter, and prior to the trial of said superior court action, plaintiff filed application for adjustment of claim with the Industrial Accident Commission. The superior court action was tried before the court sitting without a jury resulting in a judgment for plaintiff in the sum of $2,250.00 and costs.

Thereafter, the Industrial Accident Commission entered an award in favor of the applicant (plaintiff herein) for $2,890.00, based on a permanent disability rating of 24¾% at the maximum rate of $25.00 per week, plus an additional 10% under Labor Code, section 4554, based upon the fact (which was expressly found by the Commission), that defendant had wilfully failed to secure the payment of compensation to her employees. An award was also made for the cost of the medical care and treatment, and plaintiff's counsel was allowed an attorney's fee of $350.00, pursuant to provisions of Labor Code, section 4555. Plaintiff concedes that by reason of a clerical error made by the Industrial Accident Commission in computing the items constituting the award made to him, the same should be reduced by the Commission from $2,890.00 to $2,695.00.

By his complaint in the superior court action, plaintiff alleged that defendant op-

erated a cabinet shop; that she omitted to carry insurance; that on the 10th of November, 1945, plaintiff was employed in said shop; that as a direct and proximate result of the negligence, carelessness and unlawful acts and conduct of the defendant, plaintiff's left hand was drawn into and became engaged with the teeth of a saw; that he sustained lacerations to his left thumb and second, third and fourth fingers, and suffered damages thereby in the amount of $20,000.00; that he was employed at $42.00 per week and his disability would continue for eight weeks and thereby he suffered damage in the sum of $336.00; that he would require medical and surgical care, attention and nursing in the treatment of his injuries, which medical and surgical care was of the reasonable value of $150.00

By her answer, defendant admitted the ownership of the shop; that plaintiff's hand was cut; but denied the employment or that the accident occurred to the plaintiff while in the performance of his duties, or that there was any negligence upon her part.

The trial court found that plaintiff was in the employ of the defendant as a saw operator and in other capacities in a cabinet shop owned and operated by her. That defendant "unlawfully failed and omitted to carry insurance covering her said employees, as required by Article I of Chapter 4 of Part I, division 4 of the Labor Code of the State of California." That as the direct and proximate result of the negligence and carelessness of the said defendant, plaintiff's left hand was then and there drawn into and became engaged with the teeth of said saw. That as a result thereof, plaintiff sustained severe injuries to his left thumb and to the second and third fingers of his left hand; that he was thereby seriously injured in his health, strength and activity, and was caused to suffer great physical pain and bodily anguish. Judgment was thereupon entered in favor of plaintiff for the sum of $2,250.00. Defendant appeals.

[1] The contention of appellant that the elements of damage represented by the award of the Industrial Accident Commission are duplicated in and by the judgment rendered in the instant case can not be sustained.

The Industrial Accident Commission award compensated respondent for only 65% of the damages suffered by him because of the permanent impairment of his earning capacity and for the cost of medical attention received by him in the treatment of his injuries. The award does not encompass the elements of damage contained in the judgment, which were based on the findings that respondent was "injured in his health, strength and activities," and "caused to suffer great physical pain and bodily anguish." There was, therefore, no duplication of the elements of damage contained in the judgment and the elements of damage represented by the award.

[2] Section 3706 of the Labor Code expressly confers upon an injured employee the right to recover damages in an action at law against an uninsured employer, and also to recover compensation for his injuries in a proceeding before the Industrial Accident Commission. These rights are subject to but a single limitation, and that is contained in section 3709 of the Labor Code, reading as follows: "If, as a result of such action for damages, a judgment is obtained against the employer in excess of the compensation awarded under this division, the compensation awarded by the commission, if paid, or security is given for its payment and is approved by the court, shall be credited upon such judgment."

Where, as in the case at bar, the award of the Industrial Accident Commission exceeded the amount of damages recovered in the action at law, and the elements of damage covered by the award not having been duplicated by, but having been in addition to those covered by the judgment in the action at law, respondent is entitled to enforce the payment of both the award and the judgment. Sullivan v. Tait, 38 Cal.App.2d 185, 187, 101 P.2d 145.

[3–5] From a reading of the sections 3700, 3710, and 3712 of the Labor Code in the light of section 21, Article XX, of the Constitution of California, we are persuad-

ed that Labor Code sections 3706–3709, inclusive, were manifestly adopted as additional means of enforcing compliance by employers with what the foregoing constitutional provision characterizes as the declared "social public policy of this State". Such compliance was manifestly sought by subjecting non-conforming employers to the payment of the compensation benefits to which the employees would have been entitled had the employers complied with section 3700 of the Labor Code, and in addition thereto, by subjecting such employers to actions at law for the same injuries, subject only to the single limitation contained in section 3709, and depriving such non-complying employers in such actions of their common law defenses. The constitutional and statutory provisions being free from ambiguity and uncertainty, there is no need for interpretation and no room for construction. It is the bounden duty of the courts to follow the provisions of law as they are written, and not to legislate under the guise of interpretation and construction. We are persuaded that the language of section 3709 providing that where in an action at law a judgment *in excess* of the compensation awarded by the Industrial Accident Commission is obtained, the compensation awarded by the Commission "shall be *credited* upon such judgment" (emphasis added) never contemplated such "credit" as would extinguish the judgment, but intended, as expressly provided, that such "credit" would be given only when its application would serve to reduce but not extinguish the obligation upon which it is applied.

[6] Appellant next contends that because of the phrase, "in addition" as used in section 3706 of the Labor Code, the employee must first seek compensation from the Industrial Accident Commission, and only thereafter may he proceed with his action at law. Such an interpretation does violence to the clear and unambiguous language of that section. The section in question provides that the "employee or his dependents may proceed against such employer by filing an application for compensation with the commission, and, in addition, may bring an action at law against such employer for damages, *as if this division did not apply.*" (Emphasis added.) There is no requirement that the one must precede the other. Were such a requirement contemplated, doubtless the section would so declare. To us it is clear that under section 3706, where an employer fails to comply with the requirements of the statute relating to securing payment of compensation for injuries to employees, an injured employee is given two distinct remedies and may pursue either or both. Marshall v. Foote, 81 Cal.App. 98, 100, 101, 252 P. 1075; Graybiel v. Consolidated Ass'ns, Ltd., 16 Cal.App.2d 20, 24, 60 P.2d 164.

[7–11] Appellant earnestly urges that respondent affirmatively established that there was no negligence on her part, and that the presumption of negligence under section 3708 of the Labor Code was thereby dispelled. The section just referred to provides that in an action such as the one now engaging our attention, "* * * it is presumed that the injury to the employee was a direct result and grew out of the negligence of the employer, and the burden of proof is upon the employer, to rebut the presumption of negligence. It is not a defense to the employer that the employee was guilty of contributory negligence, or assumed the risk of the hazard complained of, or that the injury was caused by the negligence of a fellow servant. No contract or regulation shall restore to the employer any of the foregoing defenses".

Taking as does section 3708 from the employer the various specified defenses, and, particularly the defense of contributory negligence, and imposing upon him the burden of rebutting the declared presumption of negligence which the Labor Code provision specifically fastens upon him, there can be little if any doubt, as contended by appellant, that the action at law for damages which is expressly reserved for the injured employee is one that is based on negligence. Section 3708 expressly provides that the presumption of negligence which is declared to exist is a rebuttable presumption. Such a presumption is evidence. 10 Cal.Jur., p. 744. And

the rule or principle permitting indulgence in such a presumption is a rule of evidence. People v. Goddard, 47 Cal.App. 730, 734, 191 P. 1012. Appellant argues that "there was absolutely no evidence that there was any negligence whatsoever on the part of defendant", citing Mar Shee v. Maryland Assurance Corporation, 190 Cal. 1, 7, 210 P. 269. Seemingly, appellant's argument urges that the failure of respondent to prove affirmatively that the former was guilty of some act or acts of negligence is equivalent to proof that she was not negligent in any respect, but such an argument ignores the fact that the provisions of section 3708 of the Labor Code give rise to the presumption that appellant was in fact negligent, and that presumption is in itself a species of evidence. The question as to whether the presumption is dispelled by the evidence is a question of fact, upon which the findings of the trial court are conclusive. Fortier v. Hogan, 115 Cal.App. 50, 58, 1 P.2d 23. It cannot be said that the presumption vanishes from the case as a matter of law, when contradicted or controverted by the party against whom it is invoked. A reading of the record herein does not disclose a situation wherein the factual background presented by respondent was so inconsistent with the possibility that the accident could have been caused by the negligence of appellant as to compel the conclusion, as a matter of law, that the employer was not at fault. Such being the case, the question of whether or not the presumption relied upon was controverted was peculiarly a question of fact to be determined by the trial court. None of the cases cited by appellant hold to the contrary.

[12, 13] While it is true, as contended by appellant, that at one stage of the trial, following her direct examination, the court stated, "I don't see any need of your cross-examining this witness. * * * How can you possibly escape liability under her testimony?" nevertheless, the record shows that following argument by appellant's counsel, the court said, "I will reverse that ruling in so far as allowing you to put on evidence. Let's see if you have evidence that in any manner will change the testimony of Mrs. Lowe. Do you want to examine her?" Appellant then offered additional testimony, argued the cause and it was submitted for decision, resulting in a judgment for respondent. We fail to perceive any prejudice to appellant as a result of the foregoing proceedings. As heretofore pointed out, the question of whether appellant dispelled the presumption with which she was burdened was a question of fact. Appellant was permitted to offer all the evidence she desired to rebut the presumption, and we can not say from a consideration of all the evidence that it was so inconsistent with the presumption that it established, as a matter of law, the freedom of the employer from negligence.

For the foregoing reasons, the judgment is affirmed.

DORAN, Acting P. J., and BARTLETT, J. pro tem., concur.




84 Cal.App.2d 454

## RUDLEY v. TOBIAS.

Civ. 16102.

District Court of Appeal, Second District, Division 1, California.

March 19, 1948.

Hearing Denied May 17, 1948.

**1. Torts** ⇐9

An infant had no right of action against woman for maliciously enticing infant's father from household, especially since statute listing rights of personal relations was amended to omit prohibition of abduction of parent from child. Civ. Code, §§ 43, 43.5, 49.

**2. Statutes** ⇐225

Amendment of statute listing rights of personal relations, whereby previous prohibition of abduction of parent from child was omitted, must be read in connection with contemporaneous statutory bar against actions for alienation of affections. Civ. Code, §§ 43.5, 49.

**3. Statutes ⇐164**

Amendment of statute repeals parts of the statute which are not re-enacted.

**4. Constitutional law ⇐70(1)**

Judicial process is concerned with interpretation and application of legislative intent, not with usurpation of lawmaking function.

---

Appeal from Superior Court, Los Angeles County; A. W. Ashburn, Judge.

Action by Stephen Hart Rudley, by Ann Rudley, his guardian ad litem, against Sarette Tobias, for damages from inducing plaintiff's father to leave the marital household. From a judgment dismissing the complaint, plaintiff appeals.

Affirmed.

Kenny and Cohn and Robert W. Kenny, all of Los Angeles, for appellant.

Cantillon & Glover and Richard H. Cantillon, all of Los Angeles, for respondent.

DORAN, Acting Presiding Justice.

The plaintiff herein, at the date of filing of the complaint an infant of the age of nine months, is the son of Ann and Herbert Rudley, who were married in 1940. According to the complaint, "Until the 5th day of May, 1946, the plaintiff's father was a devoted parent, faithfully and affectionately discharging the duties and obligations of a father". Commencing approximately on that date, the defendant Sarette Tobias is alleged to have "maliciously and for the purpose of breaking the family of which plaintiff was a member and for the purpose of depriving the plaintiff of the presence, comfort, society, guidance, affection and paternal care of Herbert Rudley, the plaintiff's father, persuaded the plaintiff's father to leave the marital household, to remove himself from the family of which both he and plaintiff were members, and to establish his permanent residence with the defendant. The defendant continued said persuasions and enticements until on or about the 3d day of June, 1946, she succeeded in persuading and enticing the plaintiff's father to leave the marital household and to take up his residence with her." The complaint further alleges that thereafter plaintiff's father did not return to the marital household, and as a consequence of the defendant's conduct, "plaintiff has been and will continue to be deprived of the presence, comfort, society, guidance, affection and paternal care of his father and of the fruits and benefits of the integral family", to the plaintiff's damage in the sum of $100,000.00. The trial court sustained a demurrer to the complaint without leave to amend, and judgment was thereafter rendered dismissing the complaint.

In appellant's brief it is contended that a cause of action exists in favor of a child such as the plaintiff herein, against one who maliciously entices the child's father from the marital household, for the following reasons: (1) "No decision to the contrary having been rendered in California or elsewhere, the cause of action should be recognized"; (2) "When a responsible defendant seeks to escape from liability for an act which he had notice was likely to cause temporal damage to another, and which has caused such damage in fact, he must show a justification", quoted from Holmes, 4 Harvard Law Review 1; (3) "Our Codes are not exhaustive. The courts retain the power to recognize causes of action not specified in the Codes"; and (4) "The Legislature has not taken away the cause of action here sued upon".

[1, 2] In considering the question here presented, conceded to be one of first impression in this state, it is imperative to note the statutory provisions existing before and after 1939, in which year the California legislature enacted Section 43.5 of the Civil Code outlawing so-called 'Heart Balm" suits by providing that "No cause of action arises for: (a) *Alienation of affection*". (Italics added.) Prior to 1939, as set forth in respondent's brief, Section 49 of the Civil Code declared that "The rights of personal relations forbid: 1. The abduction of a husband from his wife, or of *a parent from his child*". (Italics added.) However, in the year 1939, Section 49 was amended by entirely omitting the subsection above quoted, so that, as this section now reads, "The rights of personal relations forbid" only "abduc-

tion or enticement of a child from a parent" or guardian; the "seduction of a person under the age of legal consent"; and "Any injury to a servant which affects his ability to serve his master, other than seduction, abduction or criminal conversation". Obviously, none of the provisions of the amended Section 49 cover the present situation. Moreover, the amendment of this section and the omission to re-enact the previous provision forbidding "The abduction of a * * * parent from his child", must be read in connection with the contemporaneous statutory bar against actions for alienation of affection.

The appellant argues that the present action, brought on behalf of the child, is in no way analogous to the prohibited action for alienation of affections, but rather comparable to an action for the wrongful death of a parent. It is contended, in this behalf, that there is no statutory prohibition against the child's action; that the integrity of the family relation and social considerations demand judicial recognition of the defendant's liability for enticing plaintiff's father from the family home. Respondent's brief, on the other hand, takes the position that "Section 49 of the Civil Code limits the causes of action which are based upon an interference with personal relations to those enumerated in that section"; and that the omission to include in the re-enactment, any recognition of a right of action for abduction of "a parent from his child", was equivalent to a repeal of that right.

The trial court, as hereinbefore indicated, took the view that the California law as evidenced by the code sections now in effect, does not countenance such an action as is stated in the appellant's complaint. A consideration of those statutes, together with the legislative history connected with their enactment, the state of the law as it existed prior to the amendment of Section 49 of the Civil Code, and the enactment of the new Section 43.5 which prohibits actions of "alienation of affection", leads to the conclusion that appellant's position is untenable. Social considerations, and the alleged necessity or advisability of protecting the family relation by upholding the child's action here contended for, are arguments more properly addressed to the legislative branch. The existence or non-existence of such a cause of action must be determined by the state of the law as it now exists, and the evident intention of the legislative body.

[3] Admittedly, the statutory law of this state contains no authorization for such an action, either directly or by way of implication. Moreover, any implication is obviously against the appellant's contention. The rule as stated in Shearer v. Flannery, 68 Cal.App. 91, 94, 228 P. 549, 550, namely, that "the amendment of a statute or section operates as a repeal of those parts of the statute or section which are not re-enacted", is here applicable. By the omission from the amended Section 49 of the Civil Code of the provision which had previously forbidden abduction of "a parent from his child", the legislature must be deemed to have intended to do exactly what it did do, namely to remove from the law the right of action covered by the omitted subsection. No other reasonable conclusion is tenable. And in this connection it may be noted that the words "abduction" and "enticement", as used in Section 49 prior to the year 1939, have been judicially interpreted as synonymous. See Humphrey v. Pope, 122 Cal. 253, 256, 54 P. 847, and Horowitz v. Sacks, 89 Cal.App. 336, 340, 265 P. 281. "Abduction", says the Humphrey opinion, may be accomplished by fraud, persuasion or violence.

In dealing with another subsection of Section 49 of the Civil Code, namely, Subsection (c) thereof, the United States Circuit Court of Appeal in the case of Standard Oil Co. of Calif. v. United States, 9 Cir., 153 F.2d 958, 961, has declared that Section 49 "definitely limits the causes of action which are based upon an interference with personal relationships to those enumerated in the section. For example, § 49 might have given a cause of action for injuries to parties to other personal relationships similar to that of master and servant alone, i.e., for injuries to an agent, an independent contractor, a partner, a joint adventurer, et cetera." Quoting from Burglingame v. Traeger, 101 Cal.App. 365, 371,

281 P. 1051, the court in the Standard Oil case further said: "It must also be borne in mind that 'our codes, of course, were intended as complete revisions of the existing laws upon the subjects embraced therein' (In re Estate of Carraghar, 181 Cal. 15, 183 P. 161, 163), and that their provisions establish the law of this state respecting the subjects to which they relate".

It is not contended that appellant's position is supported by any existing statutory law directly sanctioning the alleged cause of action. Such general provisions as that of Section 43 of the Civil Code, guaranteeing "the right of protection from * * * injury to his personal relations", and the fundamental principles embodied in Section 871 of the Restatement on Torts, are not helpful in dealing with the present problem. Likewise, the appellant's brief does not claim that there is any pronouncement of the California courts which recognizes child's right of action. The decisions of Daily v. Parker, 7 Cir., 1945, 152 F.2d 174, 162 A.L.R. 819, and Johnson v. Luhman, 330 Ill.App. 598, 71 N.E.2d 810, holding that such an action is permissible, involve Illinois law, and obviously are not binding on the courts of California.

[4] Relying on the so-called doctrine of judicial empiricism, the appellant insists that the appellate court should "fill in the gaps" in the law, and, for reasons of public policy and in "the interest of society as a whole", sanction the action contended for. But judicial process is concerned with the interpretation and application of legislative intent, not with usurpation of the lawmaking function. The dangers of attempted interference by any one governmental division with matters committed to the jurisdiction of another division, whether executive, judicial, or legislative, are too obvious to require discussion. In view of the evident legislative intent hereinbefore commented upon, neither public policy nor any other concept can here justify a creation of personal rights by so-called "judicial process". Whether "reasonable interpretation inclines one to a view that the abduction or enticement of a father from a child sounds as much in the field of alienation of affection as its kindred suit abduction or enticement of a husband from his wife", as contended in respondent's brief, and whatever the law may be in Illinois or elsewhere, there appears to be no justification for the bringing of this action in the State of California.

The judgment is affirmed.

WHITE, J., and BARTLETT, Justice pro tem., concur.

Hearing denied; CARTER, J., dissenting.




84 Cal.App.2d 494

**BENNETT et ux. v. STEINMAN et al.**

**Civ. 16020.**

District Court of Appeal, Second District, Division 3, California.

March 23, 1948.

Rehearing Denied April 15, 1948.

Hearing Denied May 20, 1948.

**1. Escrows ⇐8(1)**

When buyers' money and sellers' deed were deposited in escrow of bank under escrow agreement entered into between the parties, bank became agent of both parties with respect to the money and the deeds, and dual agency would exist until conditions of escrow had been fully met, although if that event had occurred, escrow holder would have become agent or trustee of the buyers alone with respect to the deed, and of the sellers with respect to the money.

**2. Vendor and purchaser ⇐145**

Where buyers had within specified time performed all that was required of them in their agreement of purchase of realty made in form of escrow instruction to bank, their right to enforce performance against sellers became absolute, and sellers could not refuse performance on ground that reconveyance by trustee to enable them to furnish a title free of encumbrance of their trust deed had not been executed within time stipulated in escrow instructions, where trustee in such respect was agent of escrow holder and hence was acting in interest of buyers and sellers, and under agreement sellers had duty to furnish the reconveyance.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by William M. Bennett and wife against Ewald Steinman and another to require defendants to convey to plaintiffs a parcel of real property pursuant to written contract. From an adverse judgment, defendants appeal.

Affirmed.

Sprague & Sparks and Richard W. Sprague, all of Los Angeles, for appellants.

Vernon P. Spencer, of Inglewood, for respondents.

SHINN, Acting Presiding Judge.

This is an appeal by defendants from a judgment requiring them to convey to plaintiffs a parcel of real property for a consideration of $8,500, pursuant to a written contract between the parties.

The agreement was in the form of escrow instructions to Broadway State Bank, dated December 10, 1945, which were duly executed by plaintiffs and defendants, respectively the buyers and the sellers. Under plaintiffs' instructions the purchase money was to be used by the bank "provided within 30 days you can cause to be issued, a Pol. of Title Ins. by T. I. & T. Co." showing title vested in the buyers free of encumbrances except second half taxes and personal property tax against former owners, conditions, restrictions, reservations and rights of way of record, and the purchase was contingent upon the buyers being able to borrow $5,000 on the property. The sellers' instructions approved the foregoing conditions, stated that defendants would furnish a deed to be delivered on payment of $8,500, from which the bank was instructed to pay Pacific Mutual Life Insurance Company its demand for the release of an existing trust deed upon which there remained unpaid $2,800. There was a provision in the instructions, agreed to by both parties, that if the escrow could not be closed within 30 days the escrow holder nevertheless was to complete the same as soon as the conditions had been complied with, unless either the buyers or sellers should have made written demand for the return of the money or the instruments deposited by them.

Plaintiffs, the buyers, were required (1) to pay into escrow $8,500, and (2) to execute whatever documents might be required in connection with the proposed loan of $5,000. Defendants, the sellers, were required to hand in their deed and to procure a reconveyance of the trust deed which secured the Pacific Mutual loan. The instructions were later amended by joint action of the parties. The amendment recited that time had been lost by the "Federal Housing" in getting access to the property for inspection in connection with the proposed $5,000 loan and provided that the "escrow time limit" was extended to February 10, 1946, and that $2,000 should be paid out of the escrow to defendants on account of the purchase which was to be returned to plaintiffs or secured if plaintiffs were unable to obtain a $5,000 loan on the property.

Plaintiffs were successful in negotiating the new loan with Pacific Mutual, and they caused to be placed in the escrow $8,500, consisting partly of their own funds and partly of funds of Pacific Mutual, consisting of the difference between $2,800 still unpaid on defendants' loan and the $5,000 new loan being made to plaintiffs. Plaintiffs also executed their promissory note and trust deed for $5,000 with Pacific Mutual as payee and beneficiary, and Pacific Mutual executed a request for reconveyance addressed to the trustee under defendants' trust deed. Defendants placed in escrow their deed. The bank, as escrow holder, according to custom, forwarded to Pacific Mutual plaintiffs' note for $5,000 and forwarded to Title Insurance & Trust Company defendants' deed and plaintiffs' trust deed, securing the $5,000 note, and also a request for reconveyance under defendants' trust deed with instructions to record the same with the deed and new trust deed when title could be shown in plaintiffs. Defendants' trust deed and note which were being paid off also were sent to the title company. All of these documents were in order and were forwarded on February 8, 1946. Due to February 10 falling on Sunday, the time for completion of the escrow expired February 11. The documents were not filed by the title company on February 11, or at all. On that date defendants gave written notice that

the escrow was cancelled, demanded and received the return of their deed, and plaintiffs' money was refunded to them. It is therefore clear that the only document that had not been executed prior to February 11 was the reconveyance of defendants' property as had been requested in writing by Pacific Mutual. The trustee under this deed of trust, as executed in 1942, was Title Guarantee & Trust Company. The note and trust deed were sent to Title Insurance & Trust Company for cancellation, and we assume that the parties understood that Title Guarantee & Trust Company is now one and the same with Title Insurance & Trust Company.

It would thus appear that plaintiffs, as the buyers, had within the specified time done and performed all that was required of them by their agreement of purchase and that defendants had done all that was required of them except to see to it that a reconveyance was executed and made available for recording in order that they might furnish title free and clear of the encumbrance of their trust deed. They had obtained from Pacific Mutual a request for reconveyance but they had not caused to be placed in the escrow the reconveyance itself. Naturally, there was no necessity that this document be delivered into the escrow, since Title Insurance & Trust Company was to act as the recording agent and would have been expected to execute and record the reconveyance as trustee. Under these circumstances the title company was the only one called upon or which could act in the execution of the reconveyance and the recordation of the instruments which would have completed a transfer of title.

[1] The bank was the agent of both parties in acting as escrow holder for consummation of the transaction pursuant to the agreement and instructions of the parties. The law on this point is well settled. When plaintiffs' money and defendants' deed were deposited in the escrow the bank became the agent of both parties with respect to the money and the deed. Shreeves v. Pearson, 194 Cal. 699, 707, 230 P. 448; 10 Cal.Jur. p. 587. This dual agency would exist until the conditions of the escrow had been fully met, although if that event had occurred, the escrow holder would have become agent or trustee of the buyers alone with respect to the deed, and of the sellers with respect to the money. Orloff v. Metropolitan Trust Company, 17 Cal.2d 484, 110 P.2d 396; Crum v. City of Los Angeles, 110 Cal.App. 508, 515, 294 P. 430.

When defendants approved plaintiffs' instructions which called for a clear title, with specified exceptions, they assumed an obligation to pay their trust deed note and to procure a reconveyance of the property by the trustee. The escrow holder could not close the escrow until this condition had been met, and consequently continued to act for both parties in its capacity as agent. It appointed the title company as its agent to do the recording necessary to enable it to issue a policy showing title in plaintiffs. The title company, in the mere matter of recording the reconveyance, the deed and the new trust deed, was the agent of the escrow holder and consequently in this respect was acting in the interests of both the buyers and the sellers. The responsibility for any delay in recording the instruments rested no more upon the buyers than upon the sellers. However, if the delay in recording was due to the failure of the title company to promptly execute the reconveyance, as between plaintiffs and defendants, the responsibility rests upon the latter, since it was their duty to furnish that instrument in order to clear their property of the lien of the trust deed. Plaintiffs had no duty with respect to this matter.

[2] It seems clear under the foregoing facts that since plaintiffs fully performed the agreement upon their part, defendants cannot justify their refusal to complete the transaction. We might observe further, that the agreement did not call for recordation of the instruments nor the issuance of the policy within the time stipulated in the instructions. The title company reported on December 28, and again on January 10, that the title was such as to enable it to issue its policy in accordance with the instructions, upon the sole condition that the record be cleared of defendants' deed of trust in favor of Pacific Mutual. There were certain rights of way appearing of

record but these were not in conflict with the buyers' instructions.

The briefs are largely devoted to a discussion of certain findings which we deem to be immaterial to a proper determination of the appeal. Under the amended instructions defendants withdrew $2,000 from the escrow, but on February 7 Mr. Steinman returned this sum to the escrow and at the same time gave written notice to the bank to take no further action in the escrow until further notification by him. Upon the following day he withdrew this notice. The escrow officer testified that because of this notice he withheld instructions to the title company until the following day when, as already stated, the documents were forwarded to the title company with instructions to record them. The court made findings to the effect that the giving of the notice by plaintiff delayed the forwarding of the documents to the title company and that by reason of this delay the escrow holder was prevented from closing said escrow in the ordinary course of business on or before February 11, 1946. Defendants contend that the evidence does not support these findings for the reason that there was no evidence that the title company would have recorded the instruments on February 11 if they had been sent to it on February 7, instead of February 8. It is true that there was no explanation of the fact that the instruments were not recorded on or before February 11, although, as already noted, that date fell on Monday, and the instruments were not mailed until the preceding Friday. It is unecessary to decide whether this evidence warranted an inference that with one additional day's notice the title company would have caused the instruments to be recorded. As we have seen, the responsibility for the delay rested upon defendants, regardless of the delay caused by the notice given the bank on February 7 by Mr. Steinman.

We think we should add that we do not hold that defendants were in default in performance of their obligations under the escrow agreement. Within the time limited by the agreement they caused to be deposited with Title Insurance & Trust Company, successor trustee, their deed of trust, note and request for reconveyance, the title company being also the recording agent under appointment by the bank. We do not decide whether this constituted full performance by defendants. We do hold that there was full performance by plaintiffs and that their right to enforce performance by defendants thereupon became absolute.

The judgment is affirmed.

WOOD, J., and VALLÉE, Justice pro tem., concur.




84 Cal.App.2d 417

**CALIFORNIA CASUALTY INDEMNITY EXCHANGE v. INDUSTRIAL ACCIDENT COMMISSION et al.**

**Civ. 13646.**

District Court of Appeal, First District, Division 1, California.

March 17, 1948.

**1. Workmen's compensation ⇐986**

Where nursing services are rendered to an injured employee by a member of his family without knowledge of employer's insurance carrier, and services are not of an extraordinary nature, member of family rendering the services should not be permitted to claim a right of compensation under the Labor Code. Labor Code, § 4600.

**2. Workmen's compensation ⇐986**

Where injured employee was paralyzed and needed constant nursing services, and the attending physician, who was the agent of the employer's insurance carrier, requested employee's wife to perform the services because hospital was overcrowded and understaffed, and wife performed such services with full knowledge of insurance carrier, wife was entitled to compensation under Labor Code from insurance carrier for nursing services at rate of $7 a day. Labor Code, § 4600.

WARD, J., dissenting.

Proceeding by the California Casualty Indemnity Exchange, petitioner, to review an award of the Industrial Accident Commission of the State of California in favor of Ora Lee Elliston and Ruth Elliston, his wife, under the Labor Code.

Award affirmed.

John J. Ferdon and Burbank, Laumeister & McFarland, all of San Francisco, for petitioner.

T. Groezinger and John A. Rowe, Jr., both of San Francisco, for respondents.

PETERS, Presiding Justice.

On July 18, 1944, Ora Lee Elliston suffered a head injury in an industrial accident. He was hospitalized for a short period and then returned to work. He suffered severe headaches and other ills and was forced to be frequently absent from work. His condition progressively grew worse until in December, 1945, he became completely paralyzed on the left side. The employer and its insurance carrier, while disputing that the injury of July 18, 1944, caused the paralysis, nevertheless furnished medical care and hospitalization during certain periods. The Commission has found that the paralysis, which is permanent in nature, was caused by the blow received in the accident and has made its award accordingly. This portion of the award is not challenged by the petitioner. In its findings and award dated January 6, 1947, the Commission also found that the employee had incurred expense for medical treatment, hospitalization, drugs, medicine "and for nursing care" and found that unless the parties could amicably adjust the amounts for such items that the Commission would fix the reasonable amount thereof. It was also found that the employee was entitled to further medical treatment, hospitalization and "nursing care," and the award so provided. The petitioner did not see fit to challenge this award. The record shows that thereafter the parties agreed as to the amount of the doctors' bills and hospitalization costs, etc., but could not agree as to the amount that should be awarded, if any, for past nursing services. A hearing was had on this issue on July 7, 1947. On August 14, 1947, the Commission filed its findings, conclusions and award. It found that: "It is true that Ruth Elliston, applicant's wife, has rendered services to the applicant herein over and above those services which a wife renders to her husband under general circumstances. It is further true that the services thus rendered were reasonably required to cure and relieve applicant from the effects of injury herein, and that but for the rendering of said services by said Ruth Elliston, the defendant carrier herein would have had to pay for nursing services in excess of the amount found herein to cure and relieve applicant from the effects of said injury." The Commission further found that the services were rendered from April 5, 1946, to September 27, 1946, and from November 25, 1946, to February 26, 1947. From September to November, 1946, the employee was hospitalized, and since February, 1947, the employee has been in a rest home. The reasonable value of the services rendered was fixed by the Commission at $7 per day, and an award made totalling $1,890. On this petition no contention is made concerning the amount of the award, the sole contention being that the Commission had no power to make an award for the nursing services rendered to the injured employee by his wife under the circumstances disclosed by this record.

The circumstances under which the wife undertook to perform these services are as follows: There is no dispute that this employee was completely paralyzed on the left side, was bedridden, and needed attention. The attending physician was Dr. O. W. Jones. The patient was in the hospital. Under these circumstances Dr. Jones, according to Mrs. Elliston, and her testimony is uncontradicted, told her that the hospital was short of help and overcrowded and that her husband needed a great deal of attention, that the hospital was unable to give her husband the care he needed, and suggested to her that she care for him at home. She told the doctor that she was "a fairly good practical nurse," and thought that she could perform the required tasks. The doctor told her that if she would attempt to

care for her husband he would instruct her in what to do. The doctor stated that he thought the patient would be happier and would progress faster at home. Mrs. Elliston further testified that the attending physician explained about the various medicines to be given the patient, about back rubs and required enemas, etc.; that when her husband first came home she put him in a wall bed, but in a short time the insurance company "found I couldn't make it and the insurance company gave me a hospital bed"; that her duties in caring for the patient were most confining; that "I couldn't do anything at all except nursing. It was a night and day job"; that she gave the patient his required medicines; that his back had to be rubbed frequently; that his legs itched and had to be rubbed with lotion; that he had to have enemas; that he was very ill and wanted attention every fifteen or twenty minutes; that she had to devote full time to caring for him; that he suffered from severe headaches; that he could not turn over or lift his head without assistance; that she had to lift him and turn him constantly; that she could not leave him at all; that she was forced to neglect her household duties and to send out her laundry so she could devote her full time to nursing the patient; that on occasion she had to hire outside help when it was necessary to air the bed; that she cared for him on a twenty-four hour shift; that prior to her marriage she had been gainfully employed; that while nursing her husband she had been offered a position at $70 a week but turned it down in order to nurse her husband. On cross-examination she admitted that she had made no formal request to the insurance company for a nurse.

There also appears in the record a letter from one of the insurance company doctors, Dr. Walter F. Schaller, addressed to the insurance company, stating that he had visited the patient at his home on June 1, 1946, and that "I found Mr. Elliston in bed at home, attended by his wife who is a very intelligent and cooperative woman." Another letter from the attending physician, Dr. Jones, addressed to the insurance company and dated September 20, 1946, describes the patient's condition and then continues: "If this patient cannot be cared for at his home, it will then be necessary for him to be placed elsewhere—preferably in a rest-home. He requires no special therapy other than being helped to move, and from time to time some hot packs to his shoulder girdle area—in other words, he is primarily a nursing problem which could be handled by a practical nurse."

Under this evidence we believe the Commission was justified in making an award for the nursing services rendered to the injured employee by the wife of the employee. Section 4600 of the Labor Code provides: "Medical, surgical, and hospital treatment, including nursing, medicines * * * which is reasonably required to cure or relieve from the effects of the injury shall be provided by the employer. In the case of his neglect or refusal seasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment." It is the contention of the petitioner that, under this section, the employer is responsible for the reasonable cost of nursing care supplied to the injured employee only where the employer with knowledge of the need neglects or refuses to supply such care. It is urged that here the employee never requested nursing care, that Mrs. Elliston undertook the job voluntarily, that she at no time refused to perform the job without compensation, and that she made no demand upon the insurance company for payment until after the services had been performed.

There is a series of Commission decisions discussing the problem as to when and under what circumstances members of a family may recover for nursing services rendered to an injured employee. These decisions indicate that the policy of the Commission has not been entirely consistent. Most of these cases have been collected and commented upon in 1 Campbell's Workmen's Compensation, p. 649, § 732, where it is stated: "In the normal case it is not the policy of the Commission to allow nursing charges for services rendered by members of the family of the injured employee, unless such member is by occupation a graduate or practical nurse, or was regularly employed and had to relinquish

such employment in order to do such nursing, and attended to the employee with the consent and approval of the attending physician. When the burden upon members of the family becomes unusually great, as where daily catherterization throughout life is required, and the wife does this, obviating the services of a nurse, she is entitled to some reasonable payment therefor. No payment is warranted, however, for services reasonably within the field of duty under the marital obligation."

The same apparent inconsistency exists in the cases decided by the courts. The only California case that appears to have discussed the point is County of Los Angeles v. Industrial Acc. Comm., 8 Cal.App.2d 492, 48 P.2d 97. In that case an employee was injured in an industrial accident and was furnished hospital and medical care. She was finally discharged from the hospital and thereafter received office care. She requested an allowance of $135 as the reasonable value of the services rendered to her by her son during the first three months after she left the hospital. These services, according to the opinion, consisted in the boy helping his mother to put on and take off a required back brace. At no time was a request made for nursing assistance and, so far as the opinion shows, no one connected with the employer knew she required or was receiving this assistance. It was held that there was no neglect or refusal to furnish the services, and that such services were rendered by the son gratuitously. The award for such services was annulled.

There are a series of cases from other states where awards for such services have been annulled or a denial of an award affirmed. Galway v. Doody Steel Erecting Co., 103 Conn. 431, 130 A. 705, 44 A.L.R. 693; Meister v. E. W. Edwards & Son, 264 App.Div. 963, 37 N.Y.S.2d 56; Coates v. Warren Hotel, 11 A.2d 436, 18 N.J.Misc. 122; City of Milwaukee v. Miller, 154 Wis. 652, 144 N.W. 188, L.R.A.1916A, I, Ann. Cas.1915B, 847; Claus v. De Vere, 120 Neb. 812, 235 N.W. 450; Bituminous Casualty Corporation v. Wilbanks, 60 Ga.App. 620, 4 S.E.2d 916; see, also, annotation 44 A.L.R. 697; cases collected 71 Cor.Jur. p. 774, § 489c. In one of the most recent cases where the factual situation was somewhat similar to the one here involved an award for such services was affirmed, and several of the above cases distinguished. Daugherty v. City of Monett, 238 Mo.App. 924, 192 S.W.2d 51.

[1, 2] It would serve no useful purpose to analyze the facts of, and the law announced in, the above cases where the right to such compensation has been denied. Several of them are predicated upon the interpretation of statutory provisions radically different from § 4600 of the Labor Code. Several of them involve factual situations where the services rendered were of a minor character and were rendered without the knowledge of the employer. Several of them cite the rule that the wife cannot sue her injured husband for the reasonable value of such services, and assume that the insurance carrier of the employer can raise the same defense that could be raised by the employee—a complete non sequitur. We agree with the rule that where the services are rendered without the knowledge of the insurance company and are not of an extraordinary nature, that a member of a family should not be permitted to claim a right to compensation. But that is not this case. The statute involved entitles the injured employee to nursing care "reasonably required to cure or relieve from the effects of the injury." Labor Code, § 4600. The Commission has found that this employee needed such care. There is no doubt that such finding is amply supported, and the petitioner makes no contention to the contrary. The insurance carrier had full knowledge that such services were needed and that they were being adequately performed by the wife. The record shows that Dr. Jones, the attending physician, and the agent of the insurance carrier, knew that such services were required, and requested Mrs. Elliston to perform them. He told her that the hospital was overcrowded and understaffed and that her husband could not secure the required care at the hospital. He also instructed her how to perform her most onerous duties. He knew that those duties were being performed. The wife refused lucrative

employment elsewhere in order to perform these services. The services were not of a minor character. This man was a hospital case and required the equivalent of hospital treatment and the insurance company knew it. The agent of the insurance company secured the services of the wife in lieu of the hospital treatment. The petitioner argues that under § 4600 it is liable for such services only where it, with knowledge of the need, neglects or refuses to supply such services. It may be assumed, for the purposes of this opinion, that such is a proper interpretation of § 4600. But such assumption in no way assists petitioner. This is not a case where the insurance carrier neglected, without knowledge of the need, to supply such services, and they were secured by the employee. Far from neglecting or refusing to furnish such services the insurance carrier, with full knowledge that such services were required, through its agent, impliedly, if not expressly, requested Mrs. Elliston to perform them. The insurance carrier, in legal effect, contracted with Mrs. Elliston for her to supply such services. The petitioner had no right to presume that Mrs. Elliston was going to assume gratuitously the legal duty it owed to her husband. While her failure to request compensation during the periods the services were being rendered is a factor that could and undoubtedly was considered by the Commission in determining whether Mrs. Elliston was acting gratuitously, such factor alone does not overcome, as a matter of law, the finding that the services were not rendered gratuitously. Under such circumstances we are of the opinion that the award of the Commission was justified under § 4600 of the Labor Code.

The award is affirmed.

BRAY, J., concurs.

WARD, Justice (dissenting).

I dissent.

Under the provisions of the Workmen's Compensation Act an employer who neglects or refuses to supply nursing for an employee is liable for the reasonable expenses incurred. Labor Code, sec. 4600. The liability is based upon a neglect or refusal to supply the nursing.

The injury occurred July 18, 1944. The attention by the employee's wife at his home dated from April 5, 1946 to September 27, 1946. On the latter date the employee was returned to the hospital. On November 25, 1946 he was taken home and remained there until February 27, 1947, at which time he was sent to a rest home.

An adjustment or compromise of the disability claim was approved by the commission but set aside and a new hearing ordered. The referee before whom the hearing was held suggested that the nursing bill of the wife might be compromised by the respective parties but this suggestion was not followed by the insurance carrier. The award of $7 per day, amounting to $1,890, followed the refusal of the carrier to compromise.

The majority opinion states that "We agree with the rule that where the services are rendered without the knowledge of the insurance company and are not of an extraordinary nature, that a member of a family should not be permitted to claim a right to compensation." I assume that the attention given or the services rendered in this case may not be classified as "of an extraordinary nature." I agree with that portion of the quotation in the majority opinion from 1 Campbell's Workmen's Compensation, p. 649, sec. 732, that nursing charges by members of the family of an employee, unless by a graduate or practical nurse, are not allowable, and that no payment is warranted reasonably within the field of duty under the marital obligation, but I disagree, as the majority opinion holds, that the insurance carrier "impliedly, if not expressly" requested Mrs. Elliston to perform the services in expectation of payment therefor.

After numerous continuances caused by Mrs. Elliston's former attorney, On July 7, 1947 the referee declared: "The nursing services are in error. They are never allowed in these proceedings, and the reason for that is that the wife takes her husband for better or for worse, and unless there is a contract, expressed or implied,

by virtue of services rendered, the Commission has invariably held that the wifely services are not recoverable." At the same hearing the wife testified that no request was made for nursing services to the insurance company and that she had no experience in nursing. She had mentioned the matter to her former attorney but did not know whether he had communicated with the employer or the insurance carrier. She stated that she had never been engaged in remunerative employment at any time during her married life, but had been offered a position at $70 a week during her husband's illness, which she did not accept, even during the period when her husband was in the hospital.

The conclusion is reached in the majority opinion that "impliedly, if not expressly," a contract was entered into between the wife and one of eight physicians and surgeons who treated the employee at various times. It is not claimed that the doctor was regularly employed by the insurance carrier though his first report of examination and diagnosis of the employee's physical condition after he had been treated by other physicians was made to the insurance carrier. The doctor was paid for his services on an order made by the commission directed to the carrier. There is no evidence that the employer or the carrier authorized the doctor to engage nursing service for the employee. There is no evidence that the doctor said anything that could reasonably lead Mrs. Elliston to believe she would be paid for her wifely nursing and attention. There is no evidence that the physician ever suggested to the carrier that the wife should be paid for her services. There is no evidence that at the time the employee was permitted to go home, the wife ever contemplated that she would or should be paid for her services. No application was made for payment to the wife until many months after the employee returned home.

Whether the carrier neglected and refused to supply nursing care (Labor Code, sec. 4600), and whether an implied or express oral contract had been entered into by the employer or insurance carrier and the employee or his wife, presented questions of fact. It is the reviewing court, not the commission, that has determined that "impliedly, if not expressly" a contract was made between the respective parties.

Evidently the commission had no thought of an express or implied contract. The finding of the commission is: "1. It is true that Ruth Elliston, applicant's wife, has renderd services to the applicant herein over and above those services which a wife renders to her husband under general circumstances. It is further true that the services thus rendered were reasonably required to cure and relieve applicant from the effects of injury herein, and that but for the rendering of said services by said Ruth Elliston, the defendant carrier herein would have had to pay for nursing services in excess of the amount found herein to cure and relieve applicant from the effects of said injury."

According to the record the ordinary charges payable to practical nurses is $8 per day. The wife requested $10 per day. The amount fixed by the commission was $7 per day. The commission found that nursing services were required and that the carrier would have to pay "in excess of the amount found herein to cure and relieve applicant from the effects of said injury."

The point is not the amount involved, but whether any relative or friend may take over a task of nursing, without requesting approval of the party who will eventually be called upon to pay, give the impression by failing to file a timely claim that the services are rendered because of love for the injured employee, and thereafter reap a reward, as in this case, in the sum of $1,890.

Heretofore the general rule has been to deny such application. In one instance the employment of a relative, not a trained or practical nurse, has been ruled upon. In County of Los Angeles v. Industrial Acc. Comm., 8 Cal.App.2d 492, 48 P.2d 97 a claim for wage adjustment for nursing services rendered by the injured party's son was presented and allowed but annulled on review. As in this case, the nursing assistance was necessary. At page 493 of 8 Cal.App.2d, at page 97 of 48 P.2d, the court said: "On the other hand, it is

admitted that after her discharge from the hospital she made no request to the county or its representatives for the services of a nurse. Substantially the only support for the claim in this respect is that she went to the physician's office regularly once a week and that he must have known that she needed nursing services, but made no arrangement for her to obtain such services." Then follows the statutory provision involved in this case. The court continued, 8 Cal.App.2d at page 494, 48 P.2d at page 98: "So far as appears from the evidence, the services rendered to the employee by her son were rendered by him gratuitously, as by a son to his mother, and without any contract or claim for compensation. We find no authority for the proposition that under these circumstances there was any legal foundation for a subsequent claim such as was allowed by the award in this case. In Galway v. Doody Steel Erecting Co., 103 Conn. 431, 130 A. 705, 706, 44 A.L.R. 693, the Supreme Court of Connecticut had under consideration the validity of an award in favor of the claimant's wife for services rendered in nursing him during convalescence, in a proceeding brought under the Workmen's Compensation Act of that state. The injured employee had been transferred from the hospital to his home because the surgeon in charge advised that his recovery would be hastened thereby, and with the knowledge that the claimant would need a very considerable amount of nursing from his wife. In holding against the claim for compensation on account of services thus rendered by the wife, the court said: 'His helpless condition doubtless required that Mrs. Galway should be in attendance or within call, but there is nothing in the finding to show that the services rendered were other than those which might reasonably be expected from any affectionate wife who was physically able to give them, or that they were not voluntarily and gratuitously rendered.'" As stated in the County of Los Angeles case, 8 Cal.App.2d at page 494, 48 P.2d at page 98: "This same observation may appropriately be made in the case at bar."

The award insofar as it covers the wife's claim should be annulled.

## MANTONYA v. BRATLIE et al.*

Civ. 3458.

District Court of Appeal, Fourth District, California.

March 18, 1948.

Hearing Granted May 13, 1948.

1. Appeal and error ⇐1042(3)

In action against employer for injuries, where complaint was demurrable but employer was not misled, denial of motion to dismiss on ground that complaint failed to state a cause of action was not error.

2. Master and servant ⇐88(1)

Where husband and wife acquired ranch as joint tenants, and proceeds from sale of crops were deposited in bank account under name of ranch, with husband and wife as co-signers, relationship of employer and employee existed between wife and ranch employee and inference of husband's agency in executing contract of employment with employee was justified, so that action by employee for injuries could properly be maintained against wife as well as husband. Labor Code, §§ 3300, 3351.

3. Workmen's compensation ⇐171

"Pay roll", within compensation act provision making the act inapplicable to an employer whose "pay roll" for preceding calendar year had not exceeded $500, referred to wages earned by farm laborers performing farm labor for their employer during calendar year preceding date of injury. Labor Code, § 4250.

See Words and Phrases, Permanent Edition, for all other definitions of "Pay Roll".

4. Workmen's compensation ⇐2139, 2141

Under Compensation Act provision making the act inapplicable to an employer whose "pay roll" for preceding calendar year had not exceeded $500, instruction that "pay roll" was a list of persons entitled to payment, with amounts due, was too narrow but was not prejudicial. Labor Code, § 4250.

5. Workmen's compensation ⇐171

Wages paid employee by independent contractors engaged by ranch owners were includible in total amount of ranch owners' pay roll in determining whether such pay

* Subsequent opinion 199 P.2d 677.

roll exceeded $500 within Compensation Act provision that employer and employee were conclusively presumed to have accepted Compensation Act provisions, with exception of employer whose pay roll for preceding calendar year has not exceeded $500, but amount paid contractors representing value of the use of machinery was not includible. Labor Code, § 4250.

**6. Appeal and error ⇐1031(1)**

Prejudice from error cannot be presumed, but must be made to appear from the record. Const. art. 6, § 4½.

**7. Workmen's compensation ⇐2141**

Under Compensation Act provision that employer and employee are conclusively presumed to have accepted the act but that provision should not apply to any person whose pay roll for preceding calendar year had not exceeded $500, where employer during preceding year had engaged independent contractors to level certain land, refusal to permit contractor to testify as to what part of the money received by him was applied toward payment of employee to operate equipment was not ground for reversal in absence of proffer of proof as to what it was expected to prove by the testimony. Labor Code, § 4250; Const. art. 6, § 4½.

**8. Trial ⇐295(1)**

Instructions must be considered as a whole and all the law on given subject need not be incorporated in each instruction.

**9. Trial ⇐295(11)**

Where jury was properly instructed on reduction of damages because of contributory negligence, and when taken as a whole the instructions fully covered law involved failure in giving several instructions on measure of damages after reading pertinent sections of labor code, to mention any reduction in amount of award because of contributory negligence, was not reversible error. Labor Code, §§ 2801, 3706.

---

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by Alfred W. Mantonya against John Louis Bratlie and another for injuries. Judgment for plaintiff, and defendants appeal.

Affirmed.

Wallace P. Rouse, of Indio, for appellants.

Shaw & Roberts, of Riverside, for respondent.

MARKS, Justice.

This is an appeal from a judgment awarding plaintiff $18,000 general damages, and $951.85 special damages for serious injuries received when a caterpillar tractor he was operating fell over a bank and rolled over onto him. It is not argued that the damages are excessive.

Defendants are husband and wife and were when they acquired, as joint tenants, the Mar-Jac Rancho by a deed dated December 11, 1944. They evidently went into possession of the property before Christmas of that year and started their farming operations.

Under date of January 1, 1945, plaintiff and J. L. Bratlie entered into a written contract which provided in part as follows:

"It is understood and agreed that Alferd W. Mantonya is to work on the Mar-Jac Rancho for a period of one year, beginning this date, Jan. 1st, 1945. That he is to devote his entire time to harvesting crops and marketing same, to till the soil and do whatever possible to prepare more land for cultivation, to keep all equipment in repair and in good condition, including buildings, fences and roads.

"For and in consideration of which, J. L. Bratlie agrees to pay Alferd W. Mantonya the sum of one hundred and seventy five dollars a month (175.00) and to furnish him living quarters with light, heat, electric power, hot and cold water and cooler.

"It is further agreed and understood that Alferd W. Mantonya shall receive 10% of net profits of the Mar-Jac Rancho."

Plaintiff worked on defendants' ranch for a few days in December, 1944. He immediately started performing under his contract and was injured on May 27, 1945.

The evidence on many phases of the case is sharply conflicting. As the jury accepted the evidence offered by plaintiff as true, and as the trial judge agreed with the jury when denying the motion for new trial, we will concern ourselves principally with outlining the evidence supporting the judgment and need give but little attention to the conflicting evidence offered by defendants.

One of the implements furnished plaintiff with which to work was a caterpillar tractor which was in very poor repair. Mr. Bratlie had a master clutch installed but declined to have any further work done on it. After the repairs were completed the clutch operated fairly well for about three weeks after which it gave trouble again. Sometimes it was hard to get the machine in or out of gear and at other times it would not stay in gear. At times the gear-shift lever would hang up or lock so that the driver could not stop when he wanted to. The tracks and a roller were badly worn and the tracks would jump, pop and snap when a turn was being made, especially to the left. The machine would make a sharp turn to the right but would require a radius of not less than ten feet and sometimes more to turn to the left and even then it was difficult to make a left turn. Mr. Bratlie knew of these defects because he had driven the tractor numerous times. In trying to make left turns he knocked down several irrigating standpipes and on another occasion tore out about 20 feet of fencing. Plaintiff complained to him of the condition of the tractor but Mr. Bratlie's reply was: "I don't want to spend any more money on the old thing."

After the accident Harry Maurer, who had installed the new master clutch, did some further work on the tractor. He testified concerning the condition of a roller as follows:

"A. After we got it up on the bank, off the first ledge, we could not move it because the track frame was bent. I loosened the track, took the idler out, and found a bad roller in there.

"Q. Which side was that on? A. That was on the left-hand side.

"Q. What condition was this roller in that you took out? A. It was worn out, worn in two, you might say.

"Q. Was the condition of that roller something that could have been caused by this accident? A. No. That roller was worn out.

"Q. That roller was worn out? A. Yes, sir."

This witness further testified that a roller in that condition might possibly cause the track to lock.

Mr. and Mrs. Bratlie returned to their home in the State of Washington about the 12th of May, 1945, leaving plaintiff in complete charge of the ranch.

The cement irrigating pipes and stand pipes on the ranch needed repair and plaintiff had suggested to Mr. Bratlie that sand for the repairs could be obtained from the bottom of a wash a short distance from the ranch which would save trips into a neighboring town for sand. Mr. Bratlie thought this might be a good idea.

Shortly before noon on May 27, 1945, plaintiff, accompanied by his brother-in-law, attempted to drive the tractor into the wash to obtain sand. The road down into the wash, if it could be called a road, was steep. Plaintiff drove the tractor to the wash and made a right turn onto a steep descent about 25 or 30 feet long and onto a bench where he was required to make a left turn to follow the bench to the bottom of the wash. He made the right turn and the descent successfully, but could neither make the left turn nor stop the tractor which ran onto the edge of the bench and toppled over the caving edge down a drop of 12 or 14 feet. The brother-in-law successfully jumped onto the bench but plaintiff was not so fortunate. His jump was short and he fell into the bottom of the wash. The tractor landed on its radiator and toppled over onto plaintiff, the exhaust pipe seriously burning his legs. One of his legs was so badly crushed that it had to be amputated below the knee.

[1] At the commencement of the trial defendants moved to dismiss the action on the ground that the complaint failed to state a cause of action against defendants, which motion was denied. The motion

was renewed several times during the trial and each time was denied. These rulings are now urged as error under the authority of McLain v. Llewellyn Iron Works, 56 Cal.App. 60, 204 P. 869. A casual reading of that case shows that it cannot be controlling here. It there appears that the minor son of plaintiff was an employee of the defendant corporation and was killed when an electric crane fell upon him. Subdivision b of section 12 of the then Workmen's Compensation Act, Stats.1913, p. 283, as amended, Stats.1915, pp. 1079, 1081, as in effect at the time of the death of the son of Mrs. McLain, permitted actions at law by an injured employee against his employer, in certain cases, for the employer's gross negligence or wilful misconduct. The judgment in favor of the plaintiff mother was reversed because this section provided only for an action at law by the employee and did not give such right of action to the deceased employee's mother. We have no such situation here. The Workmen's Compensation Act has been variously amended since the decision in the McLain case. See Rideaux v. Torgrimson, 12 Cal.2d 633, 86 P.2d 826.

No demurrer was filed to the complaint in the instant action. Had one been filed it probably would have been sustained with leave to amend. Clearly, this case falls within the language and reasoning and the rule announced in Lewis v. Curran, 17 Cal. App.2d 689, 62 P.2d 800, 801, where, in considering the sufficiency of a complaint, it was said:

"An examination of the transcript reveals that the theory upon which the action was tried brought home to the appellant full knowledge of every phase of the case upon which the plaintiff relied. * * * The paragraph which we have quoted may not be technically as full and complete as it might have been made, but it does exhibit the fact that the action was based upon the defective condition of the tractor which was allowed to remain and be operated in that condition by the negligence of the defendant in not having necessary repairs made thereto. The record shows fully that the action was tried upon the theory that the tractor was defective, and on the part of the appellant it was urged that, notwithstanding the alleged defective condition of the tractor, the injury to the plaintiff was caused by his independent, negligent act in attempting to disengage the clutch * * * It is evident from the record and the testimony introduced that the defendant was not misled in any particular by reason of any defective pleading in this action. Under such circumstances, section 4½ of Article 6 of the Constitution comes to the assistance of the plaintiff in specifying that no judgment shall be reversed, etc., for any error as to any matter of pleading, unless the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

[2] Defendants also urge that the action should have been dismissed as to Mrs. Bratlie because plaintiff was employed under a written contract between him and Mrs. Bratlie, co-signers"; that these funds cy, Mrs. Bratlie was not an employer of plaintiff and was not liable for his injuries.

Defendants were husband and wife and had been married about 35 years when they acquired the Mar-Jac Rancho as joint tenants. Mrs. Bratlie testified that she was living on the ranch when plaintiff was employed and remained thereon during the continuance of his employment until about May 12, 1945; that Mr. Bratlie took care of all matters in which they were interested; that she left all business to him to care for. Mr. Bratlie also testified that proceeds from the sale of crops from the ranch were deposited in a bank account under the name of "Mar-Jac Rancho, Mr. J. L. Bratlie and Mrs. Bratlie, co-signers"; that these funds were used for the maintenance of the ranch. Thus Mrs. Bratlie received the benefit of plaintiff's labor and his salary was in part paid by her. This is sufficient to show the relation of employer and employee (see secs. 3300, 3351, Labor Code) and supports the inference of agency of Mr. Bratlie in executing the contract of employment. See, Cowell v. Industrial Acc. Com., 11 Cal.2d 172, 78 P.2d 1016; Rauer's Law & Collection Agency v. Berthiaume, 21 Cal.App. 670, 132 P. 596, 833.

Defendants complain of many of the instructions given by the court. They were not made a part of the record originally

filed but this has been corrected by its amplification on stipulation.

[3, 4] Many arguments of defendants concerning instructions center around the question of whether or not defendants were required by law to carry Workmen's Compensation insurance on plaintiff who was an agricultural worker, it being admitted they had no such insurance. The conclusion reached on this question will make unnecessary the detailed consideration of numerous instructions which defendants attack as erroneous as well as their further argument that the complaint fails to state facts sufficient to constitute a cause of action against either of them.

Very generally speaking, section 4250 of the Labor Code provides, among other things, that under certain conditions not material here, the employer and employee are conclusively presumed to have accepted the provisions of the Labor Code relating to Workmen's Compensation with the exception noted that "this section shall not apply to any person, or to those employed by him, whose payroll for the preceding calendar year has not exceeded $500." This presents the question of whether or not defendants' payroll for 1944 exceeded $500 as well as what constituted the "payroll."

The trial judge instructed the jury that "payroll" is defined as "A row (roll) or list of persons entitled to payment with the amounts due."

While this definition, with the correction of the typographical error of "row" to "roll" is an exact and correct copy of Mr. Webster's definition of the term, we think it too restrictive a definition of "payroll" as used in the Labor Code. If this were not true, the farmer, whose only record of wages paid were the checks given laborers, could not be said to have any payroll if the names of the laborers and the amounts due and paid to them were not entered on some record.

In MacGruer v. Fidelity & Casualty Co., 89 Cal.App. 227, 264 P. 501, 502, the term was defined as follows: "The term 'payroll' in the usual and ordinary acceptation means a fund or sum of money on hand in cash, to be disbursed in payment of wages at a designated place and time."

In Beisigl v. Industrial Accident Commission, 9 Cal.App.2d 739, 51 P.2d 153, it was held that payroll, as used in the Labor Code, referred to money paid laborers for services rendered in operating the farm, whether the work was occasional or continuous, and included many operations of permanent benefit to the farm such as leveling ground. See also, Globe Indemnity Co. v. Industrial Accident Commission, 45 Cal.App. 328, 187 P. 452.

We therefore conclude that the term "payroll" as used in the statute refers to wages earned by farm laborers performing farm labor for their employer during the calendar year preceding the date of an injury. See, Earl Ranch, Limited v. Industrial Accident Commission, 4 Cal.2d 767, 53 P.2d 154. This is in accordance with the generally understood and widely accepted definition of the term as used in the Labor Code and in other connections.

Defendants complain of the instruction given defining "payroll". We agree with them that this definition is too narrow and should not have been given but we can see no great resulting prejudice because of the commonly and widely understood definition we have already given. The jury could not have been misled by this instruction.

[5] We must now turn to the question of the evidence as to the amount of defendants' payroll for farm labor during the calendar year of 1944, which in this case is confined to the month of December as there is no showing of any payroll for such labor prior to that month.

Plaintiff introduced evidence showing payments by defendants in December, 1944, of $300 to Leo Boelter, of $15 to plaintiff, and of $4.50 to Fred Lewis, a total of $319.50. These payments were made for farm labor. He also introduced evidence of a payment of $759 to Jones Brothers for leveling land during the same month, making a total of $1078.50 paid during December, 1944.

Defendants called Clyde Jones as a witness in their behalf. He testified that he was a member of the partnership of Jones Brothers which did the leveling for defendants in December, 1944; that the charge was $765. for the work but was reduced by

$6 to compensate defendants for a stand pipe which was broken by the operator; that the equipment used in the leveling operation consisted of one RD–7 Caterpillar tractor, a BG drag, a scraper and pump; that it was operated by one man; that the $765 charged included the wages paid to the operator and the cost of the use of the equipment.

An objection by plaintiff was sustained to the question: "What was the total amount, the portion of this $759.00 that was applied by you towards the payment of the employee for the work in operating that equipment?" This ruling is now urged as error on the ground that while the "payroll" of defendants might include the wages paid to the operator of the leveling equipment, it could not include the value of the use of the equipment.

Jones Brothers were seemingly independent contractors hired by defendants to do the leveling. They paid their operator out of the money paid them by defendants. While the employee was working defendants' farm for independent contractors who paid his wages to him directly, still his wages were indirectly paid by defendants so that those wages should be included in the total amount of defendants' payroll. See, Lowe v. North Dakota Workmen's Compensation Bureau, 66 N.D. 246, 264 N.W. 837, 107 A.L.R. 973, and cases cited in note. While this is true, still we find no authority for including in the amount of the payroll the value of the machinery used in the leveling operations as "payroll" is the amount of money earned as wages for labor performed. Beisigl v. Industrial Accident Commission, supra.

[6, 7] We conclude, therefore, that the trial court should have permitted defendants to prove the amount of money paid to the operator of the leveling equipment as distinguished from the amount paid for the use of the equipment. While the rulings on this matter were clearly error it does not necessarily follow that the error was prejudicial and would afford grounds for a reversal of the judgment.

It has been repeatedly held that prejudice from error cannot be presumed, but must be made to appear from the record. Counsel for defendants made no proffer of proof of what he expected to prove from the evidence of this witness and the trial judge and we are left in total ignorance of how much defendants hoped to establish was paid to the operator of the leveling equipment. As said in Re Claire, 9 Cal. App.2d 749, 50 P.2d 1070, 1072: "We are of the opinion that the trial judge unduly limited this cross-examination. Counsel for contestant made no proffer of proof and did not inform the trial judge, and has not informed us, what he expected to prove by this witness. We cannot presume prejudice in an error of this kind." In Re Bewick, 49 Cal.App.2d 287, 121 P.2d 815, 818, is to the same effect where it is said: "There is nothing in the record to show prejudice in the challenged ruling of the trial court. That ruling, assuming it was erroneous, can furnish no ground for a reversal of the judgment because prejudice must be shown and cannot be assumed." See also, Marshall v. Hancock, 80 Cal. 82, 22 P. 61. Since no offer to prove the contrary was made, we might be able to assume in support of the judgment that the amount paid to the operator was at least $181. There is nothing to the contrary in the record. In the absence of a showing of prejudice we are precluded from reversing the judgment for this error by the provisions of section 4½ of Article VI of the Constitution.

Defendants urge error in the giving and the refusal to give numerous instructions. We have already considered one, and numerous others may be considered together.

[8, 9] Section 3706 of the Labor Code provides in effect that if an employer fails to secure the payment of compensation the injured employee may proceed either by a petition before the Industrial Accident Commission, or may bring an action for damages against his employer, or both.

Section 2801 of the Labor Code provides in part as follows:

"The fact that such employee has been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in

proportion to the amount of negligence attributable to such employee."

At the request of plaintiff the trial judge read this and the other pertinent sections of the Labor Code to the jury. He then gave several instructions on the measure of damages. These were in the form usually found in the ordinary accident cases and contained no mention of any reduction in the amount of the award because of contributory negligence, if any, of the plaintiff. This is now urged as error.

While the general instructions on the measure of damages, as a matter of precaution, well might have called attention to the provisions concerning the reduction of damages because of the contributory negligence of plaintiff, if any, the failure to do so cannot be regarded as reversible error. Instructions must be considered as a whole and all the law on a given subject need not and often cannot be incorporated in each instruction. The jury was properly instructed on the question of the reduction of damages because of contributory negligence and when taken as a whole the instructions fully covered the law involved in this case which is all that is required. Robinet v. Hawks, 200 Cal. 265, 252 P. 1045.

Defendants urge numerous other grounds for reversal of the judgment. We have considered all of them and find that none of them possesses sufficient merit to require detailed consideration.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



NATIONAL UNIVERSITY LIBRARY
3 1786 10047 2007

NATIONAL UNIVERSITY LIBRARY

SAN DIEGO

NON CIRCULATING

